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

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European Private International Law

Second Edition

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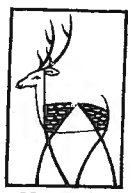

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The Insolvency Regulation

5.1 The Overall Nature of and Core Approaches to Insolvency and Private International Law

This whole volume and many others with it arguably are testimony to private international law's overall intricate nature. Insolvency proceedings however involve additional challenges. The subject of insolvency proceedings by its nature almost always involves a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average private international law scenario.[1]

There are two core approaches to insolvency and private international law. *'Universality'* argues that against one particular insolvent person (whether he be a private individual or an undertaking), only one insolvency procedure ought to be opened. This one procedure would then (have to) include all debts and assets, and decisions reached in its course ought to be recognised by all other jurisdictions. In its purest form, universality combines universality of effects, with unity of proceedings. The often used term *'lex concursus'* is more or less uniquely[2] attached to the universality doctrine. It refers to the law of the place where insolvency proceedings have been opened (*'concursus'*, as a variety of claims 'concur'), and hints at the standard *Gleichlauf*[3] between forum and applicable law in insolvency proceedings.

The *territorial approach* to insolvency proceedings focuses on the location of the assets: an insolvency proceeding may/must be opened in each State where the insolvent has assets, and, in its purest form any consequences of such proceeding are limited to the territory concerned: territoriality of effects and plurality of proceedings.

One does not really 'support' one theory or the other. Rather, universality is what one aspires to; territoriality is the interim (potentially ultimate) reality. The universal approach can only work when other States accept the exclusivity of the proceedings in a different State, and are happy to attach consequences to the findings of those proceedings. This requires bi- or multilateral agreements and eventually a global approach to insolvency proceedings.

[1] For a good illustration, see the UK Supreme Court in *Rubin v Eurofinance SA* [2012] UKSC 46 (not within the scope of the Insolvency Regulation as none of the debtors had their centre of main interests in the EU).

[2] Grammatically, of course, there is no reason why *lex concursus* could not also apply to the territoriality doctrine; however, standard terminology is such as to reserve it for the universality doctrine.

[3] See the three processes of private international law, and standard 'connecting factors', in the introductory chapter.

5.2 Genesis of the Insolvency Regulation

As noted above in the review of the Brussels I Recast, insolvency was exempt from the 1968 Brussels Convention. This was evidently not because it was not deemed to have any relevance to business. Rather it was seen to be of such high relevance to cross-border business, that it required a specific, tailor-made regime. Unlike the majority of issues dealt with in the Brussels Convention (and the subsequent Regulation), the subject of insolvency proceedings by its nature almost always involves a multitude of stakeholders, and the subject-matter of the multitude of claims is much more varied than in the average Rome I or Rome II situation.

There have been plenty of attempts to come to a Convention in the insolvency field.[4] In May 1996 one was very nearly there. The entry into force of the 23 November 1995 Convention on insolvency proceedings[5] was made subject to ratification by all 15 Member States at the time,[6] within a period of 6 months. This period lapsed on 24 May 1996 without the United Kingdom having ratified (due to strategic quarrels over the institutional position of Gibraltar, and the lingering animosity between the UK and the other Member States over the fall-out of the BSE crisis). Having nearly succeeded, it would of course have been foolish not to somehow recycle the 1995 text. In the meantime, the legal basis for the initiative had changed. Article 65 EC, in combination with 67(1) EC, post Amsterdam, no longer kept the issue outside of the EC's legal framework:

> Article 65: 'Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include: ...
>
> Article 67: 1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.

The Member States taking the 'initiative' where Germany and Finland under their respective 1999 presidencies of the Union. The 'Insolvency Regulation', Regulation 1346/2000,[7] which is reviewed in this heading, by default has become a global focal point for attempts to reach a multilateral approach to jurisdiction and applicable law in insolvency proceedings. There is no global or truly multilateral equivalent of the Regulation. Especially given the use of some of the core concepts of the Regulation (first and foremost the 'Centre of Main Interest—COMI, as the main jurisdictional driver) in other jurisdictions, too, their interpretation by courts of the Member States under the guidance of the European Court of Justice, has become of global interest.[8]

Interestingly, given the collapse of the 1995 Convention at the last moment only, it already had all the trimmings of EC private international law Conventions, including the

[4] See the overview in G Moss, IF Fletcher and S Isaacs (eds), *The EC Regulation on Insolvency Proceedings*, 2nd edn (Oxford, OUP, 2009) 2 ff.

[5] It can be downloaded from the Archives of European Integration, eg via http://aei.pitt.edu/2840/.

[6] Art 49(3): 'This Convention shall not enter into force until it has been ratified, accepted or approved by all the Member States of the European Union as constituted on the date on which this Convention is closed for signature.'

[7] Regulation 1346/2000, [2000] OJ L160/1.

[8] See eg A Ragan, 'COMI Strikes a Discordant Note' (2010) 27 *Emory Bankruptcy Developments Journal* 117–68.

accompanying 'Report', in this case the Virgos–Schmit Report.[9] The Report never having been formally adopted, it nevertheless has considerable influence in the application of the Insolvency Regulation. The institutional awkwardness is made more poignant by the aforementioned legal basis of the Regulation. In the five-year interim period post Amsterdam, the Commission did not have sole right of initiative. In this case, given the history of the Regulation, Germany and Finland revived the Convention text more or less as it stood, leading to a lack of Commission proposal (and explanatory Memorandum) and, given the streamlined decision-making procedure, neither any extensive Parliament involvement. The Regulation's *travaux préparatoires* in other words are thin on the ground, making the Virgos–Schmit Report an important (if unofficial and never formally adopted) reference. The eventual Regulation tries to pre-empt some of the perhaps expected controversy by making full albeit not unusual use of recitals.

The Regulation does not apply to Denmark, which has created one or two peculiar difficulties, for instance that English courts can justifiably consider the use of anti-suit injunctions against Danish proceedings (see a recent application (injunction not granted) in *Swiss Marine*.[10,11]) This is probably not possible in the context of the insolvency Regulation (see further, *Kemsley*).[12]

[9] It can be downloaded from the Archives of European Integration, eg via http://aei.pitt.edu/952/.

[10] *SwissMarine Corporation Limited v OW Supply & trading A/S (in bankruptcy)* [2015] EWHC 1571. SwissMarine Corporation Limited ('SwissMarine') applied for an anti-suit injunction against OW Supply & Trading A/S ('OW Supply'), a Danish company that had filed for bankruptcy in the Bankruptcy Court of Aalborg, Denmark on 7 November 2014. SwissMarine sought an order restraining OW Supply (i) from proceeding with an action that it had brought in the District Court in Lyngby, Denmark (the 'Lyngby action') and (ii) from commencing any other or further proceedings in Denmark or elsewhere against SwissMarine directed to obtaining a 'disputed' sum claimed under an ISDA Master Agreement (the 'ISDA Agreement') or any transaction thereunder.

The Brussels I Recast did not apply for the dispute arguably fell under that Regulation's insolvency exception. The Insolvency Regulation as noted does not apply for Denmark has opted out of it. The High Court held essentially that the Lygnby action is not covered by the jurisdiction agreement because it was not a suit, action or proceedings relating to a dispute arising out of or in connection with the ISDA Agreement or any non-contractual obligations arising out of or in relation to it. The Court followed the defendant's argument that OW Supply was not seeking to have determined any dispute under the ISDA Agreement or about the parties' rights and obligations under it, and there was no dispute about their contractual rights and obligations. The question for the Lyngby court was how the Danish insolvency regime applied to the parties. In the words of Smith J: 'The wording [of the choice of court clause in the ISDA Agreement] does not bear on the question whether OW Supply can invoke the protection of Danish insolvency rules, or whether the jurisdiction agreement was intended to prevent this. I cannot accept that the parties evinced an intention in the schedule that OW Supply (or SwissMarine) should abandon the protection of its national insolvency regime' (26). In conclusion, SwissMarine have not shown a sufficient case that the jurisdiction agreement applies to the Lyngby action to justify its submission that it should be granted an anti-suit injunction on the grounds that in bringing and pursuing the action OW Supply is acting in breach of it (29).

Smith J also discussed at length the impact of the Brussels I and Brussels I Recast Regulation on the reference, in the choice of court provision of the ISDA Agreement, to 'Convention' (ie 1968 Brussels Convention) parties. Although this discussion had no bearing on the eventual outcome, the Court's (disputable) conclusion that reference to Convention States should be read as such (and not include 'Regulation' States), in my view would merit adaptation, by parties ad hoc or generally, of the relevant choice of court clause.

[11] See for an application by the Courts of the Isle of Man in favour of US proceedings (to which the Regulation equally does not apply) *Interdevelco Limited v Waste2Energy Group Holdings Plc* CHP 2012/56. The Isle of Man High Court declined to accept jurisdiction in insolvency proceedings against a company incorporated in the Isle of Man. Waste2Energy may be incorporated in the Isle of Man but it has considerable commercial connections in the US, where other companies within the group are located, and is subject to insolvency proceedings there. The Manx court had jurisdiction in principle, on the basis of the incorporation there. However, Manx rules on civil procedure include a general *forum non conveniens* rule, and its insolvency laws express clear preference for universality. The combination of both with comity led the High Court to relinquish jurisdiction in favour of the US.

