INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

2023 / 2024

Module A: Session 6 Materials – European Union Regulation on Insolvency Proceedings

CONTENTS

R J van Galen, An Introduction to European Insolvency Law, Deventer: Wolters Kluwer 2021, Chapter 2 (The European Insolvency Regulation")

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2.1 Origins of the EIR

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15. Article 220 of the 1968 EEC Treaty provided inter alia:

'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...]:
the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.'

Initially, this subject matter was not one of the topics under the EEC Treaty to which the ordinary EU legislation procedure applied. It was therefore treated as an intergovernmental matter. Although a model law could possibly have been negotiated on this subject matter, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was concluded between the member states in 1968.[1] This contained rules on jurisdiction in such matters and provided for a system of recognition and enforcement of judgments obtained in other member states. Important features of the Brussels Convention were that where a court in a member state had assumed jurisdiction on the basis of the Convention's provisions its decision could only be challenged on appeal, whereas the court concerned could refer questions on the interpretation of the Brussels Convention to the ECJ. However, except for some special cases, jurisdiction could not be contested in other member states. Consequently, even a judgment given by a court which had wrongly assumed jurisdiction under the Brussels Convention would be recognised and given effect to in the other member states. The Brussels Convention was succeeded by the Brussels I Regulation of 2000, which was itself revised in 2012.[2] The system has remained the same.

16. However, Article (1)(2)(b) of the 1968 Brussels Convention/Brussels I Regulation provides as follows:

'This Convention/Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal.
The Convention/Regulation shall not apply to:
[…]
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.'

17. Thus, insolvency proceedings were excluded from this Convention/Regulation. Consequently, as the wording of Article 220 of the EEC Treaty (see above) did not exclude insolvency proceedings, the member states still had to introduce an instrument for the simplification of formalities governing the reciprocal recognition and enforcement of insolvency judgments.[3]

18. Several attempts were made to reach agreement on a convention regarding insolvency proceedings, and finally, in 1995, the wording was agreed. The convention had been signed by all member states except the United Kingdom by 23 May 1996, which was the deadline for signature specified in the draft of the convention. As a reason for its refusal to sign, the United Kingdom referred to the EU measures that had been introduced to prevent British beef being exported to the Continent following an outbreak of mad cow disease. Needless to say, this reason was quite unrelated to the subject matter of the convention. A more likely explanation for the refusal is that the drafters had omitted to include a provision limiting the effects of Spanish insolvency proceedings in Gibraltar, which was a sensitive issue at the time.[4] Thus, the 1995 draft was never adopted. However, as the constitutional documents of the EU were subsequently adapted in such a way that the subject matter could be provided for in a regulation,[5] the provisions of the draft convention were copied into an EU regulation,[6] which was adopted in 2000 (Regulation (EC) No 1346/2000) and entered into force on 31 May 2002. Denmark opted out of the Regulation and has stayed out ever since. Under the European Insolvency Regulation, insolvency proceedings opened in other member states are not effective in Denmark and vice versa.

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19. The draft insolvency convention was accompanied by an explanatory report (the Virgós-Schmit report), but this was not adopted by the European Council because the United Kingdom did not sign the 1995 convention. As regulations, unlike conventions, are not customarily accompanied by such a report, the Virgós-Schmit report has no official status. However, as the wording of Regulation 1346/2000 closely resembled the wording of the draft convention, the Virgós-Schmit report is nevertheless considered an important interpretative text.[7] Another source of explanation used in interpreting the EIR is its 89 recitals.

20. Regulation (EC) 1346/2000 was revised in 2015 and replaced by Regulation (EU) 2015/848. Most of the regulation's provisions entered into force on 26 June 2017 and the remainder on other dates. Although Regulation (EU) 2015/848 mainly introduces additions to Regulation 1346/2000, it also makes some changes to it. As the main features and provisions of Regulation 1346/2000 have been preserved, the case law and commentaries on Regulation 1346/2000 remain highly relevant, as does the Virgós-Schmit report. In many cases, however, the numbering of the articles has changed. This book is about the law as it stands today, i.e. Regulation (EU) 2015/848. For the sake of simplicity, both Regulation (EC) 1346/2000 and Regulation (EU) 2015/848 will be referred to below as the **EIR**. The articles of the EIR will be referred to by their numbers in Regulation (EU) 2015/848 (unless otherwise indicated), even where case law relating to Regulation (EC) 1346/2000 is being discussed.[8]

Voetnoten

[1]
Convention of 27 September 1968, 72/454/EEC.

[2]
Regulations of 22 December 2000, EC/44/2001 and 12 December 2012, EU/1215/2012.

[3]
Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation*, 2016: Van Zwieten 0.14.

[4]
For more information about these two reasons, see Bork & Van Zwieten (2016): Van Zwieten 0.29.

[5]
Treaty of Amsterdam of 10 November 1997.

[6]
With some exceptions, the most notable of which is that the convention provided that proceedings would be before the ECJ. Such a provision was unnecessary in the regulation because it is based on Articles 61(c) and 67(1) of the Treaty establishing the European Community, which itself provided for proceedings to be before the ECJ.

[7]
See, for example, the opinion of Advocate General Jacobs in the *Eurofood* case, no. 2. See also Bork & Van Zwieten (2016): Van Zwieten 0.29.

[8]
The original numbering of the articles referred to in this earlier case law is replaced by the present numbering.

An Introduction to European Insolvency Law 2021/2.2

2.2 Subjects of the EIR

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21. The EIR provides primarily for a framework of jurisdiction and for recognition of insolvency proceedings opened in other member states, for recognition and enforcement of insolvency-related judgments, for rules on the law applicable to

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insolvency issues, for rules on the interplay between main and secondary proceedings and for procedures on lodging claims. It contains virtually no rules on substantive insolvency law, such as the requirements that must be met when confirmation of a restructuring plan is requested, what rules apply to the dismissal of employees in insolvency proceedings and how claims are ranked. As the following topics may be relevant to the practitioner, I will discuss them in some detail in this book:

- scope of the EIR
- jurisdiction
- recognition and enforcement
- applicable law
- exemptions
- main and local proceedings
- submission of claims
- group insolvencies
- international cooperation

22. The provisions on insolvency registers and data protection will not be discussed in detail.

2.3 Scope

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23. The extent to which the EIR is applicable depends on three factors:

(i) the type of proceedings
(ii) the eligible debtors
(iii) the geographical requirements

(i) The type of proceedings

24. The EIR applies to 'insolvency proceedings' as defined in Article 2(4) EIR and to judgments closely linked with such proceedings. Article 2(4) EIR provides that 'insolvency proceedings' means the proceedings listed in Annex A. To determine whether proceedings qualify as insolvency proceedings under the EIR, it is only necessary to check whether they are listed in that Annex.[1] Annex A contains lists of proceedings in all the EU member states which deal with insolvency matters. For example, the proceedings listed for Germany are the *Insolvenzverfahren* and some of its predecessors, and for France the *sauvegarde*, *sauvegarde accélérée*, *sauvegarde financière accélérée*, *redressement judiciaire* and *liquidation judiciaire*. As appears from the Annex, the proceedings themselves are procedures under the domestic law of the member state. It should be noted that in addition to those listed proceedings, there are insolvency-related instruments under the national laws, which are not on the list. The EIR provides rules on recognition, jurisdiction and so forth. The types of procedures that could be included in Annex A are determined by the scope of the Regulation, as defined in Article 1(1).

Article 1(1) provides:

'This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:

(a) *a debtor is totally or partially divested of its 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).*

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Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.
The proceedings referred to in this paragraph are listed in Annex A.'

25. The present definition was included in 2015 and is broader than the original definition in the EIR 2000. The main alteration is that it is no longer necessary for an insolvency practitioner to be appointed. As follows from points (b) and (c), proceedings in which the debtor can stay in possession of the assets now come within the scope of the EIR and can therefore be listed in Annex A. Point (b) concerns proceedings under the control or supervision of the court. Recital 10 EIR explains that the wording 'control of the court' includes situations in which the court only intervenes on appeal by a creditor or other interested parties. Point (c) concerns the preparation of an out-of-court restructuring plan. The definition refers to the ordering of a stay of enforcement proceedings, but it is likely that the clause should be read as meaning that out-of-court restructuring proceedings can be listed in Annex A even where the ordering of a stay is optional, and that *if* a stay is granted in the context of such restructuring, suitable measures should be available for the protection of creditors. This somewhat extended interpretation of the clause is plausible, because Directive EU 2019/1023 instructs the member states to provide for preventive out-of-court restructuring plans with an option for a stay.[2] The second main change is the inclusion of the second paragraph, from which it follows that the EIR extends to proceedings which are opened when there is only a likelihood of insolvency.[3] Thus pre-insolvency proceedings may be brought within the scope of the EIR. The term 'insolvency' itself however is not defined in the EIR and the member states use different concepts. As the Vírgos-Schmit report puts it:[4] *'There is no test of insolvency other than that demanded by the national legislation of the State in which proceedings are opened.'* It seems likely, however, that the proceedings that can be included in Annex A must at least be proceedings which aim at dealing with financial distress of some degree suffered by the debtor.[5]

26. The proceedings must be public.[6] That means that the opening of the proceedings 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.
Accordingly, 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.'[7]

27. The proceedings must also be collective. They should include 'all or a significant part' of the debtor's creditors, and Recital 14 explains that the debtor should owe those creditors all or a substantial proportion of its outstanding debts. If not all creditors are involved in the proceedings, the claims of the creditors who are not involved should remain unaffected. Recital 14 notes that proceedings which do not include all the creditors of a debtor should be proceedings aimed at rescuing the debtor, whereas proceedings that lead to definitive cessation of the debtor's activities or the liquidation of its assets should include all the debtor's creditors.[8]

28. Article 1(1) refers to a court and an insolvency practitioner. In some places in the EIR the word 'court' refers to a judicial body of a member state (e.g. in Article 1(1) (b) and (c)), in other places it can also refer to another competent body of the member state. This is elaborated in the definition of 'court' in Article 2(6). Insolvency practitioners are persons who perform certain tasks such as verifying and admitting claims, representing the collective interests of the creditors, administering and liquidating the assets of the debtor and supervising the administration of the debtor's affairs.[9] They are listed for each member state in Annex B.

29. Proceedings in which no insolvency practitioner is appointed and in which the debtor remains in possession were included in the 2015 revision. In the text of the EIR they are sometimes mentioned together. In other instances, the provisions concerning the insolvency practitioner are extended to the debtor in possession (Articles 6(2), 28, 29, 38, 41, 55 and 76). In this book, I will generally refer to the insolvency practitioner only, but the reader should be aware that the provisions usually apply to the debtor in possession as well.

30. The last paragraph of Article 1(1) provides that 'The proceedings referred to in this paragraph are listed in Annex A.' Many proceedings have been listed in the Annex from the outset. New proceedings can be added, but this requires an amendment of the EIR.

(ii) The eligible debtors

31. Article 1(2) provides that the EIR does not apply to proceedings that concern insurance undertakings, credit institutions, investment firms, other firms, institutions and undertakings that are covered by Directive 2001/24/EC and collective investment undertakings. Insurance companies and credit institutions are not defined. As Directives 2009/138/EEC[10] and 2001/24/EEC[11] contain special insolvency regimes for insurance companies and credit institutions, it is appropriate for the

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exclusion to be applied to debtors that come within the scope of these Directives.[12] The excluded investment firms and collective investment undertakings are defined in Articles 1(2)(b) and 2(2) EIR respectively. Regulation EU 806/2014 concerns the resolution of credit institutions and certain investment firms. The rules on these excluded enterprises will not be discussed in this book.

32. Apart from these exclusions, the EIR does not specify which debtors are eligible for insolvency proceedings under its provisions. Domestic law determines their eligibility for each of the national regimes.[13] For example, domestic law may provide that certain types of insolvency proceedings cannot be opened with respect to individuals that are not merchants, with respect to state-owned companies or with respect to partnerships.

(iii) The geographical requirements

33. Article 3(1) provides that the courts of the member state where the debtor has its centre of main interests (COMI) can open main insolvency proceedings, and Article 3(2) provides that where the debtor's COMI is situated in a member state the courts of another member state have jurisdiction to open proceedings only if the debtor has an establishment in that other state. It follows from these two provisions that if the debtor does not have its COMI in any member state, i.e. its COMI is located outside the EU,[14] the EIR does not apply at all.[15] The EIR does not therefore provide for the recognition of such foreign proceedings by the member states, but it also does not prevent the member states from recognising or giving some effect to proceedings opened outside the EU with respect to a debtor that has its COMI outside the EU. This is therefore a matter to be determined by domestic law. Furthermore, if the COMI is located outside the EU, the EIR does not prevent the member states from opening any kind of insolvency proceedings with respect to that debtor. In Germany, for example, local proceedings can be opened if the debtor only has assets in Germany and not an establishment.[16] The proceedings thus opened in a member state do not come within the scope of the EIR, because, once again, the debtor's COMI is not located in the EU. Proceedings could conceivably be opened outside the EU even where the debtor's COMI is in the EU. Whether such proceedings are recognised by the courts of a member state is a matter for domestic law, but such recognition cannot limit the effect of main proceedings opened in another member state (where the COMI is located).

34. Denmark has opted out of the EIR. For the purposes of the EIR, Denmark is therefore treated as if it were not an EU member state.

35. The EIR does not only apply where there is a cross-border element, in the sense that two or more member states are involved. Article 3(1) EIR applies whenever the COMI is located within the EU.

Ancillary judgments

36. Article 6 EIR lays down that the court of the member state within the territory of which insolvency proceedings have been opened, has jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions. Consequently, these related actions come within the scope of the EIR. Recital 35 EIR explains that avoidance actions against defendants in other member states and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the insolvency proceedings, are ancillary actions of this kind. In contrast, actions for the performance by the other party of obligations under a contract preceding the insolvency proceedings are not.

37. The Brussels I Regulation, which concerns actions and judgments in civil and commercial matters in general, makes an exception in Article 1(2)(b) for bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The ancillary actions/judgments which come within the scope of Article 6 of the EIR are considered to fall under this bankruptcy exception of the Brussels I Regulation, even though the wording is not exactly the same. Under the Brussels I Regulation, the main rule is that the court of the domicile of the defendant has jurisdiction,[17] whereas under the EIR the competent court is the relevant court in the member state where the insolvency proceedings have been opened (debtor's COMI or establishment). Particularly in cases in which the debtor in possession or the insolvency practitioner commences proceedings, the competent court under Article 6 EIR may in fact be the court of the plaintiff. In a number of cases, the ECJ has held that jurisdiction under the EIR and under the Brussels I Regulation should be mutually complementary wherever possible.[18] All of these judgments concern the question of whether an ancillary action/judgment comes within the scope of the Brussels I Regulation or the EIR.

38. In the same vein, Article 32(2) EIR provides that the recognition and enforcement of judgments other than the ancillary judgments under the EIR are governed by the Brussels I Regulation, '*provided that that Regulation is applicable*'. So, as this provision correctly points out, if a matter does not come within the scope of Article 6 EIR there may be a gap. This may be the case because there are also other exceptions under Article 1(2) Brussels I Regulation than the 'insolvency exception'. Examples of such exceptions are exceptions relating to the status or legal capacity of natural persons, social security, maintenance obligations and wills. Otherwise, the purpose of Article 32(2) is to avoid gaps.[19]

39. The rule that proceedings that derive directly from the insolvency proceedings and are closely linked with them not only fall under the bankruptcy exception of Article (1)(2)(b) of the Brussels I Regulation but also come within the scope of the EIR

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was developed in case law and predates Article 6(1) EIR 2015.[20] Article 6(1) is perceived as a codification of the ECJ's judgment in the *Seagon v Deko Marty* case of 2 June 2009.[21] The ECJ has also held in a number of cases that the intention of the Community legislature was to provide for a broad definition of 'civil and commercial matters' in Article 1 Brussels I Regulation and therefore for a narrow exception under Article 1(2)(b) Brussels I Regulation and for an equally narrow interpretation of Article 6(1) EIR.[22]

40. The ECJ has elaborated its views on this issue in several cases. As regards the question of whether the proceedings derive directly from insolvency proceedings, the ECJ considers that the court has to determine on each occasion whether the action at issue derived from insolvency law or from other rules. The decisive criterion for identifying the area within which an action falls is not the action's procedural context but its legal basis. '*(I)t must be determined whether the right or the obligation which respects the basis of the action finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings*.'[23]

41. As regards the element of whether the action is closely linked with the insolvency proceedings, the ECJ has held, perhaps somewhat superfluously, that the closeness of the link between the proceedings concerned and the insolvency proceedings is decisive when deciding whether these proceedings are closely connected to the insolvency proceedings.[24]

42. As the case of *H. v H.K.*[25] demonstrates, there is no requirement that the statutory provision on which the action is based must be applicable exclusively after insolvency proceedings have been opened.[26] That case concerned an action based on paragraph § 64 of the German Law on Limited Liability Companies (GmbHG) by a German insolvency practitioner against the debtor's directors. The debtor had made payments to a subsidiary after the debtor had become insolvent and after it had been established that the debtor's liabilities exceeded its assets. The ECJ held that:

'an action based on a provision whose application does not require insolvency proceedings to have formally been opened but does require the actual insolvency of the debtor, and thus on a provision which (…) derogates from the common rules of civil and commercial law',

may derive directly from insolvency proceedings and be closely connected with them.

'Under Paragraph 64 of the GmbHG, the managing director of a debtor company must reimburse the payments which he made on behalf of that company after it became insolvent or after it was established that the company's liabilities exceeded its assets. That provision therefore clearly derogates from the common rules of civil and commercial law, specifically because of the insolvency of the debtor company.'

43. It follows that an action may be held to derive directly from insolvency proceedings and be closely connected with them even if the provision on which the action is based requires only the actual insolvency of the debtor and not the actual opening of insolvency proceedings, provided that insolvency proceedings have indeed been opened. As regards cases in which no insolvency proceedings have been opened, the ECJ notes that such an action may come within the scope of the Brussels I Regulation, even if it is based on the same statutory provision.[27] It should also be noted that the issue of the jurisdiction of the court is related to that of the applicable law. Under Article 7 EIR, the law applicable to insolvency proceedings and their effects is that of the state in which such proceedings are opened. In its judgment in the *Kornhaas v Dithmar* case,[28] the ECJ held that if the court assumes jurisdiction because the action is based on insolvency law and the matter therefore derives from and is closely linked with the insolvency proceedings, this will generally mean that the statutory provisions concerned qualify as rules of insolvency law and therefore come within the scope of Article 7 EIR as well. It follows that the decisions under Articles 6 and 7 are closely interconnected and that jurisdiction under Article 6 will usually mean that the applicable law is the law of the insolvency proceedings, which is the law of the court that has jurisdiction under Article 6 EIR.

Some examples of the application of the bankruptcy exception/Article 6(1) rule

44. Cases that come within the scope of the EIR are:

- a claim instituted by an insolvency practitioner during insolvency proceedings against the debtor's managing directors in order to supplement the deficit in those proceedings;[29]
- an avoidance action instituted by an insolvency practitioner;[30]
- an avoidance action or action to reclaim monies that have been transferred while the debtor was insolvent in cases where the action could also have been instituted without insolvency proceedings having been opened; the case in point is ECJ 4 December 2014, C-295/13, ECLI:EU:C:2014:2410, H. v H.K., as discussed above at 42;[31]
- an avoidance action concerning immovable property located in another member state; in such a case the court of the insolvency proceedings has exclusive jurisdiction;[32]
- proceedings concerning the question of the extent to which an insolvency practitioner can dispose of assets of the debtor;[33]
- a claim against members of a creditors' committee for breach of their duty to act in the interest of the creditors when taking a decision on a rescue plan;[34]

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- an action for a declaration of the existence of a claim for the purpose of its registration in the context of insolvency proceedings;[35] please note that this means that if there are several proceedings (main and secondary), each of those proceedings may produce a different result;
- determination whether assets fall within the scope of the main proceedings or the scope of secondary proceedings.[36]

Some examples of cases which fall under the Brussels I Regulation

45.

- ECJ 10 September 2009, C-292/08, ECLI:EU:C:2009:544, *German Graphics v Van der Schee*. This case concerned the question whether German Graphics, which relied on a reservation-of-title clause, was the owner of assets located in the member state of the proceedings. The ECJ stressed that this was the only point of dispute. The mere fact that the liquidator was a party to the proceedings was not sufficient to classify the proceedings as proceedings deriving directly from the insolvency and being closely linked with proceedings for realising assets. It seems to me that the outcome may be different if the proceedings are brought to determine whether exercise of these property rights can be suspended as a result of the opening of the insolvency proceedings.
- An avoidance action instituted by a party to whom the insolvency practitioner has transferred his claim based on avoidance.[37]
- An avoidance action instituted by a creditor without insolvency proceedings having been opened.[38]
- An action by a creditor against a managing director and a shareholder of a debtor, which had entered into insolvency proceedings, for carrying on the business while the debtor was insolvent.[39]
- ECJ 6 February 2019, C-535/17, ECLI:EU:C:2019:96, *NK v BNP Paribas Fortis*. In this case, the debtor had transferred money to a bank account and subsequently withdrawn it in cash from that account. In the subsequent bankruptcy proceedings, the insolvency practitioner instituted a claim against the bank based on liability for a wrongful act, accusing the bank of having breached its monitoring duties and having failed to investigate and report unusual transactions. The insolvency practitioner asserted that the creditors had suffered loss as a result. The claim was brought in the interests of all the creditors as part of the insolvency practitioner's general task. The ECJ held that the action was based on the ordinary rules of civil and commercial law and not on the derogating rules specific to insolvency proceedings. Moreover, the action could have been brought by the individual creditors themselves and was independent of the opening of the insolvency proceedings.

46. Article 29 of the Brussels Regulation concerns the situation where proceedings involving the same cause of action and between the same parties are brought before courts in different member states. In that event the court first seized should decide the case and the other courts should stay their proceedings until such time as the jurisdiction of the court first seized has been decided upon. If the court first seized assumes jurisdiction the other courts should decline jurisdiction. In that way, multiple proceedings between the same parties about the same matter can be avoided. However, this rule does not apply by analogy with respect to cases under the EIR. As mentioned above,[40] an action for a declaration of the existence of a claim for the purpose of its registration in the context of insolvency proceedings falls within the scope of the EIR. Such an action can be brought concurrently in the main proceedings and in secondary proceedings with respect to the same debtor.[41] That, of course, raises the question of recognition if one court renders judgment before the other.