[12] See n 75 below and accompanying text.

In the meantime, the Regulation was considerably amended in 2015. It will be replaced by Regulation 2015/848,[13] which will apply to insolvency proceedings opened after 26 June 2017. I use 'EIR 2015' for the new Regulation and 'former EIR' when I refer to Regulation 1346/2000. A first observation when comparing the old and new version of the EIR is that the Regulation, and its recitals,[14] have almost doubled in size. That is in some measure due to the introduction of an entirely new chapter for group insolvency.

5.3 General Context of the 2015 Amendments

The EIR 2015 is the result of an entire 'insolvency package', which was adopted by the European Commission in December 2012.[15] The whole package comprises the proposal to revise Regulation 1346/2000,[16] the Hess–Oberhammer–Pfeiffer–Pieckenbrock–Seagon Report on the application of that Regulation,[17] the Commission Report on same,[18] an Impact Assessment[19] and a Communication on a new European approach on business failure and insolvency.[20] That latter Communication was later supplemented with a Recommendation,[21] in which the Commission again observed the lack of harmonisation at the applicable and substantive law level. The Recommendation includes among others guidelines on the facilitation of negotiations for business restructuring.

A report on the functioning of the former Regulation was scheduled for June 2012, with the Commission having tendered a study in late 2011, collecting information on the practice in the Member States. In its call for tender, the Commission identified a number or changes in the insolvency environment since the adoption of the Regulation:[22] the number of Member States has increased twice since (in 2004 and 2007), meaning 12 new Member States have entered the arena, some of which have rather specific insolvency procedures. Generally, some Member States adopted new legal schemes for restructuring and treatment of insolvency, based on the UNCITRAL Model Law. Finally, the organisation of business itself has changed: companies are incorporated in international groups (parent company and subsidiaries), they apply corporate governance rules, and have access to capital in the

[13] Regulation 2015/848, [2015] OJ L141/19.

[14] I am grateful to Prof Wessels for providing, on his blog (http://bobwessels.nl/2015/08/2015-08-doc1-eu-insolvency-regulation-v-recast-recitals-compared/, accessed 22 September 2015) a table of equivalence of the old and new Regulation's recitals.

[15] 'Giving Honest Businesses a Second Chance: Commission Proposes Modern Insolvency Rules', IP/12/1354, 12 December 2015, available via http://europa.eu/rapid/press-release_IP-12-1354_en.htm or ow.ly/Q1x1H, accessed 24 July 2015.

[16] COM(2012) 744.

[17] B Hess, P Oberhammer, T Pfeiffer, A Pieckenbrock and C Seagon, *External Evaluation of Regulation 1346/2000 on Insolvency Proceedings* (December 2012), available at http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf or ow.ly/Q1ymC, accessed 24 July 2015.

[18] COM(2012) 743.

[19] SWD(2012) 416, available via http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf or ow.ly/Q1zUT, accessed 24 July 2015.

[20] COM(2012) 742.

[21] Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency, COM(2014) 1500.

[22] Open invitation to tender JUST/2011/JCIV/PR/0049/A4.

financial markets. Faced with new risks (global economy, relocation of business, unemployment, the 2008 financial crisis), European companies have had to adapt continuously to a changing environment.

In most Member States bankruptcy law has been modernised to fit with the new economic context: beside traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, new schemes applicable to a group of main creditors (eg banks, public bodies) at a pre-insolvency stage are regarded as being more efficient for the purposes of business continuation and preservation of jobs. At the same time, new procedures for the treatment of over-indebtedness of natural persons have been put in place in many countries (eg 'civil bankruptcy') with a view to guaranteeing a decent life to the poorest debtors (as a principle of social justice).

As a consequence, the Commission flagged in particular the following difficulties in application which, it suggested, may have required an amendment to the Regulation:[23]

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1. Scope of the Regulation

— the limitation of the scope of the Regulation to insolvency and winding-up proceedings as defined in Articles 1 and 2 and listed in Annexes A and B thereof and a possible extension to hybrid proceedings (ie pre-insolvency compulsory arrangements to prevent the formal insolvency proceedings, for example in the UK; *"pre-pack"*, French *"sauvegarde"*);
the exclusion from the scope of the institutions referred to in Article 1 (2). The re-organisation of financial undertakings and payment systems and from the Directives should be examined as a possible extension of the scope of the Regulation;
the limitation of the territorial scope and its effect on insolvency procedures involving debtors with a COMI or assets in Denmark and/or non-EU States; in particular, the effect of Danish decisions in relation to insolvency proceedings opened in other Member States;
— the delineation of the scope with other Union instruments in the area of civil justice, notably the JR.

2. The system of main and secondary proceedings:

jurisdiction for opening proceedings: the concept of COMI;
— the issue of transfer of seat/shift of COMI to another Member State (Case C-1/04 Staubitz-Schreiber, Case C-396/09 Interedil) and the relationship with the principle of freedom of establishment and corporate mobility (Article 49 TFEU, Case C-210/06 Cartesio, conclusions of the Experts' Group on European Company Law 2011) and Directive on the approximation of the laws of the Member States and the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses;
— the division of powers between main and secondary proceedings;
— pending parallel insolvency proceedings;
recognition and enforcement of decision opening insolvency proceedings in another Member State;
— the public policy exception;
— recognition and enforcement of other decisions under the Regulation.

3. The insolvency of groups of companies, the application of the Regulation taken by national courts in such situations.
4. Debt adjustment of private individuals ("consumer bankruptcy").
5. Insolvency proceedings and arbitration/ADR: effect of insolvency on arbitration/ADR clauses, effect of arbitration/ADR proceedings in context of Article 15.
6. Applicable law rules: *lex fori* vs *lex situs*, rules on protection of rights *in rem*, set-off, reservation of title.
7. Claims handling and distribution, priority of security.
8. Detrimental acts, avoidance actions.

[23] Ibid, footnotes omitted.

9. Jurisdiction over actions related to insolvency proceedings, in particular for civil claims to set a transaction aside (*actio pauliana*).
10. Registration and publication of proceedings.
11. Cooperation and communication between liquidators, judicial cooperation between courts, electronic forms in all languages, interconnection of insolvency registers beyond the scope of the project currently carried out in the framework of the European e-Justice Portal.
12. Coherence, synergies and coordination between the Regulation, particularly Articles 3, 10 and Annex A, and the Directive on the protection of employees in case of insolvency of the employer—(including case law where co-operation between the various national guarantee institutions is needed and analysed).

The report issued on the basis of the points of interest, originally due for the summer of 2012, was made public in December 2012.[24] In October 2012, the Insolvency Regulation did feature in the European Commission's second round (list of intended) of proposals to shake up the Single Market, 'Single Market Act II' (SIMA II).[25]

As noted above, there is one very important limit to the Insolvency Regulation in its current form: it does *not* harmonise insolvency law. There are substantial differences in the general approach to insolvency proceedings: what level of protection is given to 'weaker' creditors, such as employees; whether and how there is State intervention in the proceedings; whether courts play a central role or leave creditors (or certain categories of creditors) in the driving seat; etc. These are not at all addressed by the Regulation.

The Commission eventually tabled a proposal with two angles:[26] firstly, what one could call a procedural angle (firmly within the conflicts area, especially in terms of recognition and enforcement), which would continue the current focus of not harmonising insolvency law (although the last element of these comes close). On this angle SIMA II[27] declared that:

> We thus need to establish conditions for the EU wide recognition of national insolvency and debt-discharge schemes, which enable financially distressed enterprises to become again competitive participants in the economy. We need to ensure simple and efficient insolvency proceedings, whenever there are assets or debts in several Member States. Rules are needed for the insolvency of groups of companies that maximise their chances of survival. To this end, the Commission will table a legislative proposal modernising the European Insolvency Regulation.

Secondly, a more substantial angle which would actually aim to create a (step-up to a) European insolvency law. As SIMA II put it:

> However, we need to go further. At present, there is in many Member States little tolerance for failure and current rules do not allow honest innovators to fail 'quickly and cheaply'. We need to set up the route towards measures and incentives for Member States to take away the stigma of failure associated with insolvency and to reduce overly long debt discharge periods. We also need to consider how the efficiency of national insolvency laws can be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market. To this end, the Commission will table a Communication together with the revision of the European Insolvency Regulation.

[24] COM(2012) 743.
[25] COM(2012) 573: Communication on the 'Single Market Act II—Together for New Growth.
[26] COM(2012) 744.
[27] See n 25 above.

The Commission effectively already threw in the towel on trying to convince Member States that some kind of harmonised insolvency laws (especially with a view to installing a 'right to fail') ought to be agreed: the second leg of the exercise, as the above extract indicates, eventually merely consisted of a Communication.

The Commission's own summary of its proposal to amend the insolvency Regulation read as follows:

> The elements of the proposed reform of the Insolvency Regulation can be summarised as follows:
>
> — Scope: The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition;
> Jurisdiction: The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction;
> — Secondary proceedings: the proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;
> Publicity of proceedings and lodging of claims: The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims;
> — Groups of companies: The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

At a practical level, of particular note are the provisions in the EIR 2015 dealing with the interconnection of insolvency registers (Article 25). The need for this has repeatedly been highlighted.[28] The Commission is to adopt the necessary implementing regulation to enable this interconnection, which will be operated inter alia via the EU's E-Justice portal. Data protection is one of the concerns that will need to be addressed in the roll-out of the register.

Finally, the EIR 2015 will apply to insolvency proceedings opened after 26 June 2017 (Articles 84 and 92). 'Opened' requires formal opening by a Member State's judicial authorities, within the meaning of Article 2(7) EIR 2015. It does not refer to the date of a request to open those proceedings.[29]

[28] For instance, in the circumstances of Case C-251/12 *van Buggenhout/van de Mierop ECLI*:EU:C:2013:566, and G van Calster, 'van Buggenhout/van de Mierop: ECJ Disagrees with its AG re Protection of Debtors', www.gavclaw.com, 20 September 2013, accessed 28 July 2015.

[29] Case C-1/04 *Susanne Staubitz-Schreiber* [2006] ECR I-701 (re Art 43 of the former EIR).

The former EIR has been repealed from 25 June 2015 (see Article 92 with respect to entry into force), though in accordance with Article 84(2) it will continue to apply to insolvency proceedings which have been opened before 26 June 2017 (and provided of course these proceedings are within the scope of the former, not the new, EIR).

Article 84(1), second sentence (which existed as Article 43, second sentence), solves the *conflit mobile*[30] which might arise as a result of the interim period between acts committed by a debtor (classic example: contracts entered into), and that debtor subsequently being the subject of an insolvency proceeding. If that proceeding is opened after 26 June 2017, the acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed. The EIR 2015 then covers all other procedural aspects of the insolvency. The rather quick succession of two insolvency regimes (2000 and 2014) means in practice that quite a few insolvencies which procedurally might be subject to the EIR 2015 involve 'acts committed by a debtor' stretching back to before the entry into force of the former EIR. Article 84's (and before it Article 43's) intention may be simple, namely to prevent retroactive application of the applicable conflict of law rules.[31] However, in practice the split between applicable law and applicable procedure in my view may[32] create more practical complications than it solves.

5.4 Scope of Application, Dovetailing with the Brussels I Recast and Overall Aim

5.4.1 The So-called 'Bankruptcy' Exception Under the Jurisdiction Regulation

Article 1(2)(b) of the Brussels I Recast provides that it does not apply to

> Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceeding

The first sentence of the sixth recital in the preamble to Regulation No 1346/2000 (the 6th recital of the 2015 Regulation contains a similar provision) clarifies that the Regulation should, in accordance with the principle of proportionality,

> be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

Consequently, the scope of application of the Insolvency Regulation, old and new should not be broadly interpreted (*German Graphics*).[33] Per *Gourdain*, in the context of the

[30] A *conflit mobile* in the narrow sense occurs when the factual matrix included in the connecting factor changes. A classic example would be a change in nationality (a relevant connecting factor in much of family law) or a change in contractual terms (eg parties amend the agreed place of delivery). In the context of the current Article I propose to apply it to a change in the conflict of laws rule.

[31] See M Virgos and F Garcimartin, *The European Insolvency Regulation: Law and Practice* (The Hague, Kluwer, 2004) 157–58, 31–32.

[32] Discussion in scholarship is vague to non-existent, and in case-law the issue would not seem to have featured abundantly.

[33] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, para 25.

Brussels I (and Recast), an action is related to bankruptcy only if it derives directly from the bankruptcy and is closely linked to proceedings for realising the assets or judicial supervision.[34] It is the closeness of the link, in the sense of the case-law resulting from *Gourdain*, between a court action and the insolvency proceedings that is decisive for the purposes of deciding whether the exclusion in Article 1(2)(b) of the Brussels I Recast Regulation applies.[35] The mere fact that the liquidator is a party to the proceedings is not sufficient to classify the proceedings as deriving directly from the insolvency and being closely linked to proceedings for realising assets (*Gourdain*).[36] Relevant case-law is aptly summarised by the UK Supreme Court in *Rubin v Eurofinance*.[37]

I review the 'bankruptcy exception' also in the relevant chapter on the Brussels I Recast Regulation. Recent case-law which tries to focus the analysis from the point of view of the Insolvency Regulation includes *Nickel & Goeldner*[38] (which also deals with Article 71's rule on the relation between Brussels I and the Convention for the International Carriage of Goods by Road (CMR)). In *Nickel & Goeldner*, the insolvency administrator of Kintra applied to the relevant Lithuanian courts for an order that Nickel & Goeldner Spedition, which had its registered office in Germany, pay its debt in respect of services comprising the international carriage of goods provided by Kintra for Nickel & Goeldner Spedition, inter alia in France and in Germany. According to the insolvency administrator of Kintra, the jurisdiction of the Lithuanian courts was based on Article 14(3) of the Lithuanian law on the insolvency of undertakings. Nickel & Goeldner Spedition disputed that jurisdiction, claiming that the dispute fell within the scope of Article 31 of the CMR and of the Brussels I Regulation.

[34] Case 133/78 *Henri Gourdain v Franz Nadler* [1979] ECR 733, para 4: case-law under the Brussels I Regulation is not irrelevant in this respect, as the Regulation, like the Brussels Convention, excludes 'bankruptcy' from its scope of application.

[35] For instance *not* an action seeking to ensure the reservation of a title clause over goods in possession of the debtor: the answer to that question of law is independent of the opening of insolvency proceedings. See *German Graphics* (note 33) para 31. The judgment also clarifies that Art 7 of the Regulation, on reservation of title (see further analysis below), only constitutes a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State of opening of insolvency proceedings: it is not concerned with the delineation between the Brussels I Recast and the Insolvency Regulation. By contrast, per *SCT Industri*, the exception does apply (and hence the Insolvency Regulation is applicable) to a judgment of a court of Member State A, regarding registration of ownership of shares in a company having its registered office in Member State A, according to which the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B. The action which gave rise to such a decision derives directly from insolvency proceedings and is closely linked to them. First, the link between the court action and the insolvency proceedings is particularly close since the dispute concerns solely the ownership of the shares which were transferred in insolvency proceedings by a liquidator on the basis of provisions, such as those enacted under the legislation of Member State B on insolvency proceedings, which derogate from the general rules of private law and, in particular, from property law. Thus, the transfer of the shares and the action for restitution of title to which it gave rise are the direct and indissociable consequence of the exercise by the liquidator—an individual who intervenes only after the insolvency proceedings have been opened—of a power which he derives specifically from the provisions of national law governing insolvency proceedings. Second, the content and the scope of the decision declaring the transfer to be invalid are intimately linked to the conduct of the insolvency proceedings since the ground on which the transfer was held invalid relates, specifically and exclusively, to the extent of the powers of that liquidator in insolvency proceedings: Case C-111/08 *SCT Industri v Alpenblume* [2009] ECR I-5655.

[36] Case 133/78 *Henri Gourdain* v *Franz Nadler* [1979] ECR 733.

[37] *Rubin v Eurofinance SA* [2012] UKSC 46.

[38] Case C-157/13 *Nickel & Goeldner Spedition GmbH* v *'Kintra' UAB* ECLI:EU:C:2014:2145.

The Courts instructed how its earlier case-law (*Gourdain, Seagon, German Graphics, F-Tex*) needs to be applied:

> It is apparent from that case-law that it is true that, in its assessment, the Court has taken into account the fact that the various types of actions which it heard were brought in connection with insolvency proceedings. However, it has mainly concerned itself with determining on each occasion whether the action at issue derived from insolvency law or from other rules.
>
> It follows that the decisive criterion adopted by the Court to identify the area within which an action falls is not the procedural context of which that action is part, but the legal basis thereof. According to that approach, it 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. (26–27)

The action at issue was an action for the payment of a debt arising out of the provision of services in implementation of a contract for carriage. That action could have been brought by the creditor itself before its divestment by the opening of insolvency proceedings relating to it and, in that situation, the action would have been governed by the rules concerning jurisdiction applicable in civil and commercial matters. The fact that, after the opening of insolvency proceedings against a service provider, the action for payment was taken by the insolvency administrator appointed in the course of those proceedings and that the latter acts in the interest of the creditors does not substantially amend the nature of the debt relied on which continues to be subject, in terms of the substance of the matter, to the rules of law which remain unchanged.

Hence, there was no direct link with the insolvency proceedings and the Brussels I Regulation continued to apply.

It is not the procedural context (in particular, whether the liquidator takes the action) but rather the legal basis of the action that determines the insolvency exception. This is a useful alternative formulation of the *Gourdain* et al case-law

In *Nortel*,[39] the CJEU confirmed *Nickel & Goeldner*, and also extended its findings in *Seagon* (see below) to secondary proceedings. Nortel Networks SA ('NNSA') was established in Yvelines (France). The Nortel group was a provider of technical solutions for telecommunications networks. Nortel Networks Limited ('NNL'), established in Mississauga (Canada), held the majority of the Nortel group's worldwide subsidiaries, including NNSA. In 2008 insolvency proceedings were initiated simultaneously in Canada, the US and the EU. In January 2009, the High Court opened main insolvency proceedings under English law in respect of all the companies in the Nortel group established in the EU, including NNSA.