47. As was discussed in paragraph 35 above, the EIR applies whenever the COMI is located within the EU, regardless of whether other member states are involved. In a case where insolvency proceedings have been opened in a member state and the insolvency practitioner seeks to commence related proceedings[42] against a defendant located outside the EU (e.g. in Switzerland), Article 6(1) of the EIR applies and the insolvency practitioner can conduct such proceedings in the state in which proceedings are opened, regardless of whether such proceedings will be recognised in the defendant's home state.[43]

Insolvency proceedings not covered by the EIR

48. The EU Regulation recognises that some insolvency proceedings may not come within the scope of the EIR. [44] This can occur in three situations, namely where insolvency proceedings: (i) are opened in a member state with respect to a company which has its COMI outside the EU, (ii) do not meet the requirements of Article 1(1) of the EIR and (iii) do meet the requirements of Article 1(1) EIR but are not listed in Annex A. The last situation occurred in relation to several cases involving proceedings in the United Kingdom, when it was still a member state. The main question was whether a UK scheme of arrangement would be recognised in the EU.

49. Where a debtor has its COMI outside the EU, for example in the United States, insolvency proceedings can be opened in a member state regardless of whether the debtor has an establishment there (it will certainly not have its COMI there), provided that national law allows for such proceedings. These proceedings need not be listed in Annex A.[45] Whether these proceedings will be recognised in the other member states is a matter of domestic law in each of them. Furthermore, there is no provision in the EIR that a decision taken by a court of a member state to recognise non-Community insolvency proceedings should be recognised in the other member states. Consequently, whether such a recognition judgment should

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be recognised is a matter to be determined by domestic law.[46] Provided that no court in another member state disagrees with the finding that the debtor's COMI is located outside the EU, there will be no competing EIR proceedings. Second, a situation may arise where the COMI is within the EU, but the courts of a member state open proceedings which are not listed in Annex A because they do not meet the requirements of Article 1 EIR. An example would be confidential (i.e. non-public) proceedings opened in France (e.g. *mandataire ad hoc* proceedings). This too is not prevented by the EIR. However, such proceedings cannot limit the effects of EIR proceedings opened in another member state. If main proceedings are opened under the EIR in the member state of the COMI and local proceedings are opened under the EIR in a member state where there is an establishment, the local proceedings limit the effect of the main proceedings in the state of the establishment. For example, the assets in that state would then be administered not by the insolvency practitioner in the main proceedings but by the insolvency practitioner in the local proceedings. However, if main proceedings are opened in the member state of the COMI and non-EIR proceedings are opened in another member state (state of an establishment or other state), the powers of the insolvency representative of the main proceedings will not be limited in the second state. Finally, it is possible that a member state may choose not to list insolvency proceedings in Annex A even though they meet the requirements for listing.[47] The effect is probably the same as that of opening proceedings which are not listed in Annex A and do not meet its requirements.

ECJ 8 November 2012, C-461/11, ECLI:EU:C:2012:704, Radziejewski v Kronofogdemyndigheteni Stockholm

50. Radziejewski was a Swedish national who resided in Belgium. He was employed by the Church of Sweden. In 2011 Radziejewski applied to the *Kronofogdemyndigheten i Stockholm* (KFM), an administrative body, for debt relief. The KFM refused to open proceedings because Radziejewski did not meet the requirement of being a Swedish resident. On appeal, Stockholm District Court referred questions to the ECJ for a preliminary ruling. The ECJ confirmed that the debt relief proceedings did not fall within the scope of the EIR, inter alia because they were not listed in Annex A to the EIR.[48] Furthermore, a debt relief decision under these proceedings could not be recognised under the Brussels I Regulation because such a decision was not taken by a court. As the proceedings and the decision were therefore not recognised under either the EIR or the Brussels I Regulation, there was no European recognition mechanism. However, this did not mean that the Swedish legislature was free to impose the requirement that debtors had to be resident in Sweden to be eligible for the debt relief proceedings. The ECJ ruled that such a requirement violated the freedom of movement for persons, as provided for in Article 45 TFEU,[49] since it meant that Radziejewski, by leaving Sweden, lost the right to file for debt relief.

51. A scheme of arrangement is a proceeding which is provided for in the UK Companies Act. In fact, schemes of arrangement are used for two distinct purposes under the provisions of the Companies Act. Schemes of the first type are used to modify shareholders' rights and actually have nothing to do with insolvency. They have been used in the context of mergers and of companies in which the shares are owned by a small number of family members. Schemes of the second type are used to modify creditors' rights in an insolvency context. Adoption of such a scheme requires 75% of the class of creditors whose rights are affected. It can be used in relation to all kinds of creditors, for example to amend or reduce the rights of secured creditors. In this respect it differs from a company voluntary arrangement, which can only affect creditors without priority or security rights. To be binding upon the dissenting minority, the scheme needs to be confirmed by the court. A scheme of arrangement of the second type, i.e. a scheme that modifies creditors' rights, has to be submitted to the shareholders as well, but even if they reject the scheme it can still be confirmed. The proceedings in the United Kingdom mentioned above involved schemes of this second type. It should be noted that under UK legislation a new instrument was added in 2020: the Part 26A restructuring plan, which is a more sophisticated version of this scheme of arrangement.

52. As schemes of arrangement were not listed in Annex A, the British courts did not need to base their jurisdiction on the rule of Article 3(1) EIR. Indeed, in many cases where schemes had been adopted, the COMI of the scheme-offering debtor was not in the United Kingdom or was there only as a result of a questionable COMI shift.[50] Under UK law, proceedings relating to schemes of arrangement could be opened only if there was sufficient connection with the UK. In cases with a continental angle, for example a considerable number of continental creditors, a relevant factor for the British courts was whether the scheme would be recognised in the other EU member states. A key question was whether the confirmation judgment would be recognised under the Brussels I Regulation. The main obstacle, however, was that Article 1(1)(b) of the Brussels I Regulation excludes 'judicial arrangements, compositions and analogous proceedings'. It seems difficult to dispute that schemes of arrangement in which the creditors' rights are amended or curtailed are exactly that. The preponderant argument used in the UK proceedings in favour of recognition by the other member states was that, as the ECJ had held, there should be no gap between the recognition provisions of the Brussels I Regulation and those of the EIR. As the scheme did not fall under the provisions of the EIR, its recognition had to be determined under the Brussels I Regulation. In early decisions, the British courts held that the Brussels I Regulation would apply to the scheme and that the Article 1(2)(b) exemption would not apply. Although they held in later cases that it was uncertain whether the Brussels I Regulation would apply, they confined themselves to examining whether they would have jurisdiction in relation to the creditors under Article 8 of the Regulation if it did apply. If the Brussels I Regulation did not apply, the courts were confident

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that recognition would take place under the domestic laws of the relevant member states. There are several arguments that militate against this 'dovetail' reasoning. First, the EIR does not simply provide that all proceedings excluded from the Brussels I Regulation are swept up by the EIR.[51] On the contrary, the EIR has its own requirements. One of them is that the proceedings are public and another is that if the proceedings do not fall under Article 1(a) or (b) EIR but involve a temporary stay of enforcement in order to allow for negotiations between the debtor and its creditors, they should provide for suitable measures to protect the general body of creditors. These are minimum standards the insolvency proceedings have to meet in order to be eligible for inclusion in Annex A and consequently for EU-wide effect. It is unlikely that insolvency proceedings which are not public and cannot therefore be listed in Annex A fall within the scope of the Brussels I Regulation. It is equally unlikely that proceedings involving an out-of-court restructuring which do not provide for the protection of creditors as required under Article 1(c) EIR and therefore cannot be listed in Annex A can nevertheless be recognised under the Brussels I Regulation. The scope provisions of Article 1 EIR not only serve to demarcate the boundary between Brussels I and the EIR but also constitute minimum requirements for granting intra-Community effect. Second, if proceedings that would be eligible for listing in Annex A are not listed because a member state choses not to do so, this does not change the fact that these proceedings are still excluded under Article 1(2)(b) of the Brussels I Regulation. Refraining from including proceedings in Annex A can therefore not serve to evade the EIR rules on jurisdiction and bring the proceedings under the jurisdiction rules of the Brussels I Regulation. An example of proceedings which were not listed in Annex A and were also not eligible for recognition under the Brussels I Regulation is provided by the *Radziejewski* case,[52] which is discussed above at 50. Third, the ECJ 'dovetailing' case law, which stresses the importance of complementarity, concerns the question of whether an action is insolvency-related where insolvency proceedings have been opened under the EIR. In such cases, it is necessary to determine, for example, whether a claim by the insolvency practitioner for mismanagement of the company, is governed by Article 6 (1) EIR or by the Brussels I Regulation. Another example is a claim by an owner of chattels against the debtor or trustee to have the assets handed over.[53]

53. This was already the view of Virgós and Guarcimartin[54] prior to the British cases. According to them, the jurisdiction under the Brussels I Regulation and the EIR should dovetail but, as they noted, '*This naturally only with regard to insolvency proceedings covered by the Insolvency Regulation. The Insolvency Regulation does not apply to all kinds of insolvency proceedings, but only to those listed in the Annexes (...). If the insolvency proceedings opened are not included in that list or the debtor is not an eligible debtor, the test of exclusion from the Regulation 44/2001*[55]*will be satisfied, but not the test of inclusion in the Insolvency Regulation.*'[56]

54. The British courts considered it important for their confirmation judgment to be recognised in the other member states under the European legislation. Remarkably, in all these cases they relied on expert evidence adduced by the parties, and concluded that the scheme would be recognised. Such opinions are of only limited value. Although the lower courts have no obligation to refer preliminary questions to the ECJ, it is remarkable that, despite having the power, no British court ever did so. They thus ignored the understanding that EU law is shaped through the mutual efforts of the national courts and the ECJ.[57] Perhaps they suspected what the answer would be.

Voetnoten

[1]
See also Recital 9 EIR, Bob Wessels, *International Insolvency Law Part II*, (2017) 10497 and Christoph G Paulus, *Europäische Insolvenzverordnung,* 2021, p. 158.

[2]
This directive was enacted four years later, but the subject matter had already been covered in a recommendation of 12 March 2014 (2014/135/EU).

[3]
See Recital 10 and Bork & Van Zwieten (2016): Van Zwieten 1.24.

[4]
Virgós-Schmit report, no. 49 at (b).

[5]
Including, as Recital 17 states, 'cases in which the debtor is faced with non-financial difficulties threatening the status of its business as going concern and, in the medium term, its liquidity.'

[6]
See Recital 13; Wessels (2017) 10500a; Bork & Van Zwieten (2016): Van Zwieten 1.15-1.16. Examples of confidential proceedings that cannot be included in Annex A are the French *mandataire ad hoc* proceedings and *procédure de conciliation*.

[7]
Recitals 12 and 13 EIR.

[8]

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See also Wessels (2017) 105006; Bork & Van Zwieten (2016): Van Zwieten 1.17-1.20, 2.04-2.06; Paulus (2021), pp. 137-139.

[9]
Article 2(5) EIR.

[10]
As amended, inter alia, by Directive 2018/843/EU.

[11]
As amended by the Bank Recovery and Resolution Directive (Directive 2014/59/EU).

[12]
Bork & Van Zwieten (2016): Van Zwieten 1.58.

[13]
Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice*, 2004, 30.

[14]
The special status of Denmark will be discussed below.

[15]
As explicitly stated in Recital 25 and in the Vírgos-Schmit report nos. 11 and 82.

[16]
§§ 354-358 InsO (the German Insolvenzordnung).

[17]
The Brussels I Regulation contains many rules on alternatives and exceptions which will not be discussed here.

[18]
This was also stated in the Virgós-Schmit report, no 77. See also ECJ 4 September 2014, C-157/13, ECLI:EU:C:2014:2145, *Nickel & Goeldner v Kintra,* 9 November 2017, C-641/16, ECLI:EU:C:2017:847, *Tünkers France v Expert France*, 20 December 2017, C-649/16, ECLI:EU:C:2017:986, *Valach v Waldviertel*, ECJ 4 October 2018, C-337/17: ECLI:EU:C:2018:805, *Feniks v Azteca Products & Services*, ECJ 14 November 2018, C-296/17, ECLI:EU:C:2018:902, *Wiener & Trachte v Tadzher*, ECJ 6 February 2019, C-537/17, ECLI:EU:C:2019:96, *NK v BNP Paribas Fortis*, ECJ 18 September 2019, C-47/18, ECLI:EU:C:2019:754*Skarb Pántswa v Riel*.

[19]
Virgós-Schmit Report, no. 197.

[20]
The rule predates the EIR as it was formulated in ECJ 22 February 1979, C-133/78, ECLI:EU:C:1979:49, *Gourdain v Nadler,* and served as the criterion for the bankruptcy exception in the predecessor of the Brussels I Regulation. Prior to the EIR, applicability of the bankruptcy exception meant that there was no European rule for jurisdiction or for recognition of such proceedings in the other member states. Subsequently, under the EIR 2000, there was no Article 6(1) EIR and the jurisdiction of the court of the insolvency proceedings to hear cases related to the insolvency proceedings was deemed to be implied in Article 3(1) EIR 2000. As a criterion for these cases, the ECJ applied the rule that the action should derive directly from the insolvency proceedings and be closely linked with them as further developed in its case law. It borrowed this rule from the provision on enforcement of insolvency proceedings and related judgments in what is now Article 32(1) EIR. Examples of cases in which the rule was referred to are ECJ 12 February 2009, C-339/07, ECLI:EU:C:2009:83, *Seagon v Deko Marty*, ECJ 2 July 2009, C-111/08, ECLI:EU:C:2009:419, *SCT v Alpenblume*, ECJ 4 September 2014, C-157/13, ECLI:EU:C:2014:2145, *Nickel & Goeldner v Kintra*, ECJ 4 December 2014, C-295/13, ECLI:EU:C:2014:2410*, H. v H.K.*, 20 December 2017, C-649/16, ECLI:EU:C:2017:986, *Valach v Waldviertel*, ECJ 14 November 2018, C-296/17, ECLI:EU:C:2018:902, *Wiener & Trachte v Tadzher*, ECJ 6 February 2019, C-537/17, ECLI:EU:C:2019:96, *NK v BNP Paribas Fortis*.

[21]
ECJ 12 February 2009, C-339/07, ECLI:EU:C:2009:83, *Seagon v Deko Marty*. See Bork & Van Zwieten (2016): W-G Ringe 6.09.

[22]
ECJ 10 September 2009, C-292/08, ECLI:EU:C:2009:544, *German Graphics v Van der Schee*, ECJ 19 April 2012, C-213/10, ECLI:EU:C:2012:215, *F-Tex v Jadecloud-Vilma*, ECJ 4 September 2014, C-157/13, ECLI:EU:C:2014:2145, *Nickel & Goeldner v Kintra*, 9 November 2017, C-641/16, ECLI:EU:C:2017:847, *Tünkers France v Expert France*, 20 December 2017, C-649/16, ECLI:EU:C:2017:986, *Valach v Waldviertel*, ECJ 6 February 2019, C-537/17, ECLI:EU:C:2019:96, *NK v BNP Paribas Fortis*.

[23]
ECJ 4 September 2014, C-157/13, ECLI:EU:C:2014:2145, *Nickel & Goeldner v Kintra*. See also ECJ 9 November 2017, C-641/16, ECLI:EU:C:2017:847, *Tünkers France v Expert France*, 20 December 2017, C-649/16, ECLI:EU:C:2017:986, *Valach v Waldviertel*, ECJ 6 February 2019, C-537/17, ECLI:EU:C:2019:96, ECJ 18 September 2019, C-47/18, ECLI:EU:C:2019:754, *Skarb Pántswa v Riel*, *NK v BNP Paribas Fortis*, ECJ 4 December 2019, C-493/18, ECLI:EU:C:2019:1046, *UB v VA*.

[24]
ECJ 10 September 2009, C-292/08, ECLI:EU:C:2009:544, *German Graphics v Van der Schee*, ECJ 19 April 2012, C-213/10, ECLI:EU:C:2012:215, *F-Tex v Jadecloud-Vilma*, ECJ 9 November 2017, C-641/16, ECLI:EU:C:2017:847, *Tünkers France v Expert France*, ECJ 20 December 2017, C-649/16,

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ECLI:EU:C:2017:986, *Valach v Waldviertel*, ECJ 4 December 2019, C-493/18, ECLI:EU:C:2019:1046, *UB v VA*.

[25]
ECJ 4 December 2014, C-295/13, ECLI:EU:C:2014:2410, *H. v H.K.*

[26]
See Bork/Van Zwieten (2016): P. Oberhammer 32.36.

[27]
In the same sense, see ECJ 10 December 2015, C-594/14, ECLI:EU:C:2015:606, *Kornhaas v Dithmar*.

[28]
ECJ 10 December 2015, C-594/14, ECLI:EU:C:2015:606, *Kornhaas v Dithmar*.

[29]
ECJ 22 February 1979, C-133/78, ECLI:EU:C:1979:49, *Gourdain v Nadler*. As this judgment was given before the adoption of EIR, it merely entailed that no recognition of such a judgment was possible under the predecessor of the Brussels I Regulation.

[30]
ECJ 12 February 2009, C-339/07, ECLI:EU:C:2009:83, *Seagon v Deko Marty*; ECJ 16 January 2014, C-328/12, ECLI:EU:C:2014:6, *Schmid v Hertel*. Article 6(1) EIR now explicitly mentions avoidance actions.

[31]
See also ECJ 10 December 2015, C-594/14, ECLI:EU:C:2015:606, *Kornhaas v Dithmar*.

[32]
ECJ 4 December 2019, C-493/18, ECLI:EU:C:2019:1046, *UB v VA*.

[33]
ECJ 2 July 2009, C-111/08, ECLI:EU:C:2009:419, *SCT v Alpenblume*. For a more detailed consideration of that case, see: Bork & Van Zwieten (2016): P. Oberhammer 32.35-32.38, who is of the opinion that the ECJ was wrong to hold that the exception of Article 1(2)(b) Brussels I Regulation was applicable, partly because it failed to understand the Austrian judgment which was reviewed in the proceedings.

[34]
ECJ 20 December 2017, C-649/16, ECLI:EU:C:2017:986, *Valach v Waldviertel*.

[35]
ECJ 18 September 2019, C-47/18, ECLI:EU:C:2019:754, *Skarb Pántswa v Riel*.

[36]
ECJ 11 June 2015, C-649/13, ECLI:EU:C:2015:384, *Nortel Networks*.

[37]
ECJ 19 April 2012, C-213/10, ECLI:EU:C:2012:215, *F-Tex v Jadecloud-Vilma*.

[38]
ECJ 4 October 2018, C-337/17: ECLI:EU:C:2018:805, *Feniks v Azteca Products & Services*.

[39]
ECJ 18 July 2013, C-147/12, ECLI:EU:C:2013:490 *Östergötlands Fastigheter v Koot*

[40]
Under 44.

[41]
ECJ 18 September 2019, C-47/18, ECLI:EU:C:2019:754, *Skarb Pántswa v Riel*.

[42]
Proceedings that meet the substantive requirements of Article 6(1) EIR.

[43]
ECJ 16 January 2014, C-328/12, ECLI:EU:C:2014:6, Schmid v Hertel; ECJ 4 December 2014, C-295/13, ECLI:EU:C:2014:2410, *H. v H.K*; See about the extraterritorial effect of the EIR: Paulus (2021), pp. 148-149.

[44]
Recital 9 EIR.

[45]
They fall outside the scope of the EIR. See Recital 25; Virgós-Schmit report, no. 82; Virgós and Garcimartín (2004) 27a.

[46]
Virgós and Garcimartín (2004) 27.

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[47]
The EIR does not impose an obligation on the member states to request listing in Annex A if insolvency proceedings meet the requirements of Article 1(1) EIR. Dammann is of the view that there is such obligation. See Christoph Paulus and Reinhard Dammann (eds.), *European Preventive Restructuring, Article-by-article commentary*, 2021, p. 52

[48]
It also did not meet the scope requirements of Article 1 EIR 2000.

[49]
Treaty on the Functioning of the European Union.

[50]
High Court 6 May 2011, [2011] EWHC 1104 (Ch), *re Rodenstock GmbH*; High Court 20 December 2011, [2011] EWHC 3746 (Ch), *re Primacom Holding GmbH*; High Court 26 November 2013, [2013] EWHC 4605 (Ch), *re Zlomrex International Finance S.A.*; High Court 3 December 2013, [2013] EWHC 3800 (Ch), *re Magyar Telecom B.V.*; High Court 14 April 2014, [2014] EWHC 1867 (Ch), *re Apcoa Parking Holdings GmbH*; High Court 22 July 2015, [2015] EWHC 2151 (Ch), *re Van Gansewinkel Groep BV*; High Court 12 February 2016, [2016] EWHC 246 (Ch*), re Indah Kiat International Finance Company B.V.*; High Court 26 July 2019, [2019] EWHC 2532 (Ch), *re NN2 Newco Ltd*; High Court 31 July 2019, [2019] EWHC 2068 (Ch), *re Syncreon Group BV*; High Court, 26 November 2020, [2020] EWHC 3455 (Ch), *Steinhoff International Holdings N.V.*

[51]
Recital 7 last two sentences read: '*The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.*'

[52]
ECJ 8 November 2012, C-461/11, ECLI:EU:C:2012:704, *Radziejewski v Kronofogdemyndigheten i Stockholm*.

[53]
For the purpose of the exclusion under the Brussels I Regulation, it is not always necessary that EIR proceedings have been opened.

[54]
Virgós and Garcimartín (2004) no. 78.

[55]
The predecessor to the present Brussels I Regulation (RvG).

[56]
In the same vein Paulus & Dammann (2021): Dammann p. 57.

[57]
See above at 11.

2.4 Jurisdiction

mr. R.J. van Galen, datum 01-06-2021

Datum
01-06-2021
Auteur
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55. Although the question of scope precedes that of jurisdiction, the topics are closely related and some issues relating to jurisdiction have already been touched upon in the section on scope. Nevertheless, some issues remain to be discussed.