Following a joint application lodged by NNSA and the joint administrators, by judgment of May 2009 the court at Versailles opened secondary proceedings in respect of NNSA. In July 2009, industrial action at NNSA was brought to an end by a memorandum of agreement settling the action. It provided for the making of a severance payment, of which one

[39] Case C-649/13, *Comité d'entreprise de Nortel Networks SA and others v Cosme Rogeau et al* ECLI:EU:C:2015:384, On the application of Art 71, the Court held that, in a situation where a dispute falls within the scope of both the Regulation and the CMR, a Member State may, in accordance with Art 71(1) of the Regulation, apply the rules concerning jurisdiction laid down in Art 31(1) CMR.

part was payable immediately and another part, known as the 'deferred severance payment', was to be paid, once operations had ceased, out of the available funds arising from the sale of assets. That memorandum was approved by the court at Versailles. NNSA's positive balance was, however, subsequently caught up in the global settlement for Nortel, including transfers of funds to escrow accounts in the US, to be distributed following global settlement, and new debt following the continuation of Nortel's activities as well as costs related to the global winding-up of the company. The deferred severance payment therefore could no longer be paid.

The works council of NNSA and former NNSA employees brought an action before the court at Versailles seeking, first, a declaration that the secondary proceedings gave them an exclusive and direct right over the share of the overall proceeds from the sale of the Nortel group's assets that falls to NNSA and, second, an order requiring the liquidator to make immediate disbursement, in particular, of the deferred severance payment, to the extent of the funds available to NNSA. The French liquidator then summoned the joint administrators as third parties before the referring court. However, these then suggested the court at Versailles decline international jurisdiction, in favour of the High Court at London, and in the alternative, to decline jurisdiction to rule on the assets and rights which were not situated in France for the purposes of Article 2(g) of the Insolvency Regulation when the judgment opening the secondary proceedings was delivered. That Article reads:

> (g) 'the Member State in which assets are situated' shall mean, in the case of:
> — tangible property, the Member State within the territory of which the property is situated,
> — property and rights ownership of or entitlement to which must be entered in a public register, the Member State under the authority of which the register is kept,
> — claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);

There are essentially two parts to the referring court's questions: (i) the allocation of international jurisdiction between the court hearing the main proceedings and the court hearing the secondary proceedings; and (ii) identification of the law applicable to determine the debtor's assets that fall within the scope of the effects of the secondary proceedings.

On the first question, the Court first reviewed whether the Insolvency Regulation applied at all—an issue seemingly that did not feature in the national proceedings or in the written procedure before the CJEU, but which came up at the hearing. The issue being that what the Works Council was after was that an agreement to pay a debt be honoured: one that looks just like a fairly standard agreement were it not to arise out of insolvency. Per *Nickel & Goeldner* the Court reviewed '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'. Here, the basis of the action, as was pointed out by Mengozzi AG, was relevant French insolvency law (for the determination of the order of creditors' rights) and the Insolvency Regulation (for the determination of the hierarchy between main and secondary insolvency proceedings). The Insolvency Regulation therefore applies. The AG's review in fact was clearer than the Court's summary. More generally, the CJEU does seem to go out of its way to re-emphasise the *Nickel & Goeldner* formula, even if the separation of the Brussels I and the Insolvency Regulation was not particularly controversial in the case at issue.

5.4.2 The Definition of Insolvency Proceedings

Regulation 1346/2000:

> Article 1
>
> **Scope**
>
> 1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
> 2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.
>
> Article 2
>
> **Definitions**
>
> For the purposes of this Regulation:
>
> (a) 'insolvency proceedings' shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;
> (b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C;
> (c) 'winding-up proceedings' shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B;

Core to Article 1(1) of the former EIR as noted was the following provision:

> This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

It then defined most of these concepts in turn in Article 2. The combined application of these Articles with the associated Annexes meant that the Member States furnished the scope of application of the Regulation by virtue of their including, or not, relevant procedures in an Annex. It was not sufficient that national proceedings met the conditions of Article 1 in a generic way for them to be included in the scope of application of the Regulation. The Virgos–Schmit Report was clear on this point.[40] In *Bank Handlowy*,[41] the CJEU moreover confirmed that when a procedure is included in the Annex, upon proposal by the Member State, the EU or indeed the courts in other Member States are not to second-guess whether these are 'true' insolvency proceedings. 'Insolvency' may be a substantial condition for the Regulation to apply, but it is not defined by it and continues to be left undefined.

Under the former EIR, Member States in practice could reorganise, etc, outside the pure insolvency context subject to the EIR by virtue of including the relevant procedure in an Annex. The EIR 2015 formalises the wider approach, in line with the Commissions's objectives as highlighted above (namely to no longer limit the scope to liquidation proceedings).

[40] Virgos–Schmit Report, para 48, 32.

[41] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp z oo*, ECLI:EU:C:2012:739.

The core definition of insolvency proceeding, previously spread over Articles 1 and 2, has now been somewhat better integrated, though is still spread over Articles 1 and 2. It now reads:

> 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 debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
> — the assets and affairs of a debtor are subject to control or supervision by a court; or
> — 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).
>
> 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.

Some, but certainly not all, Member States have included a variety of restructuring mechanisms in their relevant Annexes. Recital 9 (of the 2015 EIR) is very clear as to the fate of procedures included or excluded from the Annexes:

> This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation.

The EIR 2015 emphasises its wider calling (not just liquidation but also reorganisation) by dropping the term 'liquidator' in favour of 'insolvency practitioner'.

'Insolvency' as noted continues to be undefined by the Regulation. Article 1(1) clarifies that the Regulation at any rate only applies to

> *collective* proceedings, which are
> based on *insolvency*,
> — which entail the *partial or total divestment* of a debtor, and
> the appointment of a '*liquidator*', now called an 'insolvency practitioner', further defined in Article 2(5) (new).

The combined application of these Articles with the associated Annexes means that the Member States furnish the scope of application of the Regulation by virtue of their including, or not, relevant procedures in Annex.[42] There is a simplified amendment of the Annexes, in particular, allowing the Member States to propose an amendment, rather than leaving

[42] The 1990 Council of Europe's 'Istanbul Convention', the European Convention on Certain International Aspects of Bankruptcy, employs the same method and to that effect inspired the Regulation.

the initiative with the EC, and granting the Council the right subsequently to amend the Annexes without having to go via Parliament.

Needless to say, a number of what might seem to be insolvency proceedings existing in the Member States, have not been included in the Annexes, hence the Regulation does not apply to them. This evidently may influence the choice of procedure by creditors in insolvency-relevant national procedures. Where the business involved has cross-border dimensions, the recognition and enforcement leg of the Regulation in particular may well push the creditor into choosing a procedure which is covered by the Regulation.

National insolvency proceedings which meet the requirements of Article 1(1) however which have not been included by the Member State concerned in Annex A, are not covered by the Regulation.[43] It is not sufficient that national proceedings meet the conditions of Article 1 in a generic way (Virgos–Schmit Report).[44] Arguably, proceedings which have been included in that Annex but which do not meet with those same conditions are not covered by the Regulation either: otherwise the conditions of said Article would be nugatory.

Ad nauseam, the Annex is the trigger and it is the Member States that pull it. In my view that renders nugatory many of the discussions which one could conceivably have vis-à-vis the terminology of the EIR. For instance, in the absence of European harmonisation of substantive insolvency law, what laws are '*laws relating to insolvency*' must be left to the Member States. Any autonomous interpretation of the concept by the CJEU would, in my view, run counter to the clear deference to national law expressed in the Annex system.

One of the elephants in the room are the English Schemes of Arrangement. These have gained considerable popularity for use by companies not registered in the UK, the most obvious attraction being the possibility to 'cram down' under the relevant English law (Part 26 of the Companies Act 2006 (England and Wales)). A Scheme of Arrangement allows a (qualified) majority of creditors to accept restructuring of the company's debt in spite of opposition by a minority, *and* to have that restructuring have binding effect on those unwilling creditors. Relevant case-law[45] leaves the Schemes firmly outside of the EIR and within the scope of application of the Brussels I Regulation.[46] That Regulation facilitates jurisdiction of the English courts, in contrast with the EIR where jurisdiction is based on objective elements. Schemes of Arrangement have had an important impact on the attraction of London as a basis for restructuring practice, arguably also leading continental European States to amend their insolvency laws in relevant part. The Annex approach of the Regulation would, in my view, have sufficed to emphasise the exclusion of Schemes of Arrangement from the EIR. So as to leave no doubt, however, the UK succeeded in having a specific recital (recital 16 of the 2015 EIR) inserted to emphasise the point:

> This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.

[43] Moss G et al (n 4) 42.

[44] Virgos–Schmit Report, para 48, 32.

[45] See in particular *Apcoa* [2014] EWHC 3849 and *Van Gansewinkel* [2015] EWHC 2151.

[46] Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1, and the Recast regulation 1215/2012, [2012] OJ L351/1. Reviewed in the relevant chapter.

By virtue of Article 1(2), the Regulation does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. The regulatory environment for these undertakings was considered too specific, and, to some extent, the national supervisory (prudential) authorities have extremely wide-ranging powers of intervention.[47] In the meantime, the EU has put in place tailored insolvency regimes for some[48] of these categories,[49] urged on by the drafters of the Convention (the then 15 Member States). For while they recognised the need for a specific regime for these specific undertakings, they did not want the exclusion to gain a more than temporary character.

5.4.3 Four Cumulative Conditions

The Regulation only applies to *collective* proceedings, which are based on *insolvency*, which entail the *partial or total divestment* of a debtor, and the appointment of a '*liquidator*' (now called 'insolvency practitioner').

The debtor need not have a particular status: the Regulation applies equally to all proceedings, whether these involve a natural person or a legal person, a trader or an individual.[50]

The Regulation is not limited to winding-up proceedings (which used to have their own definition in Article 2(c) (old)),[51] contrary to earlier mooted versions of the Convention. This would have included a fifth condition, that the proceedings may lead to the realisation of the debtor's assets. Such limitation would have had the advantage of simplifying the resulting rules, as the spread of national proceedings involved would have been a lot thinner.[52] However it would also have ruled out application of the Regulation to a considerable amount of 'reorganisation'[53] procedures in the Member States, now more generally referred to as 'restructuring'. A compromise was found in the 2000 text to extend the system of the Regulation to insolvency proceedings, the main aim of which was not winding-up but reorganisation. However as part of the compromise, negotiated under the draft Convention, local proceedings opened after the main proceedings could only be winding-up proceedings (see further below). The often unfortunate consequence of this compromise was that when main proceedings have been initiated with a view to restructuring a company with assets in a variety of Member States, the step or threat by some of the creditors of opening up (a) secondary proceeding(s) in another Member State(s)—which, as just noted, have to be winding-up proceedings—may derail the very chances of success of the restructuring.[54] As I further explain below, this substantial difference between 'secondary' and 'territorial' proceedings has now been removed from the Regulation.

[47] Recital 9 of the Regulation (old and new).

[48] However, not for collective investment undertakings, which leaves a considerable gap.

[49] For insurance undertakings: Directive 2001/17, [2001] OJ L110/28; for 'credit institutions': Directive 2001/24, [2001] OJ L125/15.

[50] Virgos–Schmit Report, para 53, 39, and recital 9 of the Regulation (old and new).

[51] Art 2(c) (old), '"winding-up proceedings" shall mean insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B.'

[52] Virgos–Schmit Report, para 51, 35.

[53] Ibid, 36.

[54] See also Moss et al (n 4) 51.

The formal definition of 'insolvency proceedings' has been amended, but in substance does not differ from the previous version. I will therefore continue to use the four main tenets of the concept, as employed in the 2000 version.

5.4.3.1 Collective Proceedings

Individual action by one creditor only is precluded from cover by the Regulation (Virgos–Schmit Report)[55] lest arguably circumstances are such that there is only one individual creditor, who consequently equals collectivity (in which case at any rate one of the collective proceedings included in Annex A has to be followed).

5.4.3.2 Based on the Debtor's Insolvency

Procedures based on any other ground are not covered by the Regulation. 'Insolvency' is not defined by the Regulation.

> 'The [Regulation] is based on the idea of financial crisis, but does not provide its own definition of insolvency. It takes this from the national law of the country in which proceedings are opened. There is no test of insolvency other than that demanded by the national legislation of the State in which proceedings are opened. Thus, if a national law is based on the occurrence of an act of bankruptcy listed in the bankruptcy law or on the evidence that the debtor has ceased to pay his debts, it is sufficient for one of these facts to be established in order that insolvency proceedings be opened and the [Regulation] applied.' (Virgos–Schmit Report)[56]

5.4.3.3 Which Entail the Partial or Total Divestment of a Debtor

The requirement of 'divestment' (French: *dessaisissement*; German: *Vermögensbeschlag*), means that the debtor must lose control, partially or totally, of his estate and business:

> that is to say the transfer to another person, the liquidator, of the powers of administration and of disposal over all or part of his assets, or the limitation of these powers through the intervention and control of his actions (Virgos–Schmit Report).[57]

5.4.3.4 Which Entail the Appointment of a 'Liquidator', Now Called an 'Insolvency Practitioner'

This requirement is directly linked to the previous condition: it is the insolvency practitioner who gains control over administration and disposal of the debtor's assets. 'Practitioner' is defined in (now) Article 2(5) which again employs the Annex approach joined to an abstract definition in the Article itself. Specific legal positions in the Member States are qualified (or not) as 'liquidator' per Annex B (in the previous Regulation, Annex B contained the list of winding-up proceedings, but this is no longer a qualification that is relevant for the purposes of the Regulation). The definition of Article 2(5) re-emphasises

[55] Virgos–Schmit Report, para 49, 32.
[56] Ibid, 32–33.
[57] Ibid, 34.

the aforementioned condition of divestment. The liquidator has to be in control of at least part of the debtor's affairs. Courts may be themselves be 'liquidator' in the sense of Article 2(5), however this needs to be indicated in so many words in (now) Annex B.

5.4.4 Opening by a 'Court' or Judicial Authority?

For insolvency proceedings to be within the scope of the Regulation, they need not be opened by a judicial authority (a great many, though not all, of the procedures included in Annex A are of this variety). This was done

- mostly[58] for the same reason as the inclusion of proceedings which may not lead to a winding-up of the debtor (see above). Ordinary non-judicial collective proceedings in particular in the UK and Ireland (especially creditor's voluntary winding-up) represent an important percentage of all corporate insolvency cases. Excluding them would have excluded a sizeable portion of insolvency practice particularly in those countries.
- Further, these proceedings are not of the 'cloak and dagger' variety. They offer sufficient guarantees (including access to the courts, for the legality of the proceedings to be supervised and for any questions which may arise to be settled) in order that they be brought under the Regulation.[59]
- Finally, one of the crucial aims of the Regulation is to safeguard the position of creditors in other Member States, for which it has enough mechanisms to defend the positions of the creditors (the possibility of secondary proceedings, public order exceptions, safeguard of acquired rights, etc.) to enable these proceedings to benefit from the Regulation system.

As I also review below, the fact that insolvency proceedings not opened by a judicial authority, are covered by the Regulation to the degree they are included in Annex A and meet with the conditions of Articles 1 and 2, does not mean that they receive all the benefits of the Regulation. In particular, decisions adopted in the course of these proceedings do not enjoy automatic recognition and enforcement (Virgos–Schmit Report).[60] They do, however, benefit from two core consequences of inclusion in the Regulation (Virgos–Schmit Report):[61]

---

1. these proceedings have to be recognized as collective insolvency proceedings pursuant to Article 1. Once proceedings have been opened in a [Member] State in accordance with Article 3, the creditors must seek payment of their debts through these collective proceedings, even if they are not conducted by the courts. Any question relating to the conduct of the proceedings or the decisions taken in the course of those proceedings, should be referred to the courts of that State;
2. the appointment of the liquidator and the powers conferred on him by the law of the State where proceedings were opened must be recognized in other [Member] States. However if the liquidator wishes to exercise his powers in another [Member] State, it is necessary for the [Member] States having proceedings of this

[58] Ibid, para 52, 37.

[59] In particular, the automatic recognition of the judgment under the Regulation requires one to be sure that the proceedings included in it are sound from the point of view of the rule of law.

[60] Virgos–Schmit Report, para 52, 37.

[61] Ibid, 38.

type (the United Kingdom and Ireland) to introduce into their national legislation a system of confirmation by the courts of the nature of the proceedings and the appointment of the liquidator. This condition is shown in the list in Annex A which contains the proceedings designated by each country. In both cases these are termed proceedings "with confirmation of or by a court".

5.4.5 Relation with the Judgments Regulation (Brussels I Recast): Dovetail or Not?

Recital 7 of the 2015 EIR addresses the relation between the Brussels I Recast Regulation 1215/2012[62] and the Insolvency Regulation.

> Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012 of the European Parliament and of the Council. Those proceedings should be covered by this Regulation. 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.

Insolvency, as noted above, was excluded from the Brussels I Regulation (and from the 1968 Brussels Convention[63] before it) because it was envisaged to be included in what eventually became the Insolvency Regulation. Consequently the scope of application of the Brussels I (and Recast) Regulation and the Insolvency Regulation evidently is determined by each other's existence.

However, whether they clearly 'dovetail' (ie slot into one another leaving no spare space; rather like the joint from which the expression takes its name) when it comes to their respective scope of application, is less clear.[64]

Nickel & Goeldner at paragraph 21[65] and *Nortel Networks* at paragraph 26[66] are often quoted in support of the dovetail. However, Recital 7 of the 2015 EIR usefully reminds us not to treat *exclusion* of Annex A EIR as automatically leading to *inclusion* in Brussels I Recast. I do not in fact think the Jenard Report[67] suggests that the Brussels Convention

[62] [2012] OJ L351/1.