56. Article 3 EIR sets out the rules on jurisdiction to open insolvency proceedings. A distinction is made between main proceedings and local proceedings. Main proceedings can be opened by a court in the member state where the debtor has its centre of main interests (COMI). Local proceedings can be opened where the debtor has an establishment.[1] The relevant point in time is that at which the request for the opening of proceedings is filed. If the centre of main interests – or the establishment – is moved after the request but before the opening of the proceedings, the court where the centre of main

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interests – or the establishment – was located at the time of the filing retains jurisdiction.[2] If the debtor no longer has a registered office at the time of the filing, there is a rebuttable presumption that its last registered office constitutes its COMI.[3]

57. Jurisdiction is determined by means of the same system as under the Brussels I Regulation. If a court in a member state has held that the COMI is located in that state and has consequently opened main proceedings, that finding can be challenged in that member state, provided that the possibility of appeal exists, and the courts in the appeal chain can refer questions about the determination of the COMI to the ECJ for a preliminary ruling.[4] However, that determination cannot be challenged in a court in another member state unless such recognition would be manifestly contrary to public policy. Moreover, the public policy clause should be applied in exceptional cases only. According to the principle of mutual trust among member states, the courts in other member states should recognise without review the determination of the COMI by the first court.[5] This is a marked difference from the system under the UNCITRAL Model Law on Cross-Border Insolvency, under which the receiving court itself determines whether the COMI is situated in the state where the proceedings have been opened. Under the EIR, where requests to open main insolvency proceedings under Annex A are pending simultaneously in two member states, the first decision by which a court opens main proceedings must be recognised by the courts in the other proceedings. That decision does not need to be final.[6]

58. It should be noted that if there has been a request to open insolvency proceedings, the court may order preservation measures prior to deciding on that request. An order of this kind is recognised in other member states under Article 32(1) EIR. However, preservation measures of this kind do not imply a decision on the presence of a COMI or an establishment. It follows, for example, that a preservation measure ordered in France should be automatically recognised in Italy, but if a concurrent request to open main proceedings is pending in Italy and an Italian court holds that the COMI is in Italy and opens main proceedings there before such proceedings are opened in France, main proceedings can no longer be opened in France. For this reason, it is important to distinguish between preservation measures and preliminary insolvency proceedings, which may be conducted for a certain period of time before the court issues an order confirming the continuation of the proceedings.[7] Unlike a decision to take preservation measures, a decision to open preliminary insolvency proceedings may involve a finding that the COMI is located in the state of the opening decision. An example of preliminary proceedings is the German *vorläufiges Insolvenzverfahren*, which involves the appointment of a *vorläufiger Insolvenzverwalter* (preliminary insolvency practitioner).[8] The distinction between a temporary-measures-only situation and preliminary insolvency proceedings was clearer under the EIR 2000 because the criterion for insolvency proceedings was then that the debtor was at least partially divested. As the present Article 1 EIR has a wider scope and no longer contains that requirement, the distinction has become more blurred. A further complication is that the EIR acknowledges that the court may also, prior to opening insolvency proceedings (including preliminary insolvency proceedings), appoint a temporary administrator. A temporary administrator does not have the powers of an insolvency practitioner, but may request preservation measures in other member states such as the state of the establishment.[9]

Centre of main interests

59. The centre of main interests (COMI) is defined as '*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*'.[10] Moreover, the second paragraph of Article 3(1) provides that in the case of a company or legal person there is a rebuttable presumption that the place of its registered office is the COMI. The EIR 2015 added a further refinement which rendered this presumption inoperative if the registered office has been moved to another member state less than 3 months prior to the request for the opening of the insolvency proceedings. The term 'registered office' is used in the English version of the EIR, while the equivalent of the term 'corporate seat' is used in some other language versions. The 'centre of a debtor's main interests' has an autonomous meaning and must be interpreted in a uniform way, independently of national legislation.[11] The concepts of registered office and corporate seat must be construed as interchangeable.

60. Shortly after the adoption of the EIR, a difference of opinion arose as to whether the COMI was primarily located where the managerial decisions were taken (the 'head function') or rather where the debtor's actions were visible to third parties. British courts especially had assumed jurisdiction with respect to whole groups of companies on the basis of the head function doctrine. This caused discontent in France when a British court opened insolvency proceedings with respect to a French subsidiary that operated a plant in France. The Versailles Court of Appeal held, however, that the British judgment should be respected.[12] The discussion more or less petered out following the ECJ's judgment in the *Eurofood* case.[13]

The Eurofood judgment, ECJ 2 May 2006, C-341/04, ECLI/281

61. The *Eurofood* judgment addresses several issues relating to the EIR, in particular the meaning of COMI, the time when proceedings open in cases where there are preliminary proceedings and the application of the public policy clause. As these issues are interconnected, I will discuss them here together in the context of this case, and will refer back to this passage where they surface in other parts of this book.

62. Parmalat SpA was a company registered in Italy. Parmalat had over 30 subsidiaries in various jurisdictions. One of its

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subsidiaries was Eurofood IFCS Ltd., a company established under the laws of Ireland and having a registered office in Dublin. Eurofood's principal objective was the provision of financing facilities for companies in the Parmalat group. Bank of America, a bank established in the United States with branches in Dublin and Milan, managed the day-to-day affairs of Eurofood in accordance with the terms of an administration agreement. At the end of 2003, Parmalat was found to be in a deep financial crisis, which led to the opening of insolvency proceedings with respect to many of its key companies. On 27 January 2004, Bank of America presented petitions to the High Court of Ireland for the winding up of Eurofood and for the appointment of a provisional liquidator. On the same date, the Irish court appointed Mr Farrell as Eurofood's provisional liquidator with powers to take possession of all its assets and manage its affairs. One month later, on 20 February 2004, the Italian court at Parma opened insolvency proceedings (*amministrazione straordinaria*) with respect to Eurofood, holding that Eurofood's COMI was in Parma and that the proceedings therefore constituted main proceedings. The Parma court appointed Dr Bondi as special administrator.[14] After holding hearings, the Irish court made a final winding-up order with respect to Eurofood on 23 March 2004. It ruled, among other things, that Irish insolvency proceedings had been opened on 27 January 2004, that they were main proceedings and that it did not recognise the opening of main proceedings by the Parma court on 20 February 2004.[15] The Irish court held that the Parma court could not open main proceedings as proceedings had already been opened by the Irish court and, second, that it did not recognise the Parma judgment because it was contrary to public policy as Eurofood's creditors had not received a notice of the hearing and because Mr Farrell had not been furnished with the petition or other papers grounding the application until after the hearing had taken place.[16] The decision of the Irish court was appealed and, ultimately, the Irish Supreme Court referred questions to the ECJ for a preliminary ruling.

63. The ECJ first addressed the question of whether Eurofood's COMI was indeed in Ireland as the Irish court had found. As the ECJ phrased it: 'The referring court asks how much relative weight should be given as between, on the one hand, the fact that the subsidiary regularly administers its interests, in a manner ascertainable by third parties and in respect for its own corporate identity, in the Member State where its registered office is situated and, on the other hand, the fact that the parent company is in a position, by virtue of its shareholding and power to appoint directors, to control the policy of the subsidiary.'[17] Article 3(1) EIR contains a rebuttable presumption that the COMI is located at its registered office. The ECJ therefore held that 'in the system established by the EIR for determining the competence of the courts of the Member States, each debtor constituting a distinct legal entity is subject to its own court jurisdiction'.[18] Furthermore, the ECJ considered that 'the concept of the COMI has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation'.[19]

64. Next the ECJ referred to the definition of the COMI in Recital 13 of the EIR 2000:[20]

'*That definition shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1)*[21] *of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.*[22]
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.'

65. And a little bit further on:

'(W)here a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.'[23]

66. The ECJ noted that if a mere 'letterbox' company does not carry out any business in the territory of the Member State in which its registered office is situated, the presumption that the registered office is the COMI may be rebutted.

67. The judgment stressed the requirement that third parties could ascertain the COMI. The basic principle is that they can do so by identifying the place of the registered office. Rebuttal of the presumption must be based on their perception.

Next, the ECJ turned to the question of the review of an opening judgment by a court in another member state. The ECJ applied the same system that governs the Brussels I Regulation. Based on the principle of mutual trust, the court in another member state must recognise the opening judgment of the court which opened proceedings first without being able to review the assessment made by the first court as to its jurisdiction.[24]

'If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies

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prescribed by the national law of that Member State against the opening decision.'[25]

68. As to the question of which proceedings were opened first, the ECJ had to resolve whether the Irish proceedings were deemed to be opened when the provisional liquidator was appointed.

69. The ECJ found that the conditions and formalities for opening insolvency proceedings vary considerably from one member state to another and that under the laws of some member states provisional proceedings may last for several months. It would be undesirable if this could result in concurrent claims to jurisdiction over an extended period of time if preliminary proceedings have been opened in multiple jurisdictions. The ECJ therefore held that a 'decision to open insolvency proceedings' must be regarded 'as including not only a decision which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application [...] seeking the opening of proceedings referred to in Annex A to the Regulation'. However, these provisional proceedings need to meet the requirements for insolvency proceedings under Article 1 EIR. Under the EIR 2000, this meant that the decision to open provisional proceedings needed to involve the divestment of the debtor and the appointment of a liquidator. Whether the insolvency practitioner is referred to as preliminary insolvency practitioner is not decisive. Pursuant to the revised Article 1 EIR 2015, if a temporary stay of enforcement proceedings is granted and the proceedings provide for suitable measures to protect the body of creditors, preliminary proceedings can be included in Annex A.

70. It should be noted that if these criteria are not met, insolvency proceedings are not deemed to be opened with immediate effect in the other member states, but a temporary administrator may ask the court of other member states to order preservation measures (see Article 52 EIR).[26] The ECJ explained this in the following way:

'In that respect, it should be noted that Article [52][27]of the Regulation must be read in combination with Article [37], according to which the liquidator in the main proceedings is entitled to request the opening of secondary proceedings in another Member State. That Article [52] thus concerns the situation in which the competent court of a Member State has had main insolvency proceedings brought before it and has appointed a person or body to watch over the debtor's assets on a provisional basis, but has not yet ordered that that debtor be divested or appointed a liquidator referred to in Annex [B][28]to the Regulation. In that case, the person or body in question, though not empowered to initiate secondary insolvency proceedings in another Member State, may request that preservation measures be taken over the assets of the debtor situated in that Member State. That is, however, not the case in the main proceedings here, where the High Court has appointed a provisional liquidator referred to in Annex B to the Regulation and ordered that the debtor be divested.'

Therefore, if the court decides that its decision is an opening decision with respect to proceedings listed in Annex A, that decision has to be respected by the courts of the other member states.

71. Finally, the ECJ addressed the scope of the public policy clause. It took at its starting point that under the Brussels I Regulation[29] the application of the public policy clause is limited to exceptional cases, since it constitutes an obstacle to the achievement of one of the fundamental aims of that regulation, namely to facilitate the free movement of judgments. Recourse to the public policy clause is allowed only where recognition or enforcement of the judgment delivered in another member state would constitute 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 recognised as being fundamental within that legal order. The case law interpreting the public policy clause under the Brussels I Regulation is transposable to the interpretation of Article 33 EIR.[30] The ECJ concluded that the public policy clause may be invoked if the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys.

'*In that respect, it should be observed that the referring court cannot confine itself to transposing its own conception of the requirement for an oral hearing and of how fundamental that requirement is in its legal order, but must assess, having regard to the whole of the circumstances, whether or not the provisional liquidator appointed by the High Court was given sufficient opportunity to be heard.*'[31]

72. The ECJ judgment of 20 October 2011 (*Interedil v Intesa*)[32] concerned a case in which a registered office had been transferred from Monopoli (Italy) to London (UK). The ECJ held that the COMI may not be at the place of the registered office if, from the viewpoint of third parties, the place in which the company's central administration is located differs from the registered office. The location of immovable property owned by the debtor company, in respect of which the company had entered into a lease agreement, and the existence in that member state of a contract concluded with a financial institution, may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. However, even in such a case a comprehensive assessment of all the relevant factors is required in order to establish whether 'the company's actual centre of management and supervision and of the management of its interests is located in that other Member State'.[33]

73. The COMI requirement is strictly applied, in the sense that main proceedings with respect to one company cannot be extended to another company which has its COMI elsewhere on the basis that the property of the two companies is intermixed.[34] The mere intermixing of the property of the two companies does not mean that their COMIs coincide. In order

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to rebut the presumption that the COMI of the second company is located at its registered office, an overall assessment of the relevant factors ascertainable by third parties is needed.

74. If main proceedings are opened in a member state, the court of that member state appoints an insolvency practitioner who will administer the estate and facilitate or conduct a reorganisation or liquidation. The powers of the insolvency practitioner are the powers under the insolvency law of that member state and can be exercised throughout the whole EU. Thus, the member state of the COMI 'exports' the powers of the insolvency practitioner under its law to the whole area of the EU. Also, the insolvency-related judgments of the COMI court will have effect throughout the whole EU. Under Article 7 EIR, the law of the COMI will apply to numerous issues which are considered matters of insolvency law. For example, that law will determine the ranking between the creditors, voting criteria with respect to a restructuring plan and, with some exceptions, the effect of the insolvency proceedings on current contracts. It should be noted that the insolvency laws of the member states are not harmonised and may differ considerably. These differences may be of a technical nature, but may also reflect differing policies. Some member states put more emphasis on the interests of employees, others on the interests of secured creditors, tax authorities or ordinary creditors and this may be reflected in the insolvency legislation. The Community legislature therefore considered that facilitating forum shopping could be undesirable as it could encourage opportunistic conduct. [35] Thus it is important that the COMI can be determined unequivocally.

75. Two issues that arise in relation to the COMI should be distinguished. First there may be uncertainty as to its location in a given set of circumstances, second there is the possibility of a transfer prior to the opening of insolvency proceedings. An attempt is sometimes made to move a company's COMI in order to put certain creditors in a better position. This might be done, for example, because secured creditors have stronger rights under the law of the new COMI. However, such a transfer may not always be in the interests of all creditors. An important question is how much liberty interested parties should have in order to procure a transfer of proceedings from one member state to another in their own interest. While proceedings in another venue may conceivably produce a better result for all concerned, it is possible that a transfer may benefit only those creditors that have a hold over the debtor or its management. As is apparent from the preceding paragraph, a COMI transfer may undermine the policy choices made by the original COMI member state. For example, the laws of that member state may provide for a stricter application of the absolute priority rule[36] in the context of restructuring plans than the laws of the new COMI state. This stricter application may constitute an obstacle to the adoption of a restructuring plan in the original COMI state. Allowing easy COMI transfers shortly before the opening of insolvency proceedings may therefore have the effect of undermining the policy objectives of the national legislature and encouraging a race to the bottom. The European legislature considered such COMI shifts undesirable.[37] In some ways, such a transfer resembles an avoidable transaction in the sense that the rules of the game are changed at a time when the relative positions of the creditors should be frozen.

76. As a consequence of the *Eurofood* and *Interedil* judgments, the transfer of an operating company's COMI prior to the opening of insolvency proceedings is usually not feasible. However, the transfer of a COMI is easier in the case of holding companies or finance companies.

77. Obviously, the registered office presumption does not apply to individuals. In the case of individuals who do not exercise an independent business or professional activity, there is a rebuttable presumption that the place of their habitual residence constitutes their COMI. Once again, there is an exception to this presumption if the individual moved his or her habitual residence less than 6 months prior to the opening request. The main reason for this is that there has been some insolvency tourism, especially from Irish citizens moving to the United Kingdom to benefit from the fact that the discharge rules are more lenient under British insolvency law than under Irish law. The ECI held that the presumption that the COMI of such an individual is his or her habitual residence is not rebutted solely because his or her sole immovable property is located outside the member state of habitual residence.[38]

78. If a debtor's COMI is transferred after the request to open insolvency proceedings or after the proceedings are actually opened, no concurrent main proceedings can be opened in the new COMI. However, new main proceedings can be opened in the new COMI after the main proceedings in the old COMI have been closed, provided, of course, that the requirements for the opening of insolvency proceedings in the new COMI are met.[39]

Establishment

79. Article 3(2) EIR provides that where the debtor has its COMI in one member state, the courts of another member state have jurisdiction to open insolvency proceedings against that debtor only if it has an establishment in the latter state. The effects of these proceedings are limited to the assets of the debtor in the member state of the establishment. An establishment is defined in Article 2(10) EIR as '*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.'* The inclusion of 'human means' emphasises that the mere presence of assets in a jurisdiction is not sufficient to constitute an establishment,[40] as was explained in the *Interedil* judgment of the ECJ.[41] In that judgment, the ECJ also held that an establishment requires 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'*[42] and that the presence of the

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establishment must be ascertainable by third parties. Thus, if the debtor owns a property portfolio in a member state, but does not have an organisation with people in that member state, there is no establishment.[43] A subsidiary does not constitute an establishment of the parent company. It is a debtor in its own right, which may be subject to main proceedings in the jurisdiction of its COMI.[44] If the company transfers or closes an establishment, secondary proceedings can still be opened within the 3-month window. However, assets that have been moved to another member state during this 3-month period do not fall within the scope of these proceedings.

Ancillary judgments

80. Article 6 EIR provides that the courts of the member state where main or local proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them. The question of what actions fall within the scope of this provision has already been discussed in the section on the scope of the EIR.

81. Article 32(1) EIR refers to a larger set of judgments than Article 6(1). In addition to any action which derives directly from the insolvency proceedings and is closely linked with them, it also refers to judgments which concern the course and closure of insolvency proceedings, compositions approved by the court that opened the insolvency proceedings and judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it. It seems to me that all actions in which such judgments are requested must also fall under the jurisdiction clause of Article 6(1).[45]

82. The court of the insolvency proceedings decides on the admissibility of claims in those proceedings and on their ranking. For example, a claim may not be admissible in the proceedings if it was caused by the dispossessed debtor after the opening of the proceedings. These matters are obviously governed by the law of the insolvency proceedings and should be decided upon by the insolvency court. But should the insolvency court also have jurisdiction over the dispute as to whether there is even a valid claim and, if so, about its magnitude? For instance, the creditor may assert a claim for compliance with a purchase agreement because the goods delivered to it did not match the terms of the contract. Is this a matter that the insolvency court can decide or should it refer it to the court that is competent under the Brussels I Regulation? And is this different if the contract contains a forum or arbitration clause? The Virgós-Schmit report suggests that the decision on the merits does not form part of the dispute before the insolvency court, as the EIR[46] adopts neither the precept nor the philosophy of '*vis attractiva concursus*'.[47] According to the Virgós-Schmit report,[48] '*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*' do not fall within the scope of Article 32(1) EIR.[49] However, the ECJ held in its judgment of 18 September 2019, C-47/18, ECLI:EU:C:2019:754 (*Skarb Pántswa v Riel*) that the decision on the merits should be taken by the Article 6 EIR court if the issue arises in the context of the registration of the claim in the insolvency proceedings.[50]

83. Article 6(2) deals with the situation in which the insolvency practitioner[51] wishes to bring simultaneous actions against the same defendant where one or more of the actions fall under Article 6(1) EIR and others under the Brussels I Regulation. In that case, the insolvency practitioner may join the actions and bring them before the court of the member state in which the defendant or one of the defendants is domiciled.[52]

Voetnoten

[1]
The court has to examine whether it has jurisdiction on its own initiative. See Recital 32 EIR.

[2]
ECJ 17 January 2006, C-1/04, ECLI:EU:C:2006:39 *Staubitz-Schreiber*; ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671, *Interedil v Intesa*; see also Virgós and Garcimartín (2004) 68.

[3]
ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671, *Interedil v Intesa*.

[4]
ECJ 2 May 2006, C-341/04, ECLI:EU:C:2006:281, *Eurofood*, ECJ 21 January 2010, C-444/07. ECLI:EU:C:2010:24, *MG Probud Gdynia*, ECJ 22 November 2012, C-116/11, ECLI:EU:C:2012:739, *Bank Handlowy v Christianapol*.

[5]
The prohibition on reviewing the judgment of a court of another member state was confirmed in the Eurofood judgment, ECJ 2 May 2006, ECLI//281, C-341/04 and in ECJ 21 January 2010, ECLI 2010//24, C-444/07 *MG Probud Gdynia*. See also the Virgós-Schmit report, no. 203.

[6]
Virgós-Schmit report, no. 147.

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[7]
Recital 15 EIR.

[8]
§ 22 InsO.

[9]
Article 52 EIR. According to the Vírgos/Schmit report, no. 263, the temporary administrator has a more limited task than an insolvency practitioner, but this predates the 2015 revision of the EIR which created the possibility of insolvency practitioners with a more limited task. Likewise, the difference between preservation measures, including the appointment of a temporary administrator, and the preliminary opening of insolvency proceedings is subtle. The listings of proceedings and insolvency practitioners in Annex A may provide a key to classification.

[10]
Article 3(1) EIR.

[11]
ECJ 2 May 2006, ECLI//281, C-341/04, *Eurofood*, ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671*, Interedil v Intesa*; Virgós and Garcimartín (2004) 45.

[12]
Appeal Court of Versailles 4 September 2003, 2003-05038, Klempka v ISA Daisytek SA.

[13]
ECJ 2 May 2006, ECLI//281, C-341/04, *Eurofood.* Bork & Van Zwieten (2016): W-G Ringe 3.105-3.111; Paulus (2021), p. 194.

[14]
Both the judgment and the opinion of Advocate General Jacobs note that at an earlier date, before the appointment of a provisional liquidator by the Irish court, Parmalat had been admitted to Italian insolvency proceedings (24 December 2003), but this date was not relevant to the questions addressed here because Eurofood constituted a separate legal entity, not included in those proceedings at that time.

[15]
For a report of these facts, see the opinion of Advocate General Jacobs in this matter at paragraphs 31-42.

[16]
The additional relevance of this public policy finding is not really apparent from the ECJ judgment and the Advocate General's opinion, but it presumably meant that the Parma judgment also could not be recognised as a judgment opening secondary proceedings.

[17]
Paragraph 27.

[18]
Paragraphs 29-30.

[19]
This consideration is upheld in ECJ 20 October 2011 C-396/09, ECLI//671, *Interedil v Intesa*.

[20]
In the EIR 2015, the COMI is defined in Article 3(1).

[21]
Now Article 7(1) EIR.

[22]
The importance of the COMI will be discussed below.

[23]
Paragraph 36.

[24]
Paragraphs 44 and 49.

[25]
Paragraph 43.

[26]
See at paragraph 58.

[27]
The numbers of the EIR articles used in this judgment have been replaced, in brackets, by numbers representing the corresponding articles under the EIR 2015.

[28]

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Annex C to the EIR 2000.

[29]
Actually under the preceding Convention.

[30]
Paragraph 64.

[31]
Paragraph 68.

[32]
ECJ 20 October 2011, C-396/09, ECLI:EU:C:2011:671, *Interedil v Intesa*.

[33]
Paulus (2021), p. 191-192 is of the opinion that, because of the many factors that may be involved, it may be difficult to predict where the COMI will be held to be located.

[34]
ECJ 15 December 2011, C-191/10, ECLI:EU:C:2011:838, *Me Hidoux v Rastelli*.

[35]
Virgós-Schmit report, no. 8. Recital 5 EIR.

[36]
A rule that may be applied when a plan is confirmed. It is discussed below at 235.

[37]
Recital 5. See also the Virgós-Schmit report no. 8.

[38]
ECJ 16 July 2020, C-253/19, ECLI:EU:C:2020:585, *MH v Novo Banco*.

[39]
ECJ 22 November 2012, C-116/11, ECLI:EU:C:2012:739, *Bank Handlowy v Christianapol*.