[63] See n 6 above.

[64] At any rate any dovetailing does not extend to matters of choice of law. That is because neither Lugano nor the Judgments Regulation consider choice of law: they are limited to jurisdiction. See Snowden J in *Van Gansewinkel* (n 45).

[65] Case C-157/13 *Nickel & Goeldner Spedition GmbH v Kintra UAB* ECLI:EU:C:2014:2145, para 21: 'In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the [Brussels Convention], which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in F-Tex, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).'

[66] Case C-649/13 *Comité d'entreprise de Nortel Networks SA and others v Cosme Rogeau et al* ECLI:EU:C:2015:384, 26, quoting quasi verbatim from *Nickel & Goeldner*, ibid.

[67] Report by P Jenard on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, [1979] OJ C59/1 (the Jenard Report).

intended a pure parallel.[68] That Report merely mentions the (never completed) Insolvency Convention being prepared and the need to pace the inclusion of bankruptcy, etc, in European private international law. Rather it is the Schlosser Report which first in so many words suggests the need for dovetailing:[69]

> leaving aside special bankruptcy rules for very special types of business undertakings, the two Conventions were intended to dovetail almost completely with each other. Consequently, the preliminary draft Convention on bankruptcy, which was first drawn up in 1970, submitted in an amended form in 1975, deliberately adopted the principal terms 'bankruptcy compositions' and 'analogous proceedings in the provisions concerning its scope in the same way as they were used in the 1968 Convention. To avoid, as far as possible leaving lacunae between the scope of the two Conventions efforts are being made in the discussions on the proposed Convention on bankruptcy to enumerate in detail all the principal and secondary proceedings involved and so to eliminate any problems of interpretation. As long as the proposed Convention on bankruptcy has not yet come into force, the application of Article 1, second paragraph, point (2) of the 1968 Convention remains difficult. The problems, including the matters arising from the accession of the new Member States, are of two kinds. First, it necessary to define what proceedings are meant by bankruptcy, compositions or analogous proceedings as well as their constituent parts. Secondly, the legal position in the United Kingdom poses a special problem as the bankruptcy of 'incorporated companies' is not a recognized concept in that country.(footnotes omitted)

In *German Graphics*, however, the CJEU itself noted that 'it is conceivable that, among those judgments, there are some judgments which will come within the scope of application neither of Regulation No 1346/2000 nor of Regulation No 44/2001.[70]

Whatever the intention of the Brussels Convention, the way in which the EIR (old and new) has defined its scope of application has arguably upset any dovetailing that might have been intended. The eventual text of the former and 2015 EIR, and additionally the relevance of inclusion in the Annex, clearly show that the absolute parallel cannot be maintained in practice. Starting with the definition, the Jenard Report employs a definition that certainly does not entirely overlap with the definition in either former or new EIR:

> Article 1 (2) excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons judicial arrangements compositions and analogous proceedings, ie those proceedings which depending on the system of law involved, are based on the suspension of payments, the Insolvency of the debtor or his inability to raise credit, and which involve the judicial authorities for the purpose either compulsory and collective liquidation of the assets or simply of supervision.[71]

Further and as noted, neither the Jenard Report, the Schlosser Report nor the Brussels Convention itself would have envisaged the Member States being in the definitional driver's seat, as a result of the Annex approach as reviewed above.

[68] As suggested by A Layton, and H Mercer (general eds), with H Mercer, L Wyles, C Dougherty and P de Verneuil Smith (assist eds), and S O'Malley (consultant ed), *European Civil Practice*, 2nd edn, vol 1 (London, Sweet & Maxwell, 2004) 356–57, referring to the Jenard Report.

[69] Report by P Schlosser on the convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom to the convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the court of Justice, [1979] OJ C59(71) 90.

[70] Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* [2009] ECR I-8421, 17.

[71] Jenard Report, 11 *in fine* 12.

Core Aim of the Regulation

on the list of aims of the Regulation, is the avoidance of forum shopping: 'It is neces-
or the proper functioning of the internal market to avoid incentives for the parties to
ier assets or judicial proceedings from one Member State to another, seeking to obtain
re favourable legal position (forum shopping)' (recital 4; now recital 5).
radoxically, akin to the impact of the Owusu ruling on the popularity of forum non
niens in Member States outside of the UK, one of the results of the insolvency Reg-
n may well have been precisely to kindle interest in forum shopping in insolvency
edings—and rightly so. The Regulation all too readily dismisses forum shopping as
arranted in all its forms.[72] Forum shopping, especially in UK courts, is alive and well
ide the scope of the Insolvency Regulation.[73]
n interesting thought is whether, given the Regulation's aversion to forum shopping,
m non conveniens ought to be acceptable. In *Buccament Bay*,[74] Strauss QC (DJ) dealt
h the preliminary jurisdictional issue of whether the court should exercise its jurisdiction

See generally W-G Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 *European Business* ization Law Review 579–620.

See eg application in *JSC Bank of Moscow & Aor v Kekhman: Vladimir Abramovich Kekhman* [2015] EWHC Ch). The High Court refused to reverse an earlier decision establishing jurisdiction for personal bankruptcy. COMI was not in the EU and the Insolvency Regulation therefore did not apply. Jurisdiction was upheld even gh the applicant had only been personally been in the UK for one or two days. The applicant argued pro iction mainly on the basis of (a) the absence of a personal bankruptcy regime in the Russian Federation; the availability of assets in the jurisdiction (£200,000 which was to be made available to the official receiver); connection to the jurisdiction in the form of contractual English law/jurisdiction provisions; (c) the opinion Russian lawyer that the courts of the Russian Federation would recognise the bankruptcy; (d) the fact that English bankruptcy would allow for the investigation of Mr Kekhman's affairs and an orderly realisation of Kekhman's assets for the benefit of his creditors as opposed to realisation on a first come, first served basis; the promise that Mr Kekhman would cooperate with the official receiver and any trustee appointed; and (f) the pect of Mr Kekhman's financial rehabilitation.

rsonal presence has long been withheld as sufficient ground for jurisdiction in England. Section 265 Insol-y Act 1986 now provides 'Conditions to be satisfied in respect of debtor. (1) A bankruptcy petition shall not resented to the court … unless the debtor (a) is domiciled in England and Wales, (b) is personally present in and and Wales on the day on which the petition is presented, or (c) at any time in the period of 3 years ending that day (i) has been ordinarily resident, or has had a place of residence, in England and Wales; or (ii) has ed on business in England and Wales.'

Once jurisdiction has so been established, the Court has discretion to confirm or refuse jurisdiction in the case sue, on the basis of relevant authority in case-law (and further instruction in the Act).

Haister CR reviewed precedent at length (including recent case-law on schemes of arrangement in the English rts) and held pro jurisdiction. Where his arguments are mostly likely to catch attention is his review of forum opping, good and bad: 'The authorities, and in particular the corporate ones, demonstrate that the courts here are prepared to countenance what is in reality forum shopping, albeit of a positive, by which I mean a legitimate, kind' (104). 'There is no suggestion in this case that the bankruptcy order was sought for an improper purpose … beyond, the Applicants would say, Mr Kekhman's seeking to avoid the harsh consequences of Russian law (much as it might be said the companies in the two scheme cases [ie schemes of arrangement] mentioned above sought to avoid the potential consequences for them of the lack of a scheme jurisdiction in their respective countries)' (110). ather, it seems to me that Mr Kekhman has come to this jurisdiction to fill a lacuna in the laws of the country re he is domiciled and resides. Many of the cases we have looked at, though primarily, I accept, in the corporate alm, indicate that the courts here have often been content to assist in such circumstances' (111).

Russian assets can still be gone after by the banks in Russia, using Russian law. English will be credited to them the English courts using English law.

This case is a refreshing defence of forum shopping which in my view unfairly has been utterly blacklisted in e Insolvency Regulation.

[74] *Buccament Bay Ltd v Harlequin Property (SVG)* Ltd [2014] EWHC 3130 (Ch).

to hear winding-up petitions, based on largely undisputed debts, when neither of the companies concerned is incorporated in England (they are incorporated in Saint Vincent and the Grenadines (SVG)).

The judgment does not start with what logically it ought to have done, namely determining the COMI per the EU's Insolvency Regulation. Instead, Strauss DJ first considered the application of section 221(1) the UK Insolvency Act 1986, which inter alia gives the court jurisdiction to wind-up foreign companies as 'unregistered' companies, provided, subject to relevant case-law, that there is sufficient connection with England. He decided there was not (in particular because the condition, required under relevant precedent, that the petitioners derive benefit from the winding up was not satisfied here). It is only after having rejected application of Article 221(1) that the court summarily returned to the COMI under the Insolvency Regulation. Arguments pro and contra led, justifiably I believe, to a finding of the COMI being outside the EU.