[40]
Virgós-Schmit report, no. 70.

[41]
ECJ 20 October 2011, ECLI:EU:C:2011:671, C-396/09, *Interedil*.

[42]
Derived from the Virgós-Schmit report, no. 71.

[43]
Virgós and Garcimartín (2004) 300 and Wessels (2017) 10533-10537.

[44]
See, however, Virgós and Garcimartín (2004) 302, who are of the opinion that, in special circumstances, the subsidiary can be deemed an establishment of the parent. It seems to me that the assets of the subsidiary are still owned by the subsidiary and that they cannot be included in territorial proceedings opened with respect to the parent.

[45]
See also Paulus (2021), p. 236

[46]
The draft convention at that time.

[47]
Virgós-Schmit report, no. 77.

[48]
No. 196.

[49]
See also Virgós and Garcimartín (2004) 86 and Wessels (2017) 10711

[50]
See above at 44 and below at 181.

[51]
Or the debtor in possession.

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[52]
A requirement is that the Brussels I Regulation provides for the defendant's court to have jurisdiction with respect to the Brussels I action, but that is usually the case unless a forum or arbitration clause provides otherwise.

2.5 Recognition and enforcement

mr. R.J. van Galen, datum 01-06-2021

Datum
01-06-2021
Auteur
mr. R.J. van Galen
JCDI
JCDI:ADS290945:1
Vakgebied(en)
Insolventierecht / Algemeen

84. Article 19(1) EIR provides that any judgment opening insolvency proceedings handed down by a court of a member state which has jurisdiction pursuant to Article 3 must be recognised in all other member states from the moment that it becomes effective in the state of the opening of proceedings. As has been mentioned above at 28, there are two definitions of the word 'court' in Article 2(6) EIR. Here the broader meaning, as defined in Article 2(6)(ii) EIR, applies and 'court' may include any competent body of a member state empowered to open insolvency proceedings. Virgós and Garcimartín[1] argue that in the case of voluntary proceedings this may even include the corporate organ of the debtor empowered to pass a resolution to wind up the debtor.[2]

85. Article 2(7) EIR defines a judgment opening insolvency proceedings as '*(i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and (ii) the decision of a court to appoint an insolvency practitioner*'. As mentioned above, however, it is the court of the member state where the proceedings are opened which determines whether the proceedings are proceedings under Article 3(1) (main proceedings) or under Article 3(2) (local proceedings). This decision of the opening court is binding upon the courts in the other member states. In order to ascertain whether the decision on international jurisdiction will be reviewed by a court if that decision is opposed, Article 5(1) EIR provides that the debtor and any creditor may challenge before a court the decision opening main proceedings on grounds of international jurisdiction. Pursuant to Article 2(6)(i) EIR, 'court' here has the stricter meaning of 'judicial body of a member state'. The challenge has to be brought before a court of the opening state. Article 4(1) EIR provides that the court which opens the proceedings should specify the grounds on which the jurisdiction of the court is based and, in particular, whether jurisdiction is based on Article 3(1) or (2) EIR.[3] Recognition of the proceedings in another member state also takes place if the laws of that member state do not provide for insolvency proceedings against the debtor. This can be the case, for example, if in the receiving state insolvency proceedings can only be opened against merchants or legal entities, whereas under the law of the exporting member state all individuals can be subject to insolvency proceedings.[4]

86. This rule of Article 19(1) EIR that the opening judgment has immediate effect applies to both main proceedings and local proceedings, although the effect of local proceedings in the other member states is rather limited because such proceedings involve assets in the state of those proceedings only.[5]

87. The obligation to recognise the opening judgment prevents a court in another member state from opening main proceedings itself as a debtor can have only one centre of main interests. This avoids positive conflicts of jurisdiction. According to Virgós and Garcimartín, negative conflicts must be resolved by the court of the second judgment if two requests are pending at the same time. If the court of the first member state holds that it has no jurisdiction because the COMI is not in that state, the court of the second member state must respect this result and should not decline jurisdiction on the basis that the COMI is in the first member state.[6]

88. The insolvency practitioner who has been appointed in the insolvency proceedings must request that notice of the opening judgment be published in all other member states where the debtor has an establishment. Failure to do so does not render the proceedings ineffective[7] in such a member state, but if someone in that member state honours an obligation to the debtor when it should have been honoured for the benefit of the insolvency practitioner, that party will receive good faith protection more easily (see below at 196).

89. Recognition and enforcement are subject to the public policy clause of Article 13. As discussed above in relation to the

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Eurofood judgment[8], the public policy clause should be applied only when the effects of recognition or enforcement would be manifestly contrary to public policy. The principle of mutual trust among the member states of the EU limits the application of the public policy clause.

Main proceedings

90. The core provision with respect to main proceedings is Article 20(1) EIR. Under this provision, the judgment opening main proceedings will, with no further formalities, produce the same effects in any other member state as under the law of the state of the opening of the proceedings.[9] In the Virgós-Schmit report, this is referred to as the extension model.[10] Consequently, if the debtor can no longer validly transfer property rights with respect to its movable assets under the law of the opening state, that rule will also apply in the other member states, regardless of whether the opening judgments have received any kind of publicity in the other member states. Equally, if under the law of the opening state, creditors can no longer enforce their claims against assets of the debtor, the stay will also apply in the other member states. This extensive effect does not require the opening judgment to be final. There is no lapse of time between the effectiveness of the decision in the state where proceedings are opened and its effectiveness in other member states.[11] Recognition will also take place if, in the receiving state, the debtor would not have been eligible for insolvency proceedings, e.g. because he is not a merchant. This follows from Article 7(2)(a), which provides that the *lex concursus* (i.e. the law of the state of the insolvency proceedings) determines the debtors against which insolvency proceedings may be brought on account of their capacity.[12] Furthermore, Article 54(1) EIR provides that the insolvency practitioner must inform the foreign creditors immediately after the opening of the insolvency proceedings. However, failure to observe this rule does not affect the application of Article 20(1) EIR.[13] It is not clear whether the 'same effects' rule of Article 20(1) EIR also applies with respect to powers of a public law nature. For example, if the opening of insolvency proceedings affects an environmental permit under the laws of the opening state but not under the laws of the receiving state, the effect of the opening judgment is unclear.

ECJ 21 January 2010, C-444/07, ECLI:EU:C:2010:24 (MG Probud Gdynia)

91. After main proceedings had been opened in Poland with respect to MG Probud Gdynia, the court in Saarbrücken (Germany) ordered the attachment of assets of MG Probud Gdynia at the request of the German tax authorities. Polish insolvency law does not permit enforcement proceedings to be brought against the debtor in respect of the pool of assets included in the insolvency proceedings. The ECJ held that once the main proceedings had been opened, the competent authorities of another member state were not entitled to order enforcement measures pursuant to the law of that other member state if this was contrary to the legislation of the state of the main proceedings.[14]

92. Generally, the extensive effect of the opening judgment and the main proceedings is limited in two ways: (i) if local, secondary, proceedings are opened in another member state, this will considerably limit the effects of the main proceedings in the state of the local proceedings; (ii) the insolvency proceedings do not affect the rights *in rem* of creditors or third parties in respect of assets of the debtor located in another member state. This exemption will be discussed in the section on exemptions.

93. One of the consequences of the extensive effect of the main proceedings is that the insolvency practitioner appointed in these proceedings can also exercise his rights in the other member states. This is the subject of Article 21 EIR.

94. Article 21(1) EIR provides that the insolvency practitioner appointed by the court that opened main proceedings may exercise all the powers conferred on him by the law of the state of the main proceedings in the other member states. Thus an important principle is that the law of the state of the main proceedings governs the powers of the insolvency practitioner throughout the EU, without the need for any judgment or other formality in the other member states. The insolvency practitioner in the main proceedings is not equated with a local insolvency representative.[15] Needless to say, this is very different from the status of an insolvency practitioner under the UNCITRAL Model Law or Chapter 15 of the US Bankruptcy Code, where the foreign representative needs to obtain relief from the court of the receiving state in order to exercise any power and where such relief may be limited to what is available under the law of the receiving state. Consequently, under Article 21(1) EIR, subject to the laws of the opening state, the insolvency practitioner may continue the business of the debtor in the other member states, collect receivables, sell assets, terminate or enter into contracts and so on. He may also move assets from one member state to another. The exceptions to these powers are very limited. First, the EU-wide powers of the insolvency practitioner may not include coercive measures (Article 21(3) EIR). An example of coercive measures of this kind under Dutch law is that an insolvency practitioner has the power to enter any places where this is reasonably necessary for the performance of his duties. Thus an insolvency practitioner may obtain police assistance in order to open up a hangar or storage space where he suspects assets of the debtor to be stored.[16] Such powers cannot be exercised in other member states.[17] In order to enter places against the will of the debtor in other member states, he must obtain a warrant from the local court.[18] Second, his powers do not include the right to rule on legal proceedings or disputes. The determination of rights must be performed by the courts or other authorities charged with that task. Most importantly, Article 21(3) EIR provides that in exercising his powers, the insolvency practitioner must comply with the law of the member state within whose territory he intends to take action.[19] An example would be the manner in which a public sale is conducted. The

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law of the insolvency proceedings determines, for example, whether a public sale is necessary or whether a private sale is possible as well. Local law determines the formalities of such a sale.[20] If, for example, the insolvency practitioner wishes to sell cultural artefacts which may not be exported from a member state without government permission, he also has to observe such laws.[21]

95. After receiving a request to open main proceedings, the court may possibly appoint a temporary administrator to ensure preservation of the debtor's assets pending a decision on the opening request. According to Virgós and Garcimartín,[22] a temporary administrator can also exercise the powers which he has under the laws of his own jurisdiction in other member states. The basis for this is found in Article 32 EIR. However, a temporary administrator's powers do not include the special power conferred on the insolvency practitioner in Article 37(1)(a), namely the power to request the opening of secondary proceedings.[23] In the absence of this power, a temporary administrator may rely on Article 52 EIR, which empowers him to ask courts in other member states to take measures as provided for under the laws of the other member state to secure and preserve debtor's assets.[24] For example, he may ask the court to stay any enforcement action by secured creditors against assets in that member state. In this way, a temporary administrator can ensure that assets in a state where the debtor has an establishment are preserved until the main proceedings have been opened and the insolvency practitioner in the main proceedings is able to exercise his powers under Article 37(1)(a) EIR.

96. Article 21(1) EIR provides that the insolvency practitioner in the main proceedings may exercise his power in every other member state as long as no other insolvency proceedings have been opened there. This provision refers to local proceedings under Article 3(2) EIR. Other insolvency proceedings, which do not fall within the scope of the EIR, may not limit the powers of the insolvency practitioner. Thus, if insolvency proceedings not listed in Annex A have been opened in member state A and subsequently main proceedings are opened in member state B, member state A must give full force and effect to these main proceedings to the detriment of its own non-EIR proceedings. This may mean that the proceedings in member state A cannot continue.[25]

97. The powers of the insolvency practitioner in the main proceedings may also be limited by preservation measures ordered by the court in the state of the establishment in preparation for the opening of secondary proceedings (Article 21(1) EIR).[26] Depending on local law, creditors may request the court in the jurisdiction of the establishment to order such measures, thereby preventing, for example, the removal of local assets by the insolvency practitioner in the main proceedings.

98. Article 23(1) EIR contains the so-called hotchpot rule. A creditor which, after the opening of main proceedings, obtains by any means, in particular through enforcement, total or partial satisfaction of its claim on the assets belonging to the debtor situated within the territory of another member state, must hand over what it obtained to the insolvency practitioner in the main proceedings. An exception is made for, simply stated, secured creditors with assets in a member state other than the state of these main proceedings. They are protected by Articles 8 and 10 EIR, which are discussed in the section on exemptions. According to the Virgós-Schmit report,[27] the question whether amounts received as a pledgee should be subtracted from the claim for the purpose of distribution is left to the applicable insolvency law. The provision does not answer the question whether, if certain creditors fall outside the scope of the main proceedings (e.g. creditors with priority rights in Dutch suspension-of-payments proceedings), they have to turn over their proceeds to the insolvency practitioner in the main proceedings.[28] That seems to me to be unlikely.

99. An exception to the extensive effect of the opening of insolvency proceedings is provided by Article 31 EIR. If someone fulfils an obligation for the benefit of the debtor who is subject to insolvency proceedings in another member state in circumstances where that obligation should have been fulfilled for the benefit of the insolvency practitioner, the person honouring the obligation is protected if he was unaware of the insolvency proceedings at the time of the performance.[29] The burden of proof shifts if the insolvency proceedings were published in the insolvency register of the state where the performance takes place.

Local proceedings

100. Local proceedings may be opened under Article 3(2) EIR in a member state where the debtor has an establishment. As far as assets are concerned, the local proceedings are limited to the assets located in that state at the time of the opening of those proceedings. Under Article 19(1) EIR, these proceedings are also recognised in all other member states from the moment that they become effective in the state where the proceedings are opened. Naturally, the insolvency practitioner appointed in the local proceedings cannot exercise all these home state powers in the other member states. If assets have been removed from his home state after the opening of the local proceedings, he may recover those assets through the courts of the member state where he finds them. He may also commence an avoidance action if assets were sold and removed from the territory of his home state prior to the insolvency proceedings.[30]

101. Article 20(2) EIR provides implicitly that restrictions of creditors' rights, such as a stay or a discharge, will be effective in the home state of the local proceedings. In order to be effective in another member state, the creditor concerned would have to give its consent. The same applies to a rescue plan.[31] The prevailing view about such consent is that a majority of the

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creditors concerned cannot bind a minority (unless there is an agreement in place to that effect) and that consent is needed from each of these creditors.[32]

102. As follows from the principle of mutual trust among the EU member states, the effects of the local proceedings may not be challenged in other member states.[33]

Ancillary judgments

103. Article 6(1) EIR provides that the courts within the territory of which main or local insolvency proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them. Such actions do not fall within the scope of the Brussels I Regulation as they are excluded under its Article 1(2)(b), and recognition and enforcement of these judgments must therefore be provided for in the EIR as well. Article 32 EIR deals with this recognition and enforcement. The wording of Article 32 is somewhat broader than that of Article 6, as it also refers to judgments which concern the course and closure of insolvency proceedings, compositions approved by the court that opened the insolvency proceedings and judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it. It seems to me that it has not been the intention to create an inconsistency. All judgments mentioned in Article 32 EIR fall under the jurisdiction clause of Article 6.

Article 32(1) EIR provides that all these judgments are recognised without formalities. In order to enforce such judgments, the provisions of the Brussels I Regulation should be applied. Under these provisions, the main rule is that a judgment from a court in one member state can be enforced in another member state in the same way as a judgment from that other member state. No leave to enforce has to be obtained. The formalities are very limited.[34] The rules of enforcement are thus the rules of the receiving state. A party in interest may oppose the enforcement and submit a request to that effect to the court in the receiving state. The grounds for refusal of enforcement provided for in Articles 45 and 46 of the Brussels I Regulation do not apply. Enforcement and recognition can be refused pursuant to Article 33 EIR (public policy exception).

Voetnoten

[1]
Virgós and Garcimartín (2004) 347.

[2]
Under British and Irish law proceedings exist where they can be opened by a corporate body of the debtor. However, according to the listing of the proceedings concerned in Annex A, there is an additional requirement that the opening must be confirmed by the court.

[3]
Where the proceedings are not opened by a court, the member state may entrust the insolvency practitioner with this decision (Article 4(2) EIR).

[4]
Wessels (2017), 10741-10742; Paulus (2021), p. 339.

[5]
Virgós-Schmit report, no. 146.

[6]
Virgós and Garcimartín (2004) 70b.

[7]
Recital 75 EIR.

[8]
At 61 et seq.

[9]
See also the Virgós-Schmit report, no. 19 at e and no. 153.

[10]
No. 153. See also Virgós and Garcimartín (2004) 353 et seq.

[11]
Virgós and Garcimartín (2004) 357.

[12]
Bork & Van Zwieten (2016): R. Snowden 7.06; Bork & Van Zwieten (2016): M. Veder 19.20.

[13]
ECJ 17 March 2005, C-294/02, ECLI:EU:C:2005:172, *EC Commission v AMI*.

[14]

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This is different for holders of rights *in rem* or rights of reservation of title, because the insolvency proceedings do not affect their rights if the assets are not located in the member state where the insolvency proceedings have been opened. As regards their position, see the section below on exemptions.

[15]
Virgós and Garcimartín (2004) 364.

[16]
He needs a warrant from the court to enter a home.

[17]
See also Virgós-Schmit report, no 19 at d.

[18]
Virgós-Schmit report, no. 164 sub a; Virgós and Garcimartín (2004) 345.

[19]
Virgós and Garcimartín (2004) 370 point out that the English text of Article 21(3) is worded more strongly than the other language versions like the French, German and Spanish versions, which prescribe that the insolvency practitioner shall respect local law. Virgós and Garcimartín (2004) point out that this means that the insolvency practitioner must take the constraints of the outside world as a given. He must manage and operate the property under his control according to the requirements of local law, as any other person would be bound to do. So he must observe rules on the protection of the environment and cannot remove cultural goods from the territory of a state if the rules concerning protection of its historical and cultural heritage prohibit the export of such goods. The same applies to the realisation of assets. Both the possibility of realising assets and the form in which this is done (e.g. public auction or private sale) are determined by the law of the member state where the proceedings are opened. Where this law requires a particular form of realisation (e.g. public auction), the procedural rules to be followed are determined by local law. Thus even if the state where the asset is located requires a special form of realisation (public auction), the insolvency practitioner may dispose of it by private sale if the law of the state of opening so allows (see also Bork & Van Zwieten (2016): M. Veder 21.27).

[20]
Virgós-Schmit report, no. 164 at c.

[21]
Virgós-Schmit report, no 164 at b.

[22]
Virgós and Garcimartín (2004) 375.

[23]
See Virgós and Garcimartín (2004) 376. He may, however, request the court of the state of an establishment to take precautionary measures. See above at 70 and below at 148 and footnote 216.

[24]
This article forms part of the chapter on secondary proceedings (Chapter III), which is strange since preservation measures may be requested even if no secondary proceedings are envisaged and even in a state where there is no establishment. However, as noted above, this is because one of the functions of this article is to compensate for the fact that a temporary administrator cannot request the opening of secondary proceedings under Article 37(1) EIR. See the Vírgos-Schmit report, no. 262; see also Paulus (2021), pp. 539-540.

[25]
Virgós and Garcimartín (2004) 411.

[26]
Paulus (2021), p. 351

[27]
No. 175(2).

[28]
Bork & Van Zwieten (2016): M. Veder 23.09-23.10.

[29]
The provision does not apply where an obligation of the debtor to one of its own creditors is performed by a third party on behalf of the debtor, and this third party seeks recourse against the estate. See ECJ 19 September 2013, C-251/12, ECLI:EU:C:2013:566, *Van Buggenhout and Van de Mierop v Banque Internationale à Luxembourg*.

[30]
Virgós-Schmit report no 159; Virgós and Garcimartín (2004) 363.

[31]
Virgós and Garcimartín (2004) 361.

[32]
Bork & Van Zwieten (2016): M. Veder 20.26.

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[33]
ECJ 5 July 2012, *Erste Bank Hungary Nyrt v Magyar Allam*, C-527/10, ECLI:EU:C:2012:417.

[34]
For example, the party seeking enforcement has to obtain a certificate from the issuing court stating that the judgment is susceptible of enforcement.

2.6 Applicable law

mr. R.J. van Galen, datum 01-06-2021

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Auteur
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104. Article 7(1) EIR sets out the main rule that the law applicable to insolvency proceedings and their effects is that of the member state where the proceedings are opened. Article 7(2) lists a number of examples of topics covered by this main rule. Articles 9, 11, 12, 13, 14, 16, 17 and 18 EIR provide exceptions to this *lex concursus* rule. Articles 8 and 10 EIR concern exemptions from the insolvency regime rather than conflict rules. They will be discussed in the next section. Article 15 concerns a matter of European law, which will be discussed below under 46.

105. As has been discussed at 43. there is a close connection between the questions of whether a court has jurisdiction under Article 6 EIR and whether such action concerns a matter of insolvency law and therefore falls within the scope of Article 7.[1] The criteria under Articles 6 and 7 are virtually the same. If the court assumes jurisdiction because the action is based on insolvency law and the matter therefore derives from and is closely linked with the insolvency proceedings, this will generally mean that the legal provisions concerned qualify as rules of insolvency law and therefore fall within the scope of Article 7 EIR as well. In its judgment of 21 November 2019, C-198/18 ECLI:EU:C:2019:1001 (*CeDe Group v KAN*), the ECJ held that the EIR intended '*to reach a correspondence between courts which have international jurisdiction and the law applicable to insolvency proceedings. Other than in situations in respect of which that regulation expressly provides for provisions to the contrary, the law applicable, pursuant to Article (7)*[2]*of that regulation, follows the international jurisdiction determined in accordance with Article (6) of that regulation.*'

106. Article 7(2) EIR provides that the law of the State of the opening of the insolvency proceedings determines the conditions for the opening of those proceedings, their conduct and their closure .

ECJ 10 December 2015, C-594/14, ECLI:EU:C:2015:806 (Kornhaas v Dithmar)

107. Paragraph 64 of the German Law of Limited Companies (GmbHG) provided that the managing directors of a company had to file for insolvency proceedings within three weeks after the company had become unable to pay its debts or had become overindebted. Paragraph 2 of that article stated that the managing directors must reimburse the company with any payments which they made after the company became insolvent or after it was established that the company was overindebted. The ECJ decided that these provisions applied to a UK company subject to insolvency proceedings in Germany. Article 7(2) EIR provides that the *lex fori concursus* determines the 'conditions for opening' of the insolvency proceedings. The ECJ held as follows in the *Kornhaas v Dithmar* judgment:

'In order to ensure the effectiveness of that provision, it must be interpreted as meaning that, first, the preconditions for the opening of insolvency proceedings, second, the rules which designate the persons who are obliged to request the opening of those proceedings and, third, the consequences of an infringement of that obligation fall within its scope. Consequently, national provisions such as Paragraph 64(1) and the first sentence of Paragraph 64(2) of the GmbHG, which have the effect, in essence, of penalising a failure to fulfil the obligation to apply for the opening of insolvency proceedings, must be considered, from that perspective, too, to fall within the scope of Article (7)[3]*of (the EIR).*'

108. Article 7(2) EIR contains a non-exhaustive list of topics governed by the law of the home state:

(a) the debtors against which insolvency proceedings may be brought on account of their capacity;

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(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.

109. As the list shows, a broad range of topics is deemed to fall within the scope of the *lex concursus*. Matters belonging to contract law or the law of property are typically not governed by the *lex concursus*. However, to the extent that contracts are affected by insolvency, the insolvency law of the state of the insolvency proceedings applies. Thus, the insolvency law of that state applies to special termination rights and to *ipso facto* clauses. The EIR has special provisions governing employment contracts and property contracts, which will be discussed below. As the insolvency laws of the member states differ substantially, where the main proceedings are opened can have major ramifications. This shows the importance of the location of the COMI and the reason why those in control may seek to transfer it to another jurisdiction. Take, for example, the ranking of claims (Article 7(2)(i) EIR): as claims may be ranked differently in, say, Germany from France, the location of the COMI may affect the extent to which individual creditors can recover their claims. Also the balance of power between the insolvency practitioner and the debtor may differ from one jurisdiction to another. Article 35 EIR provides explicitly that the law applicable to secondary proceedings, is the law of the member state where those secondary proceedings are opened, and the rules of Article 7 also apply to such proceedings. The different insolvency laws of the state of the establishment may constitute a reason to open secondary local proceedings in that member state. In that case, a claim may be ranked differently in the main and secondary proceedings. Article 23(2) EIR regulates how the difference in ranking should be addressed. For example, if main proceedings have been opened in Spain but no secondary proceedings have been opened in Portugal, the ranking of creditors with respect to the proceeds of Portuguese assets will be according to Spanish insolvency law. However, if the debtor has an establishment in Portugal and secondary proceedings have been opened in Portugal, the distribution of the proceeds of the Portuguese assets will be in accordance with Portuguese law, whereas the distribution of the proceeds of assets from all other locations will be governed by the insolvency law of the Spanish main proceedings.[4]

110. I will now make some comments on the issues referred to in the list of topics above.

111. The reference at (e) to 'the effects of insolvency proceedings on current contracts to which the debtor is a party' concerns several areas. On the one hand the *lex concursus* may contain rules about so-called *ipso facto* clauses, for example that the other party to a contract may not terminate it or suspend performance merely because insolvency proceedings have been opened, on the other hand it may provide for special termination rights with respect to certain types of contracts or for rules by which the insolvency practitioner may 'take over' a contract (assumption of executory contracts). As will be discussed below with respect to some contracts, exceptions to the *lex concursus* apply.

112. Article 7(2)(h) EIR provides that the law of the member state where the insolvency proceedings are opened determines the rules governing the lodging, verification and admission of claims. As already noted in the section on jurisdiction,[5] the member state of the insolvency court may have jurisdiction to decide on disputes concerning the merits of the claim, e.g. a claim resulting from a contract. Obviously those merits are determined not by the *lex concursus* but by the law governing the obligation (contract). This is treated as a preliminary question. Similar preliminary questions arise in relation to the creation of security rights and the content of property rights.[6]

113. The 'claims arising after the opening of insolvency proceedings' listed at (g) may refer to administrative costs or to claims which cannot be recovered from the bankrupt estate, for example because the dispossessed debtor enters into an obligation after the opening of the insolvency proceedings. The question of which debts are to be treated as administrative costs and which as pre-petition debts is thus governed by the *lex concursus*. How claims are treated and administrative costs defined differs markedly among the member states.

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114. In its judgment of 9 November 2016, C-212/15, ECLI:EU:C:2016:841 (*ENEFI v DGRFP*), the ECJ inferred from items (g), (h), (j) and (k) of Article 7(2) EIR that the effects of insolvency proceedings on creditors who had not participated in those insolvency proceedings must be assessed on the basis of the *lex concursus*. It followed that the provision of Hungarian insolvency law to the effect that creditors who do not file their claims in time lose those claims, could be invoked against the Romanian tax authorities who had failed to do so.[7]

115. Some of the items in the list of Article 7(2) EIR have to be read in conjunction with the subsequent articles. Article 7(2)(d) provides that the conditions under which set-offs may be invoked is governed by the *lex concursus*, but this provision has to be read in conjunction with Article 9. And Article 7(2)(m), which concerns avoidance actions, has to be read in conjunction with Article 16.

ECJ 22 November 2012, C-116/11, ECLI:EU:C:2012:739 (Bank Handlowy v Christianapol)

116. Main insolvency proceedings had been opened in France against a Polish company Christianapol sp. z.o.o. A creditor of this company filed for main insolvency proceedings against the same debtor in Poland. The ECJ held that new proceedings could be opened in this way if the French proceedings had been closed and the COMI had been transferred to Poland after the opening of the French proceedings. The ECJ also held that '*questions such as the conditions for and effects of the closure of insolvency proceedings, about which Article (7)(2)(j) (EIR) makes an express reference to national law, cannot be given an autonomous interpretation, but must be decided under the lex concursus designated as applicable.'* In this case, the Polish court would therefore have to apply French law to determine whether the French main proceedings had been closed.

117. An example of a claim which is not governed by the law of the insolvency proceedings is a claim by the insolvency practitioner for payment of goods delivered by the debtor prior to the insolvency proceedings.[8]

118. The rules about the applicable law mean that determining the COMI may be very important, in fact much more important than under the UNITRAL Model Law. Under the UNCITRAL Model Law, the receiving court will review a decision on the COMI and determine to what extent the foreign insolvency practitioner will be assisted. Relief under Articles 21 or 19 of the Model Law will often be available only if the law of the receiving state provides for the kind of relief sought.

119. At this point, a more general observation can be made about the different consequences of determining the COMI under the EIR and the UNCITRAL Model Law. They differ with respect to several important elements. First, under Article 19(1) EIR the decision of the court opening the main proceedings that the COMI is located in that member state is binding upon the courts in the other member states. No such rule exists under the UNCITRAL Model Law. The receiving court has the power to determine whether the proceedings have been opened in the state of the COMI (Article 17(2) URL[9]). Second, under the EIR the insolvency practitioner in the main proceedings can exercise his powers in all other member states without the need to seek the leave of the court. Under the UNCITRAL Model Law, the recognition of the foreign proceedings has only a very limited effect. For example, enforcement action against the debtor's assets is stayed. However, entrusting realisation of the debtor's assets located in the receiving state to the insolvency practitioner is a form of relief that may be granted by the court (Article 21(1)(e) UML[10]). Next, under the EIR, the powers of the insolvency practitioner are governed by the law of the COMI (Article 21(1) EIR). But there is no equivalent provision in the UNCITRAL Model Law. On the contrary, the court of the receiving state has discretionary power with respect to the relief to be provided. Finally, under the EIR the COMI determines the law applicable to insolvency issues. If the COMI is in another state, the rules that should be applied in the receiving state may therefore be very different. No such conflict rule exists under the UNCITRAL Model Law.

Applicability of the law of another country

120. Articles 9, 11 et seq. EIR contain exceptions to the main rule of Article 7(1) EIR, namely that the law of the insolvency proceedings determines the effects of those proceedings. In some instances, the laws of other member states apply.[11] An example is Article 13 EIR, which provides that the law governing the employment contract applies to, inter alia, the dismissal of employees. Such exceptional provisions refer to the laws of other member states, including their insolvency law. If there are distinct insolvency regimes under the law of this other member state, it may be necessary to determine which insolvency regime under that law is equivalent to the actual foreign insolvency proceedings.

Set-off

121. Article 7(2)(d) EIR provides that the law of the state where the insolvency proceedings are opened determines the conditions under which set-offs may be invoked. However, Article 9(1) EIR provides that the opening of insolvency proceedings does not affect the right of creditors to demand a 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.[12] This can be illustrated by the following example. Let us assume that insolvency proceedings have been opened in Slovakia, the creditor is located in Hungary, the claim of the insolvent debtor against the creditor is governed by Greek law and the claim of the creditor against the insolvent debtor is governed by Croatian law. If Slovakian insolvency law allows the set-off, there is no insolvency obstacle to this. But

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even if Slovakian insolvency law prevents the set-off, it may still be allowed if Greek law (the law of the debtor's claim) allows it. The wording of Article 9(1) EIR is not quite clear on this, but it probably means that Greek law, including its insolvency law, may be applied. Insolvency law may restrict but also increase set-off rights. According to Virgós and Garcimartín,[13] three steps actually have to be taken. First, it is necessary to apply the rules of private international law to determine which law governs the set-off. Second, it is necessary to apply the rules of insolvency law of the state of the insolvency proceedings relating to the set-off. Third, if as a consequence the creditor cannot invoke set-off, it may still do so if the law of the debtor's claim, including its insolvency law, allows the set-off. The law applicable to the set-off may be a law chosen in the agreement.

122. Article 10 EIR does not apply to set-off claims obtained after the opening of the insolvency proceedings, but does apply if claims resulting from contracts entered into prior to the opening of the insolvency proceedings arise after the proceedings have opened.[14]

Immovable property and other registered rights

123. The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property are governed solely by the law of the member state where the property is situated (Article 11 EIR). This includes the rules of the insolvency law of that member state, even though no insolvency proceedings have been opened there.[15] Consequently, the question whether early termination of a property lease is possible in insolvency proceedings is governed by the law of the member state where the property is situated (*lex rei sitae*). However, Article 11(2) EIR provides that if the law of that member state requires approval of the termination or modification of such contracts by the court that opened insolvency proceedings, jurisdiction lies with the courts of the member state of the main proceedings. Of course, if secondary proceedings have been opened in the member state where the property is situated, the courts of that state have jurisdiction because the property does not then fall within the scope of the main proceedings. This leaves open the question of what should happen if the law of the member state where the property is situated requires the leave of the court to be obtained for any modification or termination of the contract, without linking it with the court of the insolvency proceedings. On another note Paulus stresses the extensive meaning of the provision, as it is not limited to contracts regarding rights in rem and leases. For example, a contract for the sale of immovable property falls within its scope as well.[16]

124. Article 14 EIR provides that the effects of insolvency proceedings on the rights of a debtor in immovable property, a ship or an aircraft subject to registration in a public register are determined by the law of the member state where the register is kept. As this provision concerns rights that are subject to registration in such a register only, it is narrower than Article 11 EIR because that provision also covers rights of use of immovable property that need not be registered. However, Article 11 relates to immovable property only. Unlike Article 13(1) EIR, Article 14 EIR does not contain the word 'solely'. The reason is that the law of the insolvency proceedings is not excluded or replaced. The *lex concursus* determines the effects which the insolvency proceedings seek to produce on the debtor's rights to registered assets, and the law of the register determines whether such effects are admissible and whether a transposition into a functionally equivalent national concept is necessary, which entries are to be made when insolvency proceedings are opened and the legal consequences of such making or not making an entry.[17] Article 14 is limited to rights of the debtor. The rights of third parties holding rights *in rem* are dealt with in Article 8 EIR.

125. Article 17 EIR concerns the protection of third-party purchasers if a debtor disposes, for consideration, of a registered asset after the opening of insolvency proceedings, whereas pursuant to the lex concursus he has lost the power to do so. The validity of such an act is governed by the law of the member state where the register is kept.[18] This law also applies if the debtor disposes of the registered asset by creating an absolute right for the benefit of a third party, such as a pledgee.

Payment systems and financial markets

126. The effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market are governed solely by the law of the member state applicable to that system or market (Article 12(1) EIR). Recital 71 EIR provides as follows:

'(t)here is also a need for special protection in the case of payment systems and financial markets, for example in relation to the position-closing agreements and netting agreements to be found in such systems, as well as the sale of securities and the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council. For such transactions, the only law which is relevant should be that applicable to the system or market concerned.'

127. Directive 98/26/EC concerns settlement finality in payment and securities settlement systems. Pursuant to Article 12(1) EIR, if a participant in a payment system enters insolvency proceedings, the effects of the insolvency on the rights and obligations of the parties under the payment system are governed not by the law of the insolvency proceedings but by the law of the payment system. The reason for the provision is that all participants should have the certainty that, regardless of where other participants are located, their rights against one another under the payment system are always governed by the

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law of the payment system. They should not be governed by the insolvency law applied in the proceedings relating to the insolvency of other participants. Directive 98/26/EC contains more specific rules about the effects of insolvency proceedings on payment systems, which have been transposed into national law. As the directive is a *lex specialis* in relation to the EIR, the national provisions enacted on the basis of it take precedence over Article 12 EIR.

128. Article 12(2) EIR also provides that paragraph 1 does not preclude any avoidance action under the law applicable to the payment system or market.

Contracts of employment

129. In some jurisdictions outside the EU, employment law plays no significant role in insolvency situations, and there may be few, if any, provisions in the insolvency legislation relating to special employee interests. Employees are treated as any other creditor. But the position is quite different in many member states of the EU. In these states, in the absence of insolvency proceedings, the rules on dismissal of employees and on employee participation tend to be protective of their rights. Moreover, sizeable severance payments may be due in the case of redundancy. In the context of insolvency proceedings, however, it may be necessary to derogate from these protective rules. In a liquidation, the protective rules may be seen as overkill, and derogation may also be necessary in the interests of a viable restructuring. If derogation is not appropriate, rules may at least have to be included in the insolvency legislation to regulate how the protective provisions are to be applied in the context of insolvency proceedings. The general view is that insolvency proceedings have a bearing not only on creditors' interests but also on the interests of the workforce, for example in relation to continuation of their employment. Some legislation on wage guarantees and the transfer of enterprises is European and will be discussed in separate chapters of this book, but most legislation concerning the effects of insolvency proceedings on employees is at the national level. Such legislation may differ considerably from one member state to another, as may the policies underlying the legislation.

130. Article 13(1) EIR provides that the effects of insolvency proceedings on employment contracts and relationships are solely governed by the law of the member state applicable to the contract of employment. This article gives rise to several comments:

131. The reference to the law of the member state applicable to the employment contract includes its insolvency law.[19] In other words, if the debtor becomes the subject of insolvency proceedings in the Netherlands and some of its employees have employment contracts governed by Belgian law, Belgian law applies to the dismissal of these employees. Since this includes Belgian insolvency law, these employees can be dismissed applying the provisions of Belgian insolvency law, even in the absence of Belgian insolvency proceedings. As there may be different insolvency proceedings with different rules on dismissal under the law of the employment contract, it has to be determined which of the Belgian insolvency proceedings is the equivalent of the relevant Dutch insolvency proceedings.[20]

132. Article 8(1) Rome I Regulation[21] provides that the parties to an employment contract may chose the law applicable to it. In the absence of such a choice, the law of the member state in which or from which the employee usually works is the law of the contract.[22] If another law is chosen, the employee will nevertheless enjoy the protection of the provisions of the law which would apply without such choice, to the extent that no derogation from those provisions is allowed by that law.[23] This leaves the question of what impact such a choice of law has on Article 13 EIR. Although it seems likely that the insolvency law rules of the chosen law apply, it is also conceivable that the protective provisions exception of Article 8(1) of the Rome I Regulation extends to the rules of insolvency law of the state where the employee usually works.

133. The employment contract exception illustrates an interesting feature of the EIR. As discussed in the section on recognition and enforcement, the insolvency practitioner in the main proceedings can exercise his powers under the *lex concursus* in the other member states. In other words, the powers of the insolvency practitioner are governed by the *lex concursus*. However, the law applying to the dismissal of an employee (disregarding the possibility of a choice-of-law clause) is the law of the place where the employee works. It is not always clear whether a matter is governed by the 'power rule' or the 'applicable law rule'. For example, it may be that under the law of the member state applicable to the main insolvency proceedings the insolvency practitioner's power of dismissal is subject to the court's leave, whereas this power can be exercised without leave in the state where the employee works. In that case, the question arises of what rule should be applied: the power rule (powers limited: therefore leave required) or the applicable law rule (applicable insolvency law does not require the court's leave). The same question arises in the reverse situation. As far as employment contracts are concerned, this issue was partly resolved in the 2015 revision. Article 13(2) EIR 2015 provides: '*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.'* However, this provision does not apply if no secondary proceedings can be opened in that member state, which is the case if the debtor has no establishment there. The main effect of the provision is to remove an incentive to open secondary proceedings in order to have dismissal issues decided by the local courts if there is an establishment.

134. Not all issues relating to employment contracts are governed by the law of the contract. Recital 72 notes that matters

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involving the continuation and termination of employment contracts and rights and obligations under them are determined under the *lex contractus*, and continues:

'Any other questions relating to the law of insolvency, such as whether the employees' claims are protected by preferential rights and the status such preferential rights may have, should be determined by the law of the Member State in which the insolvency proceedings (main or secondary) have been opened, except in cases where an undertaking to avoid secondary insolvency proceedings has been given in accordance with this Regulation.'[24]

Issues such as ranking, verification and admission of claims are not considered to be effects of insolvency proceedings on employment contracts and relationships. These issues are governed by the *lex concursus*. If, for example, employees' claims are ranked more beneficially under the laws of the state where they work, secondary proceedings may, however, be opened if there is an establishment in that state. In those secondary proceedings the local ranking rules will apply. Alternatively, there may be synthetic secondary proceedings, as will be discussed in the section on main and local proceedings.

135. As the wording of Article 13(1) EIR is fairly wide, its scope is not limited to termination of employment contracts and extends to matters of continuation as well. Examples of continuation issues covered by this article are the 'drag along' rule (where an enterprise is transferred during insolvency proceedings) and rules on worker involvement. As will be discussed in chapter 4, where an enterprise is transferred, the employees working in the enterprise are also transferred (drag along) and become employees of the new owner of the assets pursuant to Directive 2001/23/EC. The directive allows for an exception in the case of liquidation, but not all member states have made use of that exception. The applicable law may therefore be relevant in determining whether employees are transferred with an enterprise if it is sold partly or wholly in the course of liquidation proceedings. Many member states also have rules on employee participation, which may remain applicable during insolvency proceedings.

Avoidance actions

136. The law applicable to avoidance actions is determined by Articles 7(2)(m) and 16 EIR. Article 7(2)(m) provides that the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors are determined by the *lex concursus*. However, Article 16 EIR provides that Article 7(2)(m) EIR does not apply if (i) the legal act concerned is governed by the law of another member state, and (ii) the law of that member state does not allow any means of challenging that act in the relevant case. The consequence of this provision is that the parties, by choosing the law applicable to a contract, can influence the extent to which a legal act can be avoided. Although this is not primarily relevant to the avoidability of the contract itself, it can be very important in determining up to what point in time repayments of loans or the vesting of new security are safe. Naturally, banks find it important to ensure that the fulfilment of these obligations by a debtor that is on the verge of insolvency is protected and that they do not have to pay back or release the security. For example, payments made during the last three months prior to the opening of the proceedings are voidable in Germany if the creditor was aware of the debtor's insolvency. In the Netherlands, however, such payments are voidable only if the creditor and the debtor colluded together for the purpose of prejudicing the other creditors. This purpose has to be proved. Consequently, payments enjoy relatively strong protection in the Netherlands.

137. Under the system provided for in Article 16 EIR, an insolvency practitioner has to show that the transaction can be subject to an avoidance action under the laws of the state of the insolvency proceedings, and the defendant may enter a defence to such a submission. If the insolvency practitioner succeeds in establishing that the act can be avoided under the *lex concursus* , the defendant may prove that the act cannot be challenged under the *lex causae* or that the conditions which should be met under the *lex causae* in order for that challenge to be upheld have not been fulfilled .[25] Here, challenges under the *lex causae* concern not only the insolvency rules of the *lex causae* but also the general provisions and principles of that law as a whole[26].

138. Article 16 EIR does not apply to detrimental acts which took place after the opening of the insolvency proceedings. The ECJ held in this respect:

'*As from the opening of insolvency proceedings, the creditors of the debtor concerned are able to predict the effects of the application of the lex fori concursus on the legal relations which they maintain with that debtor. (...) they cannot therefore in principle claim to benefit from greater protection.*'[27]

Consequently, the issue of avoidability is determined in such cases solely by the *lex concursus* (Article 7(2)(m) EIR). In *Lutz v Bäuerle*, an attachment was levied before and payment made after the opening of the insolvency proceedings. As the attachment created a right *in rem* and thus conferred a preferential position on the creditor, the question whether Article 16 EIR applied had to be considered with respect to the time of the attachment rather than with respect to the payment. The creditor was therefore entitled to the benefit of Article 16 EIR.

139. Article 16 EIR allows a defence based on the assertion that a limitation period under the *lex causae* has expired.[28] Furthermore, for the purposes of Article 16 EIR, the relevant procedural requirements for the exercise of an action to set

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aside a transaction are to be determined according to the *lex causae*. Consequently, the insolvency practitioner will have to observe the procedural requirements under both the *lex concursus* and the *lex causae*. This does not mean, however, that the other party can benefit from whatever procedural rules of the *lex causae* are more favourable to him than those of the *lex concursus*. For example, if a procedural law of the *forum concursus* provides that the defendant will lose the opportunity to invoke a limitation period if it fails to do so in its first court submission, the defendant cannot rely on different rules of the *lex causae*.[29]

140. Article 16 EIR provides a defence against an avoidance action under the *lex concursus*. If there is no successful defence because the act is challengeable in any way under the *lex causae*, the avoidance action and its consequences are governed solely by the *lex concursus*.[30]

141. If the parties to a contract that 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, Article 16 EIR may still be invoked, unless the designation of the law of the other member state is made for abusive or fraudulent ends.[31]

142. It should be noted that the avoidance provisions do apply to the vesting of rights, regardless of whether the assets are located in the state of the insolvency proceedings. Articles 8(4), 9(2) and 10(3) EIR provide that the special rules on rights *in rem*, set-off and reservation of title (rights *in rem* and reservation of title will be discussed in the next section) do not preclude actions for voidness, voidability or unenforceability as referred to in Article 7(2)(m) EIR. As Virgós and Garcimartín note,[32] no such exception applies to Article 12 regarding payment systems and financial markets.

Pending proceedings

143. Article 7(2)(f) EIR provides that the *lex concursus* determines the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits. Article 18 EIR contains a special rule with respect to law suits and arbitral proceedings which are pending at the time when the insolvency proceedings are opened and concern an asset or a right which forms part of a debtor's insolvent estate. The effects of the insolvency proceedings on these pending proceedings are governed by the law of the member state in which the lawsuit is pending or in which the arbitral tribunal has its seat. Basically, this concerns questions such as whether the pending proceedings are suspended or terminated and whether the insolvency practitioner can take over these proceedings. It should be noted that Article 18 EIR is limited to pending law suits concerning the debtor's assets and rights. Neither Article 7(2)(f) nor Article 18 EIR deals with pending proceedings concerning other topics. For example, if proceedings concerning the debtor's debts are pending in a member state other than the state where the insolvency proceedings are opened, the EIR does not explicitly determine which law governs the effect of the insolvency proceedings on such pending proceedings.