This is then where the High Court came to the most interesting part of the judgment, even if it was obiter (25). Namely that even had the COMI been in the UK, the English court could still exercise constraints/room for manoeuvre, applying section 221(1), including recourse to *forum non conveniens*. In the words of Strauss DJ,

> the only effect of Article 3(1) [of the Insolvency Regulation] is to give the court jurisdiction, which it has anyhow under English domestic law, to open insolvency proceedings. Where a company's COMI is in this country, it is highly likely that, by definition, the court will be satisfied that there is a substantial connection with this country, but otherwise the discretionary factors will be the same. In this case, even if I had been satisfied that the respondents' COMI was here, it would still have made no sense to make winding up orders in a case which is obviously much more suitable for the SVG courts.

Respectfully, I disagree. Article 3(1) simply supersedes Section 221(1) in cases where the COMI is in the UK. It generally supersedes national jurisdictional rules, again, provided the COMI is in the EU. As Article 221(1) is a jurisdictional rule and not one of substantive UK insolvency law (which applies as lex concursus), it cannot be called upon had the COMI been in England.

That leaves the overall question of whether the Insolvency Regulation accommodates *forum non conveniens* (it certainly does not have a formal rule on it, in contrast to the Brussels I recast). Although there is no CJEU case-law on this, it is quite likely that neither Regulation nor most definitely the CJEU have sympathy for *forum non conveniens*.

A similarly interesting prospect is the use of anti-suit injunctions in the context of the Insolvency Regulation. Reflection on this issue was made in *Kemsley*.[75] At least until late 2008, Mr Kemsley was a very wealthy individual. On 25 June 2008, Barclays granted him a personal loan of £5 million on an unsecured basis. The loan was repayable after a year but the loan period was subsequently extended. In 2009, Mr Kemsley's business in England collapsed when his group of companies went into administration. Mr Kemsley was unable to keep up repayment to Barclays of instalments under the extended loan, and failed to stick to a repayment schedule for debts with another company. Mr Kemsley is a British citizen and had lived until 2009 in England. Following the collapse of his business here, he moved in June 2009 with his wife and family to Florida. They moved to New York City in

[75] *Paul Zeital Kemsley v Barclays Bank Plc et al* [2013] EWHC 1274 (Ch).

about May 2010 but subsequently Mr and Mrs Kemsley became estranged and Mrs Kemsley moved back with their children to England in about June 2012. Mr Kemsley remained in the United States.

On 13 January 2012, Mr Kemsley presented his bankruptcy petition to the High Court. His petition was based on his physical presence in England on the date of presentation, within the terms of the Insolvency Act 1986, and on his having had a place of residence in England within three years of presentation. On 26 March 2012, he was declared bankrupt on the basis of the EU's Insolvency Regulation. On 1 March 2012, shortly before Mr Kemsley became bankrupt, Barclays commenced proceedings against him under the loan agreement in the Supreme Court of the State of New York. On 21 August 2012, he applied in the US Bankruptcy Court for the Southern District of New York under Chapter 15 of the US Bankruptcy Code for recognition of the English bankruptcy as a foreign main proceeding.

In the English case, Mr Kemsley sought to restrain Barclays from pursuing proceedings in the United States: an anti-suit injunction. The anti-suit injunction was dismissed.[76] The High Court sided in favour of a restrictive approach to anti-suit injunctions in the case of bankruptcy, per precedent. It found that the US court was best placed to decide on the COMI in the US. The US bankruptcy court refused to recognise Mr Kemsley's UK bankruptcy as a foreign main or non-main proceeding under Chapter 15.[77] The court held that Mr Kemsley's COMI needed to be adjudged as at the time of his English bankruptcy filing, not the time of the Chapter 15 filing. Rejecting Mr Kemsley's statement at the time of his UK bankruptcy filing, the court found that his COMI was in the US at that time, focusing on Mr Kemsley's habitual place of residence and that of his family.

It is surprising that the High Court even considered an anti-suit injunction, given the EU's aversion to these in the area of conflict of laws, post *Gasser* and *Turner*. However, the High Court evidently must have considered the English court's duties under and loyalties to the Insolvency Regulation fully met with the previous finding of insolvency. The subsequent proceedings arguably on that basis fall outside that remit. Moreover, the aversion to anti-suit injunctions arguably only holds vis-à-vis fellow EU courts.

As will be highlighted in the analysis below, the insolvency Regulation does *not* harmonise insolvency law. There are substantial differences in the general approach to insolvency proceedings: what level of protection is given to 'weaker' creditors, such as employees; whether and how there is State intervention in the proceedings; whether courts play a central role or leave creditors (or certain categories of creditors) in the driving seat; etc. These are not at all addressed by the Regulation.

5.5 The International Impact of the Regulation

The Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Union,[78] even if the debtor's registered office or place of incorporation or

[76] Ibid.
[77] USBC New York, Case No 12-13570, in *re: Paul Zeital Kemsley*.
[78] Recital 14 (old; now 25) of the Regulation; Virgos–Schmit Report, para 11, 12.

any other concept used by other States to determine corporate 'domicile', is located outside of the EU.[79]

The Regulation does not however regulate the effect of the proceedings vis-à-vis third States. In relation to third States, the Regulation does not impair the freedom of the Member States to adopt the appropriate rules (Virgos–Schmit Report):[80] conflict rules for impact on third States are determined by the private international law of each Member State. They are free to choose whether to copy the Regulation's model for the residual jurisdictional and applicable law rules. Consequently in insolvency proceedings, much more so than under the rules of the Jurisdiction Regulation for standard civil and commercial issues, there is a much wider scope for interaction between conflicting EU and national rules.

When the centre of the debtor's main interests is outside the EU, the Regulation does not apply. In such a case, it is up to the private international law of Member States to decide whether insolvency proceedings may be opened against the debtor and on the rules and conditions to be applied. This holds true regardless of whether the debtor has assets or creditors in other Member States and whether the question of the effects of such proceedings in other Member States is raised (Virgos–Schmit Report).[81]

5.6 The Jurisdictional Model: Universal Jurisdiction Based on COMI, Alongside Limited Territorial Procedures

Draft Convention and Regulation came to the same conclusion: universal jurisdiction and the coinciding lex concursus as the law of the State of opening of the proceedings, may well be tempting from an organisation point of view, however neither practically achievable nor always warranted. Recital 11 (old; now 22) notes in this respect:

> This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (eg rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.

[79] See eg *Brac rent-a-car international Inc* [2003] EWHC 128 (Ch), in which there had been a petition for an administration order against the company, which had been incorporated in Delaware but had conducted all its operations in the UK. A creditor had been awarded an arbitration award in Italy and had had this award registered as a judgment in the UK. This creditor opposed the opening of insolvency proceedings in the UK.

[80] Virgos–Schmit Report, para 11, 12.

[81] Ibid, para 44, 29.

The result is a combined model of the existing principles of regulation of international bankruptcies (universality or territoriality of effects and unity or plurality of proceedings), a combined model which permits local proceedings to coexist with the main universal proceedings. Insolvency proceedings may be opened in the Member State where the debtor has the 'centre of his main interests'. Insolvency proceedings opened in that State will be main proceedings of universal character:

— 'main', because if local proceedings are opened, they will be subject to mandatory rules of coordination and subordination to it, and
— 'universal', because, unless local proceedings are opened, all assets of the debtor will be encompassed therein, wherever located.

Single main proceedings are always possible within the Union. However the Regulation does not exclude the opening of local proceedings, controlled and governed by the national law concerned, to protect those local interests. Local proceedings have only territorial scope, limited to the assets located in the State concerned. To open such local proceedings it is necessary that the debtor possess an establishment in the territory of the State of the opening of proceedings. In relation to the main proceedings, local insolvency proceedings can only be 'secondary proceedings', since the latter are to be coordinated with and subordinated to the main proceedings (Virgos–Schmit Report).[82]

5.6.1 Main Insolvency Proceeding: Centre of Main Interest (COMI)

5.6.1.1 'COMI' as (Un)Defined by the Regulation

COMI was not defined in the 2000 version of the Regulation. As the core connecting factor of the Regulation, this was of course unfortunate, but perhaps not all that surprising. It gave the courts and tribunals flexibility in tackling scenarios which arise in practice and which any form of abstract definition or criteria simply cannot catch. There was, however, one important clarification in the Recitals of the Regulation, which identified the angle from which COMI needs to be approached. Recital 13 (old) read:[83]

> The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

Recital 13 has now been integrated in the Regulation proper.

COMI is therefore linked to foreseeability by the (potential) creditors, all the more so because of the principal *Gleichlauf* between forum and applicable law. Those doing business with the undertaking or private individual or thus in a position to calculate the legal risks in the event of an insolvency. The Virgos–Schmit Report adds the following clarifications:[84]

— By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (eg consumers).

[82] Ibid, paras 13 ff, 13–14.
[83] In a direct copy from ibid, para 75.
[84] Ibid, 51 ff.