144. To determine the effect of insolvency proceedings opened in another member state on a pending lawsuit under Article 18 EIR, the court must apply the rules of equivalent proceedings under its own insolvency law, provided that such equivalent proceedings exist. But deciding equivalence is not always easy.[33]

145. Pending proceedings should be distinguished from enforcement actions. The effect of insolvency proceedings on enforcement actions is determined by the law of the insolvency proceedings.[34] In the case of *ENEFI v DGRFP*,[35] Romanian tax authorities had started an enforcement action against a Hungarian debtor with an establishment in Romania. When main insolvency proceedings were opened against the debtor in Hungary, the tax authorities wished to continue their enforcement proceedings in Romania. The ECJ held that enforcement proceedings did not come within the scope of Article 18 EIR, which deals with pending lawsuits. Whether the proceedings could be continued was therefore a matter to be decided by Hungarian law.

IP rights

146. Article 15 provides that a European patent with unitary effect, a Community trade mark or any other similar right established by EU law may be included in main proceedings only. IP rights cannot therefore be included as an asset in local proceedings.

Voetnoten

[1]
ECJ 10 December 2015, C-594/14, ECLI:EU:C:2015:806, *Kornhaas v Dithmar*.

[2]
The judgment was rendered under the EIR 2000. References to articles under the EIR 2000 have been replaced by references to their equivalents under the EIR 2015.

[3]

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The judgment was rendered under the EIR 2000. References to articles under the EIR 2000 have been replaced by references to their equivalents under the EIR 2015.

[4]
An exception applies if so-called synthetic proceedings (discussed below) are opened.

[5]
At 82.

[6]
See Virgós and Garcimartín (2004) 112.

[7]
Consequently, these Romanian tax authorities could not file for the opening of secondary proceedings in Romania and could also not pursue enforcement proceedings against the debtor in Romania, even though these were already pending when the Hungarian proceedings were opened.

[8]
ECJ 21 November 2019, C-198/18, ECLI:EU:C:2019:1001, *CeDe Group v KAN*.

[9]
§1517(b) US Bankruptcy Code.

[10]
§1521(a)(5) US Bankruptcy Code.

[11]
It is not always clear whether these provisions are limited to the laws of other member states or sometimes extend to the laws of non-EU member states.

[12]
This law does not have to be the law of a member state. See, for example, ECJ 16 January 2014, C-328/12, ECLI:EU:C:2014:6, *Schmid v Hertel.*

[13]
Virgós and Garcimartín (2004) 182.

[14]
Virgós and Garcimartín (2004) 187; Wessels (2017) 10662.

[15]
Virgós-Schmit report, no. 22 at 2(a) and 118.

[16]
Paulus (2021), p. 292.

[17]
Virgós-Schmit report no 130; Virgós and Garcimartín (2004) 223.

[18]
This does not have to be the law of a member state. See, for example, ECJ 16 January 2014, C-328/12, ECLI:EU:C:2014:6, *Schmid v Hertel*.

[19]
Virgós-Schmit report, no. 125.

[20]
Virgós and Garcimartín (2004) 136.

[21]
Regulation EC 593/2008 on the law applicable to contractual obligations (Rome I).

[22]
Article 8(2)-(4) Regulation EC 593/2008

[23]
This applies to a labour relationship with international elements. If the labour relationship has no international elements the protection is stronger.

[24]
These so-called synthetic secondary proceedings will be discussed in the section on main and local proceedings.

[25]
ECJ 15 October 2015, C-310/14 ECLI:EU:C:2015:690 *Nike v Sportland*; ECJ 8 June 2017, C-54/16, ECLI:EU:C:2017:433 *Vinyls Italia v Mediterranea di Navigazione*; ECJ 22 April 2021, C-73/20, ECLI:EU:C:2021:315 *ZM v Frerichs* concerned payment by the debtor (Oeltrans) on behalf of another entity (Tankfracht) to Frerichs, of an amount due under an agreement between Tankfracht and Frerichs to which Oeltrans was not a party. The payment was held to be governed by the law of the contract and Article 13 EIR could be invoked by Frerichs when the insolvency practitioner of Oeltrans invoked

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avoidance in order to recoup the amount paid.

[26]
ECJ15 October 2015, C-310/14 ECLI:EU:C:2015:690 *Nike v Sportland*.

[27]
ECJ 16 April 2015, C-557/13, ECLI:EU:C:2015:227, *Lutz v Bäuerle*.

[28]
ECJ 16 April 2015, C-557/13, ECLI:EU:C:2015:227, *Lutz v Bäuerle*.

[29]
ECJ 8 June 2017, C-54/16, ECLI:EU:C:2017:433 *Vinyls Italia v Mediterranea di Navigazione*.

[30]
Virgós and Garcimartín (2004) 241.

[31]
ECJ 8 June 2017, C-54/16, ECLI:EU:C:2017:433 *Vinyls Italia v Mediterranea di Navigazione*.

[32]
Virgós and Garcimartín (2004) 232.

[33]
See Wessels (2017) 10713, discussing decisions by the Supreme Court of Austria of 23 February 2005 (90b 135/04z) and 24 January 2006 (100b 80/05w).

[34]
ECJ 21 January 2010, C-444/07, ECLI:EU:C:2010:24, *Probud Gdynia*; ECJ 9 November 2016, C-212/15, ECLI:EU:C:2016:841, ENEFI/DGRFP; Virgós-Schmit report, no. 142; Virgós and Garcimartín (2004) 121(g), 253; Bork & Van Zwieten (2016): R. Snowden 7.40-7.44; Bork & Van Zwieten (2016): M. Virgós and F. Garcimartín 18.03.

[35]
ECJ 9 November 2016, C-212/15, ECLI:EU:C:2016:841, *ENEFI v DGRFP*.

2.7 Exemptions

mr. R.J. van Galen, datum 01-06-2021

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Rights in rem

147. Article 8(1) EIR provides that the opening of insolvency proceedings ‘shall not affect’ the rights *in rem* of creditors and third parties in respect of tangible or intangible, movable or immovable assets which are situated in a member state other than the state of the insolvency proceedings. This is a very important limitation of the intra EU effects of the main proceedings. For example, under Dutch law a pledgee has the right to sell the pledged assets independently of the estate, but the insolvency practitioner may demand that the pledgee does so within a certain period of time, failing which the right to sell the pledged assets will transfer to the insolvency practitioner. This enables the insolvency practitioner to ensure that the pledged assets are sold in good time. If, however, the pledged assets are located in, say, France, a Dutch insolvency practitioner cannot put the pledgee on notice because main proceedings in the Netherlands do not affect the rights of pledge on French assets. Conversely, if the law of the insolvency proceedings provides that the pledgee no longer has the right to sell the secured assets and that the sale must instead be effectuated by the insolvency practitioner, this rule does not affect secured assets located in another member state and the pledgee will retain the right to separate those assets from the estate and to realise the assets individually to satisfy his claim.[1] As Article 8(1) uses the words ‘shall not affect’, the

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outcome is that neither Dutch nor French insolvency law applies to these assets. Prior to the enactment of the EIR, there was a debate about whether such rights *in rem* should be subject to the insolvency law of the member state of the insolvency proceedings or of the member state where the assets are located,[2] but now neither applies. In consequence, if secured assets are located in a member state other than the state where the main proceedings are opened, they are bankruptcy immune. The only way to obviate this immunity is by opening secondary proceedings in the member state where the assets are located, since in such proceedings they are no longer situated in *another* member state. However, secondary proceedings can be opened only if the debtor has an establishment in the state where those assets are located, which may not be the case.[3] Debtors sometimes seek to insulate assets from possible insolvency proceedings by devising corporate structures in which secured assets are put into the name of a company which has its registered seat and COMI in a state other than that where the assets are located. At the same time, the company avoids engaging in activities in the state where these assets are located if these could be construed as creating an establishment. Such structures do not always succeed. For example, property in the La Défense area of Paris was owned by a Luxembourg company, but the Versailles Court of Appeal[4] held that the COMI was nevertheless located in France and opened main proceedings there. The subject of this article was brought up again when the member states discussed the revision of the EIR, but things stayed as they were in the EIR 2015.

148. If a temporary administrator has been appointed in the main proceedings, he does not have the power to request local proceedings under Article 37(1)(a) EIR. He may, however, request the court in the state of establishment to take preventive measures (Article 52 EIR). Such preventive measures may include measures enjoining secured creditors from having recourse against secured assets in that state. It is not necessary for an insolvency practitioner who is appointed subsequently in the main proceedings to request secondary proceedings.[5]

149. Obviously, Article 8 EIR does not apply exclusively to rights *in rem*, which constitute security rights. Rights of use which constitute rights *in rem* also fall within its scope, but often such rights are not affected by insolvency proceedings anyway.

150. If a secured creditor has sold the secured asset and finds it has a surplus after its claim is satisfied, it should surrender the surplus to the insolvency practitioner.[6]

151. Article 8 EIR gives rise to many interesting questions, but very few of them have reached the ECJ. I will discuss some of them briefly here.

152. First and foremost, it is important to determine what constitutes a right *in rem* under Article 8 EIR. Although the point of departure is that the meaning of a right *in rem* is to be determined by the member states and may therefore differ from one state to another, [7] Article 8(2) and (3) EIR provides a fairly detailed description. These provisions read:

> **'2.** *The rights referred to in paragraph 1 shall, in particular, mean:*
> **(a)** *the right to dispose of assets or have them disposed 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.*
> **3.** *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.'*

153. The right thus needs to pass two tests: (i) it must qualify as a right *in rem* under the *lex rei sitae*, and (ii) it must meet the requirements of Article 8(2) or (3) EIR. It should be noted that the list in Article 8(2) EIR is not exhaustive and that the provision gives a typological characterisation of what a right *in rem* should entail. A mere priority right or 'privilege' with respect to the proceeds of an asset does not constitute a right *in rem*.[8]

ECJ 26 October 2016, C-195/15, ECLI:EU:C:2016:804 (SCI v Wedemark)

154. A French court (Mulhouse) opened insolvency proceedings with respect to SCI Senior Home . Subsequently, the Wedemark local authority in Germany applied for the compulsory sale of real property situated in Wedemark in order to recover arrears of property tax. Under German law, debts due in respect of property taxes are public charges on property, which constitute rights *in rem*. The ECJ held that these were rights *in rem* for the purposes of Article 8 EIR since (i) they are charges which directly and immediately encumber taxed property, and (ii) the owner of the property must accept enforcement against that property (regardless whether it is the original tax debtor). The German tax authorities could therefore enforce their claims against the German assets.

ECJ 16 April 2015, C-557/13, ECLI:EU:C:2015:227 (Lutz v Bäuerle)

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155. In this case, the ECJ held that the right resulting from the attachment of a bank account for a judgment claim was capable of constituting a right *in rem* provided it was exclusive in relation to the debtor's other creditors. The ECJ noted that Article 8(2) EIR mentioned, among the rights *in rem*, the exclusive right to have a claim met. However, the exercise of such a right *in rem* may be voided if it constitutes a detrimental act under Articles 7(2)(m) and 16 EIR. If the detrimental act took place after the opening of the insolvency proceedings, Article 16 EIR, which provides conflict rules with respect to avoidance actions, does not apply.[9] In this case, the bank account was attached prior to the opening of the proceedings, but the detrimental payment took place after the opening. Since the right to attach was established prior to the opening of the proceedings, the payment could nevertheless benefit from the special protection of Article 16 EIR.

156. Assets obtained after the opening of the insolvency proceedings are not covered by Article 8 EIR.[10] In some cases, the question may arise whether or not they are 'future' assets when the insolvency proceedings are opened, especially if they grow out of existing assets. To give an example, a pledgee may have pledged all rental payments under a lease agreement. During the course of the lease agreement the pledgor enters insolvency proceedings. Are the pledges on the rental instalments that become due under the lease agreement after the opening of the insolvency proceedings deemed to have been created before the opening of the proceedings? According to Virgós and Garcimartín,[11] Article 8 applies to the right to receive amounts in the future under the contracts to which the debtor is a party at the time of the opening of the insolvency proceedings, but not to such rights under new contracts. Equally, it applies to crops grown on a property owned by the debtor. If finished product has been pledged before the opening of insolvency proceedings and pledged stock is converted into pledged finished product after the proceedings have opened, the question is whether the pledge of the finished product is deemed to have been created before the opening of the proceedings.

157. Article 8 EIR protects only rights *in rem* with respect to assets which are situated in another member state at the time of the opening of the insolvency proceedings. If assets are moved from the state where the proceedings are opened to another member state after the opening, Article 8 EIR does not apply.[12]

158. Although it is usually not too difficult to determine whether tangible assets are located in a member state other than the state of the main proceedings, it is often less straightforward in the case of intangible assets. For example, let us assume that a French debtor holds an account with a Belgian bank which is administered at a French branch of that bank. Should the claim against the bank be deemed to be located in France (place of the branch) or in Belgium (the bank's COMI)? Some rules on the location of assets are given in Article 2 (9) EIR, which reads:

'the Member State in which assets are situated' means, in the case of:

(i) *registered shares in companies other than those referred to in point (ii), the Member State within the territory of which the company having issued the shares has its registered office;*

(ii) *financial instruments, the title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary ('book entry securities'), the Member State in which the register or account in which the entries are made is maintained;*

(iii) *cash held in accounts with a credit institution, the Member State indicated in the account's IBAN, or, for cash held in accounts with a credit institution which does not have an IBAN, the Member State in which the credit institution holding the account has its central administration or, where the account is held with a branch, agency or other establishment, the Member State in which the branch, agency or other establishment is located;*

(iv) *property and rights, ownership of or entitlement to which is entered in a public register other than those referred to in point (i), the Member State under the authority of which the register is kept;*

(v) *European patents, the Member State for which the European patent is granted;*

(vi) *copyright and related rights, the Member State within the territory of which the owner of such rights has its habitual residence or registered office;*

(vii) *tangible property, other than that referred to in points (i) to (iv), the Member State within the territory of which the property is situated;*

(viii) *claims against third parties, other than those relating to assets referred to in point (iii), the Member State within the territory of which the third party required to meet the claims has the centre of its main interests, as determined in accordance with Article 3(1)*;'

159. With respect to the case described above item (iii) of the list provides that the location of the account is detemined by the account's IBAN code.

160. The location of the assets is important for determining not only whether Article 8(1) EIR is applicable but also whether the asset is covered by the main proceedings or by local proceedings if they have been opened.

161. As noted, Article 8(1) EIR provides that the opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties in respect of assets situated within the territory of another member state. This probably means that a temporary stay or moratorium ordered in the main proceedings cannot affect the right of a secured creditor to have recourse against the secured asset.[13] As a result of this provision, insolvency proceedings cannot affect the secured claim in the sense that the creditor's right to enforce its claim against a secured asset located in another member state is affected

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or that the insolvency practitioner is entitled to sell these assets. Equally, there is a strong argument that the immunity created by Article 8 EIR cannot be undermined by a composition involving the secured creditor.[14] Van Zwieten[15] notes that it may not therefore be possible to effectively restructure creditor claims that are secured by interests in assets located in another member state. Paulus,[16] however, argues that there cannot be such immunity and that the insolvency practitioner is entitled to sell the secured assets located in another member state. The core question revolves around the interpretation of the words 'shall not affect'. The maximalist view is that, as a result of this wording, secured assets located in another member state become completely immune to the insolvency proceedings, unless secondary proceedings are opened. A moratorium preventing enforcement against the debtor's secured assets would not therefore be effective in relation to creditors with security rights on assets in another member state. This means that these secured creditors' claim cannot be modified in a composition which would entail that the secured creditor can no longer take full recovery against the secured assets. The minimalist view is that Article 8(1) EIR protects the secured creditor only against the *opening* of the insolvency proceedings, but not against any subsequent decision such as a stay order or confirmation of a restructuring plan. The maximalist view has the greatest support, and the history of the EIR indicates that this was indeed the intention.[17] However, a more recent directive (Directive (EU) 2019/1023, which will be discussed in chapter 3) instructs the member states to enact legislation facilitating preventive restructuring plans. Such legislation should include the possibility of restructuring the claims of secured creditors. Apparently, the European legislature is now of the view that it is important for such restructuring to be achieved. The preventive restructuring plan procedure should also provide for the possibility of ordering a stay of enforcement action by the creditors, including the secured creditors.[18] It is not strictly necessary for these preliminary restructuring procedures to be entered in Annex A, but as the directive itself does not contain a recognition mechanism, listing them in Annex A is important if they are to gain recognition throughout the EU.[19] However, in view of the emphasis on the possibility of restructuring secured claims as well, it would be awkward if only creditors with secured interests in local assets could be impaired under the preventive restructuring plan proceedings. The directive provides some protection for secured creditors, in the sense that they are entitled to the liquidation value of the secured assets, Article 10(2)(d) of this directive, which limits their rights to such entitlement, would still constitute an infringement of the Article 8 immunity if the assets are located in another member state. It seems to me, therefore, that Article 8 EIR cannot be reconciled with the policy of Directive (EU) 2019/1023. I would thus expect one of two things to happen: either the courts, in particular the ECJ, will be inclined to apply a more minimalist approach to the interpretation of Article 8 EIR when it comes to modifying the rights of secured creditors under a restructuring plan, or the next revision of the EIR will see a curtailment of Article 8.

162. Although the rights *in rem* on assets located in another member state are not affected by the insolvency proceedings, the assets themselves are part of the insolvent estate (unless the insolvency law of the proceedings provides otherwise). The secured creditor will therefore have to surrender any sale surplus to the insolvency practitioner.[20]

163. As mentioned above at 142, Article 8(4) EIR provides that the special rules on the rights *in rem* do not preclude avoidance actions as referred to in Article 7(2)(m) EIR. This provides a tool for dealing with rights *in rem* that have been acquired in a "fraudulent or challengeable way",[21] thereby prejudicing other creditors.

Reservation of title

164. Article 10 EIR contains immunity provisions with respect to reservation of title comparable to those of Article 8 EIR. Article 10(1) provides that the opening of insolvency proceedings against the purchaser of an asset does not affect the seller's rights based upon reservation of title if the asset is located in a member state other than the state of the insolvency proceedings. Article 10(2) EIR provides that if the insolvency proceedings have been opened against the seller of an asset after delivery of the asset, this does not constitute grounds for rescinding or terminating the sale. Furthermore, opening insolvency proceedings against the seller does not prevent the purchaser from acquiring title after the opening of the insolvency proceedings if the asset is located in a member state other than the state of the proceedings. The provision does not prevent termination of the sale if the purchaser fails to meet its obligations in time, such as paying the purchase price. In that case, the insolvency practitioner may invoke the reservation-of-title clause and recover the asset. These provisions do not mean that the rights of the seller or purchaser, as the case may be, cannot be enforced if the asset is located in the state of the insolvency proceedings, but in that case it depends on the law of the insolvency proceedings. If, however, the asset is located in another state at the time when the insolvency proceedings are opened, the rights protected by the reservation of title cannot be affected by the insolvency proceedings.

165. In keeping with the provision of Article 8(4) EIR concerning rights *in rem*, Article 10(3) EIR provides that the special rules on reservation of title do not preclude avoidance actions as referred to in Article 7(2)(m) EIR.

Other exemptions

166. It should be noted that there may also be other exemptions which are not covered by the EIR. For example, Article 4(5) of the Financial Collateral Arrangements Directive[22] provides that financial collateral, such as a pledge of money deposited in a bank account prior to the opening of the insolvency proceedings, can be enforced in spite of the insolvency proceedings (even if the collateral is located in the state of the insolvency proceedings). In certain circumstances, the same applies to

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monies deposited after the opening of the insolvency proceedings.[23]

Voetnoten

[1]
Virgós-Schmit report, no. 95.

[2]
This is the solution chosen for employment contracts.

[3]
Virgós and Garcimartín (2004) 142.

[4]
19 January 2012, No. 11/03519, *Eurotitrisation v Heart of la Défense*.

[5]
See Virgós and Garcimartín (2004) 375. See also above under 70.

[6]
Recital 68 EIR.

[7]
Preamble, Recital 68, Virgós-Schmit report, nos. 43 and 100; ECJ 4 December 2014, C-557/13, ECLI:EU:C:2014:227, *Lutz/Bäuerle*.

[8]
Virgós and Garcimartín (2004) 152.

[9]
See above at 138.

[10]
Virgós-Schmit report nos. 96 and 103; Virgós and Garcimartín (2004) 155; Wessels (2017) 10640.

[11]
Virgós and Garcimartín (2004) 154.

[12]
Virgós and Garcimartín (2004) 156.

[13]
As regards the different views on this topic, see Wessels (2017) 10657.

[14]
See, for example, Virgós and Garcimartín (2004) 163 and Wessels 10658c.

[15]
Bork & Van Zwieten (2016): Van Zwieten 0.39.

[16]
Paulus (2021), pp. 278-280.

[17]
Bork & Van Zwieten (2016): R. Snowden 8.09-8.15; 8.41-8.48.

[18]
Article 6(2) of the directive.

[19]
Some member states have provided the plan proponent with the possibility of choosing between EIR proceedings and non-EIR proceedings.

[20]
Virgós-Schmit report, no. 98.

[21]
Virgós and Garcimartín (2004) 232.

[22]
Directive 2002/47/EC.

[23]
ECJ 10 November 2016, C-156/15, ECLI:EU:C:2016:851, *Private Equity Insurance Group v Swedbank*.

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2.8 Public policy clause

mr. R.J. van Galen, datum 01-06-2021

Datum
01-06-2021
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Vakgebied(en)
Insolventierecht / Algemeen

167. Article 33 EIR provides that '*(a)ny 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*.' As has been discussed in the context of the *Eurofood* judgment,[1] the ECJ decided in that case[2] that the public policy clause should be applied only in exceptional cases. Recourse to the clause is allowed only where recognition and enforcement of the judgment delivered in another member state would constitute a manifest breach of either a rule of law regarded as essential in the legal order of the state in which enforcement is sought or a right recognised as being fundamental within that legal order. The exceptional nature of the public policy clause is further stressed in ECJ 21 January 2010, C-444/07, ECLI:EU:C:2010:24 (*MG Probud Gdynia*). The public policy clause is applied in a similar way under Article 33 EIR and Article 45 of the Brussels I Regulation.[3]/[4]

Voetnoten

[1]
See above at 71 et seq.

[2]
ECJ 2 May 2006, C-341/04, ECLI:EU:C:2006:281.

[3]
Regulation (EU) 1215/2012.

[4]
ECJ 28 March 2000, C-7/98, ECLI:EU:C:2000:164, *Krombach v Bamberski*, ECJ 2 May 2006, C-341/04,ECLI:EU:C:2006:281, *Eurofood,* ECJ 2 April 2009, C-394/07, ECLI:EU:C:2009:219, *Gambazzi v Daimler Chrysler Canada*.

2.9 Main and local proceedings

mr. R.J. van Galen, datum 01-06-2021

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01-06-2021
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Opening of local proceedings

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168. As already discussed in the section on jurisdiction, main proceedings can be opened in the member state where the debtor has its COMI and local proceedings in the member state where the debtor has an establishment.[1] An establishment is not a separate legal entity but a branch of the debtor itself. Main proceedings have extensive effect throughout the EU. All assets of the debtor within the EU are included, the insolvency practitioner can exercise virtually all his powers in the other EU jurisdictions, and relevant ancillary judgments will be recognised and enforced. Local proceedings, on the other hand, are limited to the assets of the debtor in the member state of the establishment. Article 3(3) and (4) EIR distinguishes between local proceedings opened before the main proceedings are opened (to which I shall refer as primary territorial proceedings) and local proceedings opened after the main proceedings are opened (secondary proceedings).[2] Secondary proceedings can be opened at the request of either the insolvency practitioner in the main proceedings or any other person or authority empowered to request the opening of insolvency proceedings in the member state of the establishment (Article 37(1) EIR).[3] The possibility of opening primary territorial proceedings is much more limited. Under Article 3(4) EIR, these can be opened only where (a) main proceedings cannot be opened because of the conditions laid down in the member state of the COMI, or (b) the opening is requested by a local creditor whose claim arises from or in connection with the operation of the establishment, or (c) the opening is requested by a public authority which has the right to do so under the law of the member state of the establishment.[4] Consequently, if main proceedings can be opened, primary territorial proceedings cannot be requested by the debtor. A reason why main proceedings cannot be opened may be that the debtor is ineligible, for example because the law of the COMI requires the debtor to be a trader or provides that public authorities cannot be subject to insolvency proceedings.[5] Another reason may be that the debtor does not meet the insolvency test under the law of the COMI or that the law of the COMI requires there to be sufficient funds to pay for the costs of the insolvency proceedings. Primary territorial proceedings are exceptional.

169. As mentioned above, secondary proceedings can be requested by the insolvency practitioner in the main proceedings as well as by any other person or authority empowered to request the opening of insolvency proceedings in the member state of the establishment. Sometimes, however, the debtor (natural person) or the debtor's management may lose the right to act in any proceedings by virtue of the insolvency law of the main proceedings. The question then arises of whether the debtor or its management can nevertheless still request the opening of secondary proceedings or whether this can only be done on behalf of the debtor by the insolvency practitioner. If the debtor/debtor's management has lost the power to represent the interests of the bankrupt estate under the law of the main proceedings, it is unlikely that it still has the right to request the opening of secondary proceedings.[6]

170. Creditors may lose the right to pursue their claims in the main proceedings if they fail to file them by the bar date. If they have thus forfeited their rights under the insolvency law of the main proceedings, they can no longer request the opening of secondary proceedings in their own jurisdiction or elsewhere within the EU.[7]

171. If main proceedings have been opened in a member state other than the state of the registered office, secondary proceedings can still be opened in the member state of the registered office, provided an establishment is located there.[8]

172. If main proceedings have been opened and a request is made for the opening of secondary proceedings, the court of the member state of the establishment will not re-examine whether the debtor is insolvent.[9] In effect, it not only relies on the examination by the court in the main proceedings but also adopts the insolvency requirements of the main proceedings. However, an exception applies in cases where it was not necessary under the law of the main proceedings for the debtor to be insolvent in order to open those proceedings.[10] Insolvency is a requirement in most member states, but often preliminary proceedings can be opened without an insolvency test. This is the case, for example, in Germany where *Insolvenzverfahren* are opened on a preliminary basis and, once a preliminary insolvency practitioner has been appointed, he investigates whether the debtor is indeed insolvent. Such preliminary proceedings need to be distinguished from preservation measures, which are not in themselves insolvency proceedings and do not imply a determination of jurisdiction.[11] As a consequence of this system, it may be relatively simple to open secondary proceedings, provided the 'insolvency' has been established in the main proceedings. Tests that still may have to be conducted by the court of the establishment are (i) whether the party requesting the opening of the secondary proceedings has the capacity to do so, (ii) whether the debtor has an establishment in the member state concerned and (iii) whether the debtor is eligible for insolvency proceedings under the law of the establishment. For example, if the debtor is a trader or a public authority, that law may prevent the opening of (secondary) insolvency proceedings in that member state.[12] In such a case, the main proceedings will nonetheless remain fully effective. It should be noted, however, that even if these three requirements are met, this does not mean that secondary proceedings must be opened if requested. In the *Burgo Group v Illochroma* judgment,[13] the ECJ held that if the national law contains criteria for determining whether it is appropriate to open secondary proceedings, such criteria may be applied. Furthermore, when deciding on a request to open secondary proceedings, the court must have regard to the objectives of the main proceedings and take account of the purposes of the EIR, in keeping with the principle of sincere cooperation as provided for in Article 4(3) of the Treaty on European Union.[14]

173. If the opening of secondary proceedings has been requested, the court will notify the insolvency practitioner in the main proceedings (or the debtor in possession) and give him an opportunity to be heard on the subject. As will be discussed later in this section, the insolvency practitioner in the main proceedings can give an undertaking to apply synthetic local

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insolvency proceedings (article 36 EIR). If the court of the establishment is satisfied that such an undertaking protects the general interests of local creditors, it will not open secondary proceedings.[15] Article 38(3) EIR provides that if a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and its creditors, the court of the secondary jurisdiction may stay the opening of the secondary insolvency proceedings for a period not exceeding three months. Although the provision is not quite clear on this, it appears from Recital 45 that the temporary stay should have been granted in the context of the main proceedings. The stay in the main proceedings can be an automatic stay.[16] The court of the secondary jurisdiction may order protective measures in the interests of local creditors.[17] For example, it may enjoin the insolvency practitioner in the main proceedings from removing assets from the member state where the request for the opening of secondary proceedings has been stayed. The third and fourth paragraphs of Article 38(3) contain provisions for the stay of the opening of secondary proceedings to be lifted where the moratorium has succeeded and negotiations have resulted in an agreement, and where continuation of the stay would be detrimental to the creditors' rights.[18]/[19]

Primary territorial proceedings and secondary proceedings

174. The EIR contains very few provisions on primary territorial proceedings. The most important is the provision on their opening in Article 3(4) EIR, as discussed above. Most provisions refer to secondary proceedings only and chapter III (Articles 34 through 52) is entitled 'Secondary Insolvency Proceedings'. In general, the provisions and principles concerning secondary proceedings will apply equally to primary territorial proceedings, especially where main proceedings are opened subsequently. Article 3(4) EIR provides that if main proceedings are opened after the opening of primary territorial proceedings, the primary territorial proceedings will be secondary proceedings. However, Article 50 EIR provides that where main proceedings are opened after the opening of primary territorial proceedings a number of the articles relative to secondary proceedings will apply to those territorial proceedings, in so far as the progress of those proceedings permits. For example, as will be discussed below, the insolvency practitioner in the main proceedings may ask for a stay of the liquidation in the secondary proceedings. If these proceedings have been opened prior to the main proceedings, the liquidation may have reached a stage where suspension is not feasible in view of the expectations or rights of the prospective purchasers.[20] In the remainder of this book, I will refer only to secondary proceedings, but it should be noted that the same rules also generally apply to primary territorial proceedings.

The scope of the secondary proceedings

175. Secondary proceedings are limited to the assets located in the state of the establishment.[21] This is provided in both Article 3(2) and Article 34 EIR. Such proceedings also include (i) assets moved out of that state after the opening of these proceedings or (ii) assets moved out of it prior to the opening and subsequent to an avoidable transaction. The courts of both the secondary proceedings and the main proceedings have jurisdiction with respect to the question whether assets fall within the scope of the secondary proceedings or the main proceedings. However, pursuant to Article 32(1) EIR, the judgment that is handed down first has to be recognised in the other member states and therefore also binds the court in the other proceedings.[22] The EIR has no rule comparable to Article 31(1) of the Brussels I Regulation, which provides that the court first seized adjudicates the matter. The law applicable to this question is not the domestic law of the member state where one of the proceedings is conducted, as the issue of the location of the assets is determined by the EIR itself (in particular by Article 2(9) EIR).

176. But what about the liabilities? The secondary proceedings are not in any way limited to local creditors: Article 45(1) EIR provides explicitly that any creditor may lodge its claim in the main proceedings and in any secondary insolvency proceedings,[23] and all creditors may fully participate in the secondary proceedings.[24] Where lodging a claim is a requirement for distribution, this means that the creditor has to lodge its claim in all those proceedings in order to receive distributions.[25] The EIR provides some help here as it provides that the insolvency practitioners in the main and secondary insolvency proceedings must lodge in other proceedings claims which have already been lodged in proceedings for which they were appointed, provided that the interests of creditors in their proceedings are served by doing so.[26] For example, if there are insufficient assets in the estate to make any payment to ordinary creditors, the insolvency practitioner may refrain from lodging their claims.[27] The provision raises the question whether these insolvency practitioners should also lodge claims which they dispute in their own proceedings or which they may even consider frivolous.[28] Next, the mere fact that the insolvency practitioner lodges creditors' claims does not of itself mean that there is a right to vote on those claims. Whether the insolvency practitioner has the power to do so depends on the insolvency law of the proceedings in which he has been appointed.[29]

177. It should be noted that the process of verifying claims in one insolvency proceeding is independent from their verification in other insolvency proceedings. Claims which are recognised in one proceeding do not need to be recognised in the other proceedings. Sometimes, this is a matter of categorisation rather than proof. For example, wages that become due after the opening of the proceedings may be categorised as pre-petition claims in one member state as they flow from pre-existing contracts, whereas under the laws of the other proceedings they may be categorised as administrative costs,

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regardless of whether the employees have continued working. In some jurisdictions, post-petition interest is categorised as a subordinated claim, whereas in other jurisdictions it cannot be filed at all. Tax claims may constitute preferred claims in one jurisdiction but have no preference in others. As the secondary proceedings are subject to their own law, disparities may occur. As already discussed in the section on applicable law, these disparities may constitute a reason for requesting the opening of secondary proceedings. For example, if the employees would have a prioritised claim under the laws of the place of establishment but not under the laws of the main proceedings, they might have an interest in the opening of secondary proceedings in the member state of the establishment because they would then enjoy priority at least with respect to that asset pool.

178. Article 23 EIR contains hotchpot rules. Paragraph 1 was discussed above at 98. This concerns the situation where a creditor, after the opening of main proceedings, obtains satisfaction of its claim on assets of the debtor situated in another member state, possibly through enforcement. Such a creditor must hand over the proceeds to the insolvency practitioner in the main proceedings. The provision does not apply to holders of security interests, as they are protected by Article 8 EIR. Paragraph 2 of Article 23 EIR deals with situations involving multiple proceedings, specifically the situation in which the creditor has obtained a dividend on its claim in one of the proceedings and is to participate in a distribution in other insolvency proceedings with respect to the same debtor. In such a case, the creditor will share in distributions made in these other proceedings only after creditors of the same ranking or category have obtained an equivalent dividend in those proceedings. For example, a creditor may have a priority right in jurisdiction A and be an ordinary creditor in jurisdiction B. If that creditor has received 8% of its claim in insolvency proceedings in jurisdiction A, it will receive a distribution in the proceedings in jurisdiction B only after the ordinary creditors have received their first 8% as well. The provision can give rise to complicated calculations and to conflicting interests between creditors in respect of the sequence of distributions in the separate proceedings. The provision deals only with the situation in which a creditor has received a dividend on its claim in one of the proceedings. It does not cover the situation where the creditor has recovered against assets, for example by virtue of its security right, as this is not a distribution. It is not clear whether the provision also applies if a creditor has a priority right with respect to the proceeds of specific assets which fall within the scope of the secondary proceedings. Does this mean that a creditor that has received such proceeds should ‘lose’ its preferential position with respect to these specific assets because, as an ordinary creditor in the main proceedings, it receives a distribution only if the other creditors have received the same percentage of their claim that it received in the secondary proceedings?

Contracts

179. As the pool of assets in secondary proceedings is limited, unlike the set of creditors, the question arises of how contracts should be attributed.[30] For example, if all cars used by the debtor company were leased through the establishment, should the insolvency practitioner in the secondary proceedings have the power to terminate the contracts subject to the insolvency law of the member state of the establishment, or should the insolvency practitioner in the main proceedings be authorised to do so. And, from the other perspective, which insolvency practitioner should the other party to the contract address? Does the opening of secondary proceedings trigger provisions of its insolvency law about *ipso facto* clauses, because some contracts will be attributed to the establishment? The EIR does not contain provisions on the attribution of contracts.[31] The most appropriate solution is for contracts that are exclusively related to activities of the establishment to fall within the scope of the secondary proceedings.[32] It is generally accepted that the fate of contracts of employees who work exclusively for the establishment is determined by the secondary proceedings, and that the insolvency practitioner in the secondary proceedings is the relevant representative. Moreover, the EIR 2015 introduced a provision (Article 13(2) EIR) giving the court of the member state where an establishment is located jurisdiction to approve the termination or modification of employment contracts if no secondary proceedings have been opened. If secondary proceedings have been opened in that member state, it would therefore make sense for the termination or modification of those contracts not only to be judged by the courts in that member state but also to fall within the scope of the secondary proceedings.

180. Claims by the estate are another category not clearly regulated. Can the insolvency practitioner in the secondary proceedings hold the managing directors liable for mismanagement? It would seem from Recital 47 EIR that he can.

Surplus in secondary proceedings

181. If all claims that have been allowed in the secondary proceedings can be paid, any remaining surplus must be transferred to the main proceedings.[33] As all creditors may file in the secondary proceedings, this prompts the question of how a surplus could arise in the secondary proceedings when there is no surplus in the main proceedings. This is nevertheless possible. First, creditors may have failed to file in the secondary proceedings,[34] in which case a disparity may arise between the set of creditors in the main proceedings and those in the secondary proceedings. Second, creditors may have been accepted in the main proceedings but rejected in the secondary proceedings for lack of evidence.[35] And, third, the claims eligible for inclusion in the distribution may differ from one proceeding to another. As an example, I have already mentioned post-petition interest.

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Effect of the opening of secondary proceedings

182. As already explained in the section on applicable law, the opening of secondary proceedings can have a considerable impact. For example, among the subjects to which the insolvency law of the secondary proceedings applies are those listed in Article 7(2) EIR. Hence, the rules that apply to topics such as set-off, ranking, termination or continuation of contracts and avoidance may be different in the secondary proceedings. Furthermore, security rights vested in assets located in the state of the establishment, which were immune from the main proceedings (as the assets were located in *another* member state), [36] are not immune from the secondary proceedings (as these assets are not located in *another* member state seen from the perspective of the secondary proceedings). This may be a reason for the insolvency practitioner in the main proceedings or another party in interest to request the opening of secondary proceedings. It should be noted, however, that the mere threat of secondary proceedings may itself serve as a weapon in negotiations with a secured creditor.

Coordination between insolvency practitioners

183. The insolvency practitioner in the main proceedings has certain rights with respect to the secondary proceedings and, in some instances, all insolvency practitioners have such rights in the other insolvency proceedings. Article 41 EIR contains general provisions on cooperation between the insolvency practitioners in the various proceedings. Insolvency practitioners in main proceedings and secondary proceedings concerning the same debtor should cooperate with each other to the extent that this is not incompatible with the rules applicable to the respective proceedings. They should notify each other as soon as possible of any information which may be relevant to the other proceedings, explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a plan. They should also coordinate the realisation of assets. The insolvency practitioner in the secondary proceedings should give his counterpart in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings. One possibility of enhancing cooperation is the use of protocols entered into by the insolvency practitioners of the various insolvency proceedings (as mentioned in Recital 49). Another possibility is to appoint the same insolvency practitioner in the different proceedings. This solution is probably better suited to coordination between proceedings involving different group companies in the same member state (discussed below)[37] than to the coordination of separate proceedings concerning the same debtor in different member states. [38]

184. As I have already mentioned, insolvency practitioners must arrange for claims that have been submitted in their proceedings to be lodged in the other proceedings as well. Furthermore, Article 45(3) EIR provides that the insolvency practitioner in the main or secondary proceedings is entitled to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings. This seems to suggest that he also has the right to oppose decisions of the insolvency practitioner in the other proceedings or to be heard in court on the same footing as a creditor.

185. An important right of the insolvency practitioner in the main proceedings is to request the court in the secondary proceedings to stay the process of realising (i.e. 'selling')[39] assets in whole or in part.[40] Such a request may be rejected only if a stay is manifestly of no interest to the creditors in the main proceedings (who are for the most part the same as the creditors in the secondary proceedings). Any stay that is granted is for a maximum of three months, but can be renewed any number of times. This power of the insolvency practitioner in the main proceedings is particularly important in cases where the assets in the secondary proceedings are needed for the purposes of a restructuring plan. This can help to avoid frustration of the plan. The court conducting the secondary proceedings may require the insolvency practitioner in the main proceedings to take any suitable measure to guarantee the interests of creditors in the secondary proceedings. The insolvency practitioner in the main proceedings has the right to request the court in the secondary proceedings to convert them into secondary proceedings of another type (for example, to convert reorganisation proceedings into winding-up proceedings).[41] The insolvency practitioner in the main proceedings also has the right to propose a restructuring plan in the secondary proceedings if these proceedings provide for this possibility.[42]

Effect of a restructuring plan

186. A restructuring plan adopted in secondary proceedings cannot affect the rights of the creditors to the debtor's assets which are not included in those proceedings, save with the consent of all creditors having an interest in those assets (Article 47(2) EIR). Generally, this provision is taken to mean that a restructuring plan offered in secondary proceedings is limited to the assets located in the territory of those proceedings, save with the explicit consent of the affected creditors.[43] It seems likely that this provision may be interpreted somewhat more broadly, in the sense that contracts that fall within the scope of the secondary proceedings may also be modified by a local plan. Conversely, the question arises of whether a restructuring plan that is adopted in the main proceedings is effective in the member state of the secondary proceedings. According to Virgós and Garcimartín, such a plan is effective after the secondary proceedings have been closed because the secondary proceedings are limited to the assets in the territory of the secondary proceedings. They point out that pursuant to Article 20(1) EIR the main proceedings are limited with respect to the territory of the state of the secondary insolvency proceedings only as long as no proceedings in that state are opened. [44] In their view, it may therefore be inferred that after closure of the secondary proceedings the main proceedings regain their original scope. In my view, this argument is not entirely

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convincing. The rule that the main proceedings are effective in a member state in which secondary proceedings have not yet been opened, does not necessarily mean that the main proceedings, or a plan adopted in the main proceedings, will become fully effective in the state of the secondary proceedings after their closure. This would be especially undesirable if the provisions of the plan in the main proceedings conflict with those of the plan in the secondary proceedings, because it would make the possibility of offering a plan in secondary proceedings largely pointless.

Coordination between courts and between courts and insolvency practitioners

187. Article 42 EIR imposes obligations on the courts of main, primary local and secondary proceedings to cooperate with each other in order to facilitate the coordination of those proceedings. It is left to the courts' discretion to determine what form this cooperation should take and what topics should be addressed. Furthermore, Articles 43 and 58 contain provisions on cooperation between courts and insolvency practitioners appointed in other insolvency proceedings with respect to the same debtor or insolvency practitioners appointed in insolvency proceedings of group companies. In the European environment, where courts and insolvency practitioners from different jurisdictions often speak different languages, such cooperation is not always easy. Obviously, cooperation or joint sessions would be easier between, say, German and Austrian courts than between courts where translations have to be arranged. Usually, courts are not allowed to use languages other than their own, or they are reluctant to do so because the finesses of the legal language to which they are accustomed may get lost. Expectations should therefore not be too high, but there is much goodwill to support a common effort.

188. Recital 48 EIR states as follows: '*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).*'

Synthetic proceedings

189. The concept of synthetic proceedings was developed in the United Kingdom in the *Rover* and *Collins & Aikman*[45]*cases.* In order to discourage the opening of secondary proceedings in other member states, the insolvency practitioner gave an undertaking that the assets of the establishment in Belgium would be treated as if secondary proceedings had been opened. This implied that the ranking of creditors in accordance with Belgian insolvency law would be observed in respect of that set of assets. The UK Insolvency Act contained provisions which allowed for such derogations from the rules of UK insolvency law. As many member states did not have a similar instrument allowing derogation from their own rules, the possibility of synthetic proceedings needed to be included in the EIR 2015 if that facility were to be made available throughout the EU. Synthetic proceedings have now been regulated in Article 36 EIR, but the system is very complicated and, to my knowledge, has never been used to date. In order to avoid the opening of secondary proceedings, the insolvency practitioner in the main proceedings may give a unilateral undertaking in respect of the assets located in the member state of the establishment to the effect that, when distributing those assets or their proceeds, he will comply with the law of the state of the establishment. The undertaking should be approved by the known local creditors,[46] and the voting rules that apply to a restructuring plan should be observed. The rules do not specify what should happen if there are several classes of creditors and one or more classes reject the proposal. Creditors may apply to the court of the main proceedings to take suitable measures to ensure compliance with the terms of the undertaking, and may also apply to the courts of the member state of the establishment to take provisional or protective measures to ensure compliance with the terms of the undertaking. As mentioned above, if the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with these rules, the courts of the member state of the establishment will not open secondary proceedings if they are satisfied that the rights of local creditors are adequately protected (Article 38(2) EIR).

190. It should be noted that synthetic proceedings only copy the rules on distribution of assets or proceeds. They do not lift the immunity of secured assets under Article 8 EIR. Thus, the main proceedings still do not affect the rights *in rem* in respect of assets located in the state of the establishment. The same applies to assets subject to reservation of title (Article 10 EIR). Furthermore, although synthetic proceedings entail the distribution of assets and proceeds in accordance with the laws of the establishment, they do not import other provisions of the law of the establishment such as rules on termination or continuation of contracts and on exemptions.

Administrative costs

191. Finally, it should be mentioned that the provisions on secondary proceedings do not contain any rules on administrative costs. A question of particular importance is whether administrative costs incurred in one proceeding may have been for the benefit of another proceeding. For example, the insolvency practitioner in the main proceedings may have incurred expenses in obtaining a valuation report for the realisation of assets in the state of an establishment. The proceeds of the sale will belong to the secondary proceedings. if secondary proceedings are opened in that state after these expenses have been incurred but before the actual sale takes place.

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Voetnoten

[1]
The meaning of ‘establishment’ is discussed at 79.

[2]
If main proceedings are opened after primary territorial proceedings have been opened, the primary territorial proceedings are converted into secondary proceedings (Article 3(4) EIR).

[3]
They cannot be opened at the request of a temporary administrator in the main proceedings. He may, however, ask for preservation measures under Article 52 EIR. As regards the distinction between a temporary administrator and an insolvency practitioner, see above at 70. The criterion is whether main proceedings have been opened and not whether the insolvency practitioner is described, for example, as a provisional insolvency practitioner. Wessels (2017) 10838.

[4]
The fact that the limitation to local creditors does not apply in such a case has been confirmed in the ECJ’s judgment of 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, *Burgo Group v Illochroma*.

[5]
Virgós-Schmit report, no. 85.

[6]
Virgós and Garcimartín (2004) 322; Wessels (2017) 10839b; Bork & Van Zwieten (2016): R. Mangano 37.06. According to Paulus (2021, p. 447) under German law the debtor cannot apply for secondary proceedings.

[7]
See ECJ 9 November 2016, C-212/15, ECLI:EU:C:2016:841, *ENEFI v DGRFP*.

[8]
ECJ 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, *Burgo Group v Illochroma*.

[9]
Article 34 EIR; ECJ 22 November 2012, C-116/11, ECLI:EU:C:2012:739, *Bank Handlowy v Christianapol*.

[10]
Paulus (2021), p. 423.

[11]
See above at 58.

[12]
Article 40 contains a special condition with respect to costs. If the law of the member state of the secondary proceedings requires that the debtor’s assets are sufficient to cover the costs of the proceedings, the court may require the applicant to make an advance payment of costs or to provide adequate security.

[13]
ECJ 4 September 2014, C-327/13, ECLI:EU:C:2014:2158, *Burgo Group v Illochroma*.

[14]
ECJ 22 November 2012, C-116/11, ECLI:EU:C:2012:739, *Bank Handlowy v Christianapol*.

[15]
Article 38 (2) EIR.

[16]
Wessels (2017) 10841n referring to Reinhart, MüKoIns Art. 38 no. 21.

[17]
Wessels (2017) 10841d, 10841m.

[18]
The text refers to ‘creditor’s rights’.

[19]
Bork & Van Zwieten (2016): R. Mangano 38.22-38.25.

[20]
Virgós-Schmit report, no. 37, asserts that ‘(i)ndependent territorial insolvency proceedings also become “subordinated” proceedings as soon as main proceedings are opened within the Community.’” See also Virgós-Schmit report, nos. 86, 254-255.

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[21]
And (i) those moved out of it after the opening of these proceedings or (ii) those moved out of it prior to the opening and subsequent to an avoidable transaction.

[22]
ECJ 11 June 2015, C-649/13, ECLI:EU:C:2015:384, *Nortel Networks*.

[23]
See also Article 53 EIR.

[24]
Virgós and Garcimartín (2004) 328.

[25]
Paulus (2021, p. 510) points out that the provision does not apply to post opening debts (administrative costs). See also below at 191.

[26]
Article 45(2) EIR.

[27]
Virgós and Garcimartín (2004) 428.

[28]
R. Dammann (in Bork & Van Zwieten (2016): Dammann (45.16) is of the opinion that it does not matter whether the claim is rejected or challenged. Paulus (2021, p. 514-515) is of the same opinion.

[29]
Virgós-Schmit report, no. 240; Virgós and Garcimartín (2004) 429. Paulus (2021, p. 515) is of the opinion that the insolvency practitioner should not have voting rights on behalf of these creditors, unless he has received a power of attorney.

[30]
Wessels (2017) 10528.

[31]
The only reference to 'local contracts' in the EIR is to be found in Article 3(4), where the right to open primary local proceedings is conferred on creditors whose claim arises from or in connection with the operation of the establishment.

[32]
Bork & Van Zwieten (2016): R. Dammann 45.07.

[33]
Article 49 EIR.

[34]
And there are various reasons why the insolvency practitioner in the main proceedings may have refrained from doing so.

[35]
Outside of insolvency proceedings, a decision on whether a creditor has a claim against a debtor is obviously a matter which comes within the scope of the Brussels I Regulation. If, however, such a claim is lodged in insolvency proceedings in order to have it taken into account in those proceedings, for example so as to participate in a distribution, the action falls within the scope of Article 6 EIR. That means that if there are multiple proceedings (main and secondary), the validity of the claim will have to be examined in each proceeding and different rules of evidence may apply. Nevertheless, it may be expected that a judgment in one proceeding will have authoritative effect in the other proceedings or that the courts will cooperate in determining the validity of the claim. See ECJ 21 November 2019, C-47/18, ECLI:EU:C:2019:754, *Skarb Pántswa v Stephan Riel*. See also Paulus (2021), p. 510.

[36]
See Article 8(1) EIR.

[37]
In that case it is also possible to appoint a group coordinator. See at 208.

[38]
Article 41(2) EIR.

[39]
Paulus (2021), p. 518.

[40]
Article 46 EIR. Once again, the treatment of contracts seems to have been overlooked.

[41]
Article 51 EIR.

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[42]
Article 47(1) EIR.

[43]
Virgós and Garcimartín (2004) 384.

[44]
Virgós and Garcimartín (2004) 338.

[45]
Re MG Rover BeLux SA/NV, High Court of Justice of Birmingham 30 March 2006 [2006] EWHC 1296 (Ch.); *Re Collins and Aikman Europe SA*, High Court 9 June 2006 [2006] EWHC 1343 (Ch).

[46]
Whether this limitation to local creditors can be reconciled with the principle of non-discrimination is debatable.

An Introduction to European Insolvency Law 2021/2.10

2.10 Submission of claims

mr. R.J. van Galen, datum 01-06-2021

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192. Articles 53-55 EIR contain provisions on the lodging of claims. Article 54 EIR provides that as soon as insolvency proceedings are opened the court or insolvency practitioner should inform all known foreign creditors. Information should be provided on such issues as a possible bar date. A standard form is made available in the European e-justice portal. There is also a standard form for lodging claims and Article 55 EIR lists the information to be submitted when lodging a claim. If the court or the insolvency practitioner has doubts in relation to a claim that has been lodged in accordance with these provisions, the creditor should be given the opportunity to provide additional evidence on the existence and amount of the claim. The rules on lodging, verification and admission of a claim are governed by the *lex concursus* (Article 7(2)(h) EIR). If that law does not require certain information listed in Article 55 to be provided, a claim may be validly lodged without that information.[1]

193. Holders of rights *in rem* such as pledges or mortgages on assets located in a member state other than the state of the insolvency proceedings can exercise their rights of enforcement without filing their claims. This is because Article 8 EIR provides that the opening of insolvency proceedings does not affect such rights *in rem*.[2]

194. As already mentioned in the section on main and territorial proceedings, if multiple proceedings have been opened with respect to the same debtor and creditors have lodged claims in one of these proceedings, the insolvency practitioner in those proceedings has to lodge them in the other proceedings as well if this would be in the interests of the creditors in his proceedings.

Voetnoten

[1]
ECJ 18 September 2019, C-47/18, ECLI:EU:C:2019:754, *Skarb Pántswa v Riel*.

[2]
Virgós and Garcimartín (2004) 279.

An Introduction to European Insolvency Law 2021/2.11

2.11 Insolvency registers

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195. Obviously, creditors have an interest in being able to establish whether a debtor has entered insolvency proceedings. This is particularly true where proceedings have been opened in another member state since the creditor may be unaware of them, even though they are effective in the creditor's state as well without any further publication. Article 24 EIR therefore lays down requirements for the inclusion of information in national insolvency registers. With respect to individuals who are not exercising an independent business or professional activity, member states may decide not to include them in the register. In such cases, a request to the relevant authorities should be made in order to receive information about their insolvency. Article 25 EIR charges the Commission with the establishment of a decentralised system for the interconnection of insolvency registers. The European e-Justice Portal is to serve as a central electronic access point. Under Article 92 (c) EIR, this system should have been up and running from 26 June 2019, but this is not the case. In March 2021 only a minority of the member states were participating in the system.

196. Article 28 EIR provides that the insolvency practitioner must request that information about the insolvency proceedings in which he is involved be published in other member states where an establishment of the debtor is located. The insolvency practitioner may also request that the information is published in any other member state if he considers that to be necessary. The publication is not a prerequisite for recognition, but it is relevant in the context of Article 31 EIR. This article provides that if an obligation has been honoured for the benefit of the debtor when it should have been honoured for the benefit of the insolvency practitioner and this has taken place in a member state other than the state of the insolvency proceedings, the person who has performed the obligation is protected if he was unaware of the proceedings. If the insolvency proceedings have been published pursuant to Article 28 EIR in that member state prior to the performance, there is a rebuttable presumption that he was aware of the insolvency proceedings. If no publication has taken place, there is a rebuttable presumption that he was unaware of the insolvency proceedings. If the establishment has been entered in a public register of the member state of the establishment such as the company register, the insolvency practitioner must publish the insolvency proceedings in that register as well if the laws of that member state so require (Article 29(1) EIR).

197. The insolvency practitioner (or debtor in possession) should also ensure registration in the relevant register of the member state in which the debtor has rights with respect to immovable property, if this is required by the law of that member state.[1] Such registration is not a prerequisite for recognition of the insolvency proceedings. However, Article 14 EIR provides that the effects of insolvency proceedings on the rights of a debtor in immovable property are determined by the law of the member state where the property is located.

198. Apart from these mandatory registrations, the insolvency practitioner (or debtor in possession) may request similar registration in any other member state, provided the law of that member state allows such registration (Article 29(2) EIR).

Voetnoten

[1]
Article 29(1) EIR.

An Introduction to European Insolvency Law 2021/2.12

2.12 Data protection

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Auteur
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199. Chapter VI of the EIR (Articles 78-83) concerns data protection. The provisions are primarily directed at the member states. This chapter will not be discussed here.

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2.13 Groups of companies

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Vakgebied(en)
Insolventierecht / Algemeen

200. The EIR 2000 did not contain any provisions on groups of companies. At the time, many insolvency lawyers thought that this reduced the entire EIR to an irrelevance as most large corporations are divided into units consisting of separate legal entities and there would usually be at least one legal entity for each member state where the corporation is active. Although these insolvency lawyers turned out to be wrong as the EIR was found, in practice, to fulfil a need, the lack of provisions relating to groups was definitely felt and efforts were therefore made to fill the gap. An easy solution would have been to include a provision that, if a court has jurisdiction over one group company, it would also have jurisdiction over the others (similar to 28 U.S.C.§ 1408(2)). In a way, that is what the British courts attempted in the early cases by holding that the COMI was located at the group's management centre, but this approach was halted by the *Eurofood* case,[1] which stressed the importance of the COMI of the group company itself being ascertainable by third parties. A situation in which the insolvency proceedings of one group member created jurisdiction for the insolvency proceedings of the other group companies was never contemplated: instead, the main proceedings for each group company have to be opened at that company's COMI. Another easy solution would have been to confer powers on the insolvency practitioner of the top company that would enable him to achieve an efficient solution for the entire group. However, corporate structures are sometimes complicated and control may lie with another group company. The various drafts of the EIR 2015 that were circulated prior to its enactment show the Community legislature's struggle to reach a politically acceptable solution. Evidently, the member states had difficulty in accepting that courts or insolvency practitioners located in other member states would be able to take decisions concerning their group companies. For example, France might have difficulty in accepting that an insolvency practitioner in the main proceedings of a Spanish company would have some degree of authority over the insolvency proceedings of a French subsidiary or an otherwise related company. When the EIR 2015 was finally introduced, insolvency practitioners were given rights to obtain information and give advice, but no rules were included to regulate which proceeding should take precedence. Similarly, the scope for intervening either directly or through the courts in the insolvency proceedings of group companies was limited. The EIR also introduced the concept of a group coordinator, who could try to coordinate the negotiation of a restructuring plan. However, the group coordinator cannot be an insolvency practitioner who has been appointed in one of the insolvency proceedings, and his powers are also very limited. The whole construct seems to rest on the premise that a restructuring plan should be reached by negotiation between the insolvency practitioners appointed in all the insolvency proceedings and possibly the group coordinator and by subsequent adoption in all these proceedings. My own view is that where a case involves insolvent companies in three or more jurisdictions, the road to a fully negotiated restructuring plan is generally too complicated to be viable. Indeed, I know of no examples where that has been achieved.

201. To my knowledge, no group coordinators have yet been appointed, which may in itself be an indication that the system is not viable. However, another reason for that may be that in the period after this provision entered into force (on 26 June 2017) until early 2020 the economy performed rather well. And in 2020 the number of insolvency cases was fairly small due to the support measures taken by the member states. So there has been little opportunity to test this feature. I hope that one of the readers of this book will give it a try!

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202. As the provisions of Chapter V of the EIR confer certain rights of coordination and advice on insolvency practitioners with respect to insolvency proceedings of other companies belonging to the same group, the definition of a group is relevant. This can be found in Article 2 (13) and (14) EIR. The concept is linked to Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports. Article 2(13) EIR defines a group of companies as a parent undertaking and all its subsidiary undertakings. Article 2(14) defines a parent undertaking as an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. It adds, however, that an undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU is deemed to be a parent undertaking. Articles 22 and 23 of that directive contain an elaborate description of companies that have an obligation to draw up consolidated accounts and specify cases in which member states are allowed but not obliged to enact inclusion of additional undertakings and possible exemptions. Shareholdership and control are the key factors taken into account.

Insolvency practitioners

203. Section 1 of Chapter V (Articles 56-60) concerns cooperation and communication. These provisions are the complement to Articles 41-43, which provide for cooperation and coordination between insolvency proceedings with respect to the same debtor (main and secondary proceedings). Article 56 EIR contains an obligation for an insolvency practitioner appointed in proceedings concerning a member of a group to cooperate with any insolvency practitioner appointed in proceedings concerning another member of the same group. No distinction is made between insolvency practitioners in main proceedings and in secondary proceedings. Nor is such a distinction made throughout the chapter on group insolvencies. It follows that several independent insolvency practitioners of one company may have rights and obligations in insolvency proceedings of another member of the group. An insolvency practitioner's obligation to cooperate as provided for in Article 56 EIR is limited in three ways:

(i) it only applies to the extent that the cooperation is appropriate to facilitate the effective administration in the receiving proceedings;

(ii) it should not be incompatible with rules applicable to the proceedings of that insolvency practitioner; and

(iii) it should not entail any conflict of interest.

These limitations considerably weaken the obligation to cooperate, which is therefore more restricted than those under Articles 41-43 EIR.[2] In insolvency situations, there are often conflicts of interests between group companies because they have different sets of creditors.

204. It is interesting to note that under Article 56(2) insolvency practitioners may grant additional powers to one of their number and agree an allocation of tasks.

205. Article 57 contains a similar provision on cooperation between courts in group proceedings, including the same limitations. Article 58 provides for cooperation between courts and insolvency practitioners in other group proceedings.

206. An insolvency practitioner has certain powers in proceedings concerning other group companies.[3] These include:

(i) the right to be heard in proceedings concerning any other member of the same group;

(ii) the right to request a stay of any measure related to the realisation of assets. For example, an insolvency practitioner in proceedings of group company A can request a stay of the sale of the assets of group company B. However, this power is subject to limitations. One requirement is that a restructuring plan has been proposed for all or some members of the group. Furthermore, no coordination proceedings should have been opened with respect to companies A and B. The stay can have a maximum duration (including extension) of six months.

It should be noted that these rights are conferred on the insolvency practitioners involved in all group proceedings. Several requests for stays can therefore be made in respect of the same entity, and all insolvency practitioners have the right to be heard. However, if group coordination proceedings have been opened, the group coordinator has the exclusive right to request a stay.

207. The request for a stay concerns a '*stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group*'. The wording of the provision[4] is not limited to a stay of actions by an insolvency practitioner. It is therefore conceivable that such stay may also concern actions brought by secured creditors. If the provision does indeed have to be interpreted in this way, it might set aside Article 8 EIR.[5]

Opening of group coordination proceedings

208. Section 2 of Chapter V concerns group coordination proceedings. According to Article 61(1) EIR, group coordination proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group. The request should be accompanied by a proposal for the person to be appointed as group coordinator. Moreover it should be accompanied by an outline of the proposed group coordination, explaining why the opening of group coordination proceedings is appropriate to facilitate the effective administration of the insolvency proceedings and is not detrimental to any of the creditors of the proceedings concerned.[6] The outline should describe the key elements of the proposed

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coordination.[7] The group coordinator must not be one of the insolvency practitioners appointed in respect of any of the group companies. The group coordination proceedings will thus be opened by the court first seized (as confirmed by Article 62 EIR). Obviously, this rule could result in manipulation of the group coordination proceedings. Indeed, it is even conceivable that insolvency proceedings could be requested for dormant subsidiaries for the sole purpose of creating jurisdiction in the member state concerned for the opening of group coordination proceedings. The wording of Article 61 EIR suggests that a request cannot be limited to some of the group members or part of the insolvency proceedings of the group members. The default situation is therefore that all main and secondary proceedings with respect to all group companies are included. A limitation can be created by means of an opt-out, as discussed below.[8] The wording of Article 63(1) and Article 61 (3) (b) and (c), gives no indication that group coordination proceedings can also be requested for a selected set of group companies only, which might sometimes be more efficient than opening such proceedings for the whole group. The courts will have to determine whether such limited group coordination proceedings are possible. If this is so, or if the opt-out instrument is used, it might be possible to conduct group coordination proceedings simultaneously with respect to different sets of group companies. There is also no provision that all insolvency proceedings involving the same debtor be included in the group coordination proceedings. It is therefore possible that an insolvency practitioner dealing with a group company in main proceedings opts out and a fellow insolvency practitioner dealing with the same group company in secondary proceedings does not. This would allow a form of mini-coordination with respect to all the group companies having an establishment in the same jurisdiction. Article 61 EIR does not explicitly require that the group coordination proceedings should involve proceedings from more than one jurisdiction, but this is probably the intention. Solvent group companies cannot be included in the group coordination proceedings.

209. After the request for the opening of the group coordination proceedings has been filed, the court considers various factors, for example whether the opening of group coordination proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members. Moreover, no creditor of any group member expected to participate in the proceedings should be likely to be financially disadvantaged by the inclusion of that member in the proceedings. If the court is satisfied that these criteria are met, it notifies the insolvency practitioners involved and gives them an opportunity to be heard.

210. Subsequently, there is a waiting period of 30 days, during which insolvency practitioners appointed in respect of group companies may object to the person of the proposed group coordinator. If the court honours the objections to the person of the group coordinator, it may refrain from appointing that coordinator and invite the objecting insolvency practitioner to submit a new request for group coordination proceedings.[9] The court may not appoint a group coordinator of its own choice. If the court decides to open group coordination proceedings, it appoints the group coordinator and decides on the outline of the coordination and on the estimation of costs and the share to be paid by the group members.[10]

211. An insolvency practitioner may also opt out of the group coordination proceedings altogether (Article 64 (1)(a) and 65 (1) EIR), in which case the proceedings in which this insolvency practitioner is involved will not be included in the group coordination proceedings. Nevertheless it is possible that some kind of informal consultation takes place.[11]

212. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of group companies agree that the court of another member state having jurisdiction is the most appropriate court, that court will have exclusive jurisdiction over the group coordination proceedings. The 30-day waiting period thus gives the insolvency practitioners an opportunity to consider an alternative, both to the jurisdiction and to the group coordinator.

213. Under Article 69 EIR the possibility of opting in after group coordination proceedings have started is available for insolvency practitioners who have previously opted out and for insolvency practitioners acting in insolvency proceedings that have been opened after the start of the group coordination proceedings. The group coordinator's consent is required, and if this is withheld the insolvency practitioner has recourse to the court.

The role of the group coordinator

214. The insolvency practitioners appointed in relation to group members and the group coordinator must cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings.
215. The essential tasks of the group coordinator are to

(i) make recommendations for the coordinated conduct of the insolvency proceedings;
(ii) propose a group coordination plan.

The issues covered by the recommendations and the plan will depend on the decision of the court on the outline of the coordination (see above under 210).[12] A group coordination plan is not a rescue plan in the classic sense of a plan capable of modifying creditors' rights and resolving the insolvency. Instead, it is more about coordinating the proceedings. Article 72(1)(b) EIR provides that such a plan may contain proposals for (i) measures to re-establish the group's economic performance and financial soundness, (ii) settling intra-group disputes and (iii) agreements between the insolvency practitioners of the group companies. Under Article 72(3) EIR, the plan may not include recommendations as to any consolidation of proceedings or insolvency estates. Article 70 EIR provides that the insolvency practitioners must consider

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the recommendations of the group coordinator and the content of the group coordination plan, but are not obliged to follow the recommendations of the plan. However, if the insolvency practitioner does not follow the plan, he must give reasons for this. So this is actually tantamount to a comply-or-explain rule.

216. Under Article 72(2) EIR, the group coordinator has various important rights, including the following:

(i) the right to be heard and participate in any of the proceedings with respect to group companies included in the plan;

(ii) the right to mediate any dispute arising between insolvency practitioners of group members;

(iii) the right to request information from any insolvency practitioner in respect of any member of the group that is included in the plan, where the information might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings (the limitations on similar rights between insolvency practitioners under Article 56 EIR are not repeated in this provision);

(iv) the right to request a stay of proceedings opened in respect of any member of the group that is included in the plan, provided that such a stay is necessary to ensure its proper implementation. As already mentioned, Article 60 EIR provides that insolvency practitioners have similar rights to request a stay in other insolvency proceedings of group companies, provided that none of the companies is included in group coordination proceedings. In the case of group coordination proceedings, this right is therefore transferred to the group coordinator. He may also request the lifting of an existing stay (this need not be a stay ordered at the request of an insolvency practitioner under Article 60 EIR or a stay ordered at the request of the group coordinator, but can be a stay imposed under national law).

As noted above,[13] Article 56 EIR imposes a general obligation on insolvency practitioners appointed in proceedings of different group members to cooperate and communicate with one another. This obligation is rather more restricted than the corresponding obligation of cooperation and communication between insolvency practitioners in different proceedings with respect to the same debtor (Article 41 EIR). This is presumably due to the possibility that the interests of the different sets of creditors of each of the group companies may diverge. Article 74 EIR provides for the obligation of cooperation between the insolvency practitioners in the insolvency proceedings and the group coordinator.

Voetnoten

[1]
ECJ 2 May 2006, ECLI//281, C-341/04.

[2]
Under Articles 41-43 only the limitation referred to at (ii) applies.

[3]
Article 60 EIR.

[4]
Article 60(1)(b) EIR.

[5]
However, Recital 69 EIR seems to indicate the opposite.

[6]
Articles 61(3)(b) and 63(1) EIR.

[7]
Bork & Van Zwieten (2016): J. Schmidt 61.25.

[8]
At 211.

[9]
The wording of Articles 67 and 61(3) EIR seems to suggest that in that case the requesting insolvency practitioner has to submit a wholly new request and cannot simply request the appointment of another group coordinator.

[10]
Article 68(1) EIR.

[11]
Paulus (2021), p. 641.

[12]
Paulus (2021), p. 632.

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[13]
At 201.

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