— The expression 'main' serves as a criterion for the cases where these interests include activities of different types which are run from different centres.
— In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. Where companies and legal persons are concerned, the Regulation in Article 3(1) presumes, unless proved to the contrary, that the debtor's centre of main interests is the 'place of the registered office'. The Virgos–Schmit Report adds that this place normally corresponds to the debtor's 'head office', however this is a concept which in itself is open to a great many interpretations. In practice, national courts have been quite happy to set aside the presumption (as Article 3(1) specifically allows them to), given the presumption arguably a lot less weight than perhaps had been assumed by the drafters of the Regulation.[85] The CJEU itself had singled out mailbox companies as not being in a position simply to claim the protection of the State in which they are incorporated (*Eurofood*):

> 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. That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.[86]

A finding of COMI by the courts of one Member State must not be second-guessed by the (courts of) other Member States (*Bank Handlowy*,[87] *Burgo Group*).[88] Even if the courts of one Member State erred in accepting primary jurisdiction, the courts in other Member States have to stick by that judgment. Any challenge to it must be brought in the national courts of the Member States were main proceedings were opened.

The Regulation nevertheless of course has inserted the possibility of secondary proceedings precisely to protect local interests in other Member States. Correction of COMI was not as such thought of when the architecture of secondary proceedings was conceived, in practice such proceedings do serve to offset some of the consequences of an (allegedly) incorrect assessment of the COMI.

5.6.1.2 European and National Case-Law on COMI

5.6.1.2.1 Need for Autonomous Interpretation

> It follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question

[85] P Wautelet, 'Some Considerations on the Center of Main Interests as Jurisdictional Test under the European Insolvency Regulation' in G Affaki (ed), *Cross-Border Insolvency and Conflicts of Jurisdictions: A US–EU Experience* (Brussels, Bruylant, 2007) 73, 86 ff.

[86] Case C-341/04 *Eurofood IFSC Ltd* [2006] ECR I-3813, paras 34–35.

[87] Case C-116/11 *Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp z oo*, ECLI:EU:C:2012:739.

[88] Case C-327/13 *Burgo Group SpA v Illochroma SA and Jérôme Theetten* ECLI:EU:C:2014:2158.

This is a bit of a mouthful but is established case-law of the European Court of Justice and gains extra gloss within the context of the application by the Court of European private international law. As highlighted repeatedly throughout this volume, the Court insist on the need for predictability of the application of European private international law Regulations, and the need for autonomous interpretation of core concepts of those regulations.

The concept 'the centre of a debtor's main interests' is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation (*Eurofood*, *Interedil*).[89] The reference in (old) recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflects the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction. As noted, the recital's definition has now been moved into the Regulation proper.

In the assessment of COMI, neither domicile of the creditors nor agreement between creditors and debtor that the COMI is in a particular Member State can be of any relevance;[90] however, many other criteria can feed in particular into the assessment, by the national courts, of ascertainability by third parties.[91]

5.6.1.2.2 Objective and Ascertainable by Third Parties: Eurofood, Rastelli, Interedil

With reference to (former) recital 13, the Court has held that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings (*Eurofood*, *Interedil*).[92]

The relevance of foreseeability by the potential creditors was emphasised in *Rastelli*, too.[93] The centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty

[89] *Eurofood* (n 86) para 31; and Case C-396/09 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-9915, para 43.

[90] Contra and wrong: *Propertize BV v [Beheer] Beheer BV* ECLI:NL:GHSE:2014:1311. the court at 's-Hertogenbosch (Netherlands) held that *Propertise BV* has its COMI in the Netherlands (and the presumption in favour of the COMI being the place of corporate domicile was therefore not dismissed), paying particular attention to the fact that (1) during argument at court both parties in the meantime had agreed that the COMI was in the Netherlands, and (2) that the main creditors were based in the Netherlands.

[91] See eg the court at the Hague in *De vennootschap naar buitenlands recht New Europe Property (BVI) Ltd v Central Eastern European Real Estate Shareholdings BV* ECLI:NL:RBDHA:2014:13625. Central Eastern European Real Estate Shareholdings BV ('CEE') was incorporated in the Netherlands. The Netherlands is therefore presumed to be the COMI of the company. CEE itself suggested Romania was the COMI. The court at The Hague correctly emphasised both elements of (former) recital 13, paying particular attention to third party ascertainability. Consultation of the commercial register, the Court noted, revealed clearly to third parties that the company was being managed from the Netherlands, by Dutch directors. It is here that the Court added the reference to the commercial register revealing the 'typically Dutch names' of the directors. That is amusing and was bound to attract attention—although to be fair it is not the core reasoning of the court. Of some relevance was the fact that the directors apparently, as was revealed at the hearing, regularly consulted, in the Netherlands, with Netherlands-based consultants. It is of course difficult to read the entire mind of the court just from the succinctly written judgment; however, what seemed to be crucial was the lack of convincing elements, provided by the company, that to third parties Romania clearly was the place of administration of the company's interests. Indeed the judgment reveals no such factors at all. The aforementioned elements therefore acted in support of the presumption.

[92] *Eurofood* (n 86) para 33, and *Interedil* (n 89) para 49.

[93] Case C-191/10 *Rastelli Davide e C Snc v Jean-Charles Hidoux* (qq liquidator) [2011] ECR I-13209, paras 33 ff.

and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. In the case at issue, the property of two companies was intermixed, which led to French courts, under national procedural rules, being able to join the property to the insolvency proceeding. However to characterise such a situation, the French court uses two alternative criteria drawn, respectively, from the existence of intermingled accounts and from abnormal financial relations between the companies, such as the deliberate organisation of transfers of assets without consideration. Neither of these circumstances are easy to ascertain by third parties, rather, they are the subject of accounting hocus pocus which typically is not visible to third parties and hence cannot influence their view on the COMI of the parties concerned. Even if these circumstances were quite transparent, they need not necessarily lead to a singular COMI: such intermixing may be organised from two management and supervision centres situated in two different Member States.

Where the bodies responsible for its management and supervision are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation is wholly applicable (*Interedil*, paragraph 50). That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the EU legislature in favour of the registered office of that company can be rebutted 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 (*Eurofood IFSC*, paragraph 34, *Interedil*, paragraph 51).

5.6.1.2.3 Eurofood: Individuality of the COMI

The Regulation itself contains no specific rules on determining the COMI for groups of companies. The rules on groups of companies in the 2015 EIR, which I review below, have not changed the essence of this rule. The 'Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes') (Virgos–Schmit Report).[94] Each debtor constituting a distinct legal entity is subject to its own COMI determination.[95] The mere fact that a daughter company's 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 Article 3(1) of the Regulation (*Eurofood*).

A good recent application was made in *Northsea Base Investment*.[96] Insolvency administrators were appointed out of court, but sought a High Court declaration finding the COMI for the eight insolvent companies to be England. Such finding assists with the ease of international travel of the administrators' decisions. With ships sailing all over Europe and further afield, any decisions by the administrators are likely to have to be enforced outside of England. The sole shareholder of the holding company was incorporated in Nevis (the St Kitts and Nevis Federation) and in turn was held by three family trusts also based in Nevis. Marine Cross was a shipping agent incorporated in the UK with its registered offices

[94] Virgos–Schmit Report, para 76, 52.

[95] See the opposite view, prior to the *Eurofood* judgment, *In re Collins & Aikman Corp Group* [2005] EWHC 1754 (Ch), in which the High Court addressed COMI vis-à-vis a Michigan-based company with 24 corporations registered in the EU. The group was treated as a single unit.

[96] *Northsea Base Investment et al* [2015] EWHC 121 (Ch).

in London. The companies were the only client of Marine Cross. All eight of the applicant companies were incorporated in Cyprus, share the same company registered office in Cyprus and had essentially the same form of Cypriot corporate documents.

Birss J held, using the well-established criteria in particular of *Eurofood* (in a group of companies, the COMI has to be decided for each of them with individual legal personality) and *Interedil* (emphasis on third party ascertainability in the case of attempts to rebuke Article 3(1)'s presumption in favour of the registered office being COMI) and settled on Marine Cross being the most relevant factor in determining the COMI vis-à-vis the shipping companies: the COMI being England. For the relevant holding companies (their Nevis-based shareholders were out of the equation), the High Court observed that these do not have operational functions. It held that their relations with London-based banks under financial agreements, all subject to English law and English jurisdiction, determined the COMI as being in England too. The case is a good reminder that even intricate special-purpose vehicle structures should not detract from COMI finding on well-established principles.

5.6.1.2.4 'Actual Centre of Management and Supervision and of the Management of its Interests'

In *Interedil*, the Court emphasised transparency and publicity: the requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them (paragraph 49). The factors to be taken into account to rebut the presumption of Article 3(1), second sentence, include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties (*Interedil*, paragraph 52).

All relevant considerations tempted the Court into what may be regarded as a definition of 'COMI': in the case of a company at least, the company's actual centre of management and supervision and of the management of its interests, is its COMI. However, one must not be tempted to treat this extract as a stand-alone definition of COMI (and one which arguably closely resembles the 'Head Office' approach): throughout the *Interedil* judgment, the Court emphasised the element of transparency and publicity.

By way of illustration, a textbook application of COMI was made by the Irish High Court in *Harley Medical Group*.[97] Harley Medical Group (Ireland) Ltd had its registered office in the British Virgin Islands. It had registered in the Companies Registration Office (CRO) in Ireland as an external company with a branch established in the State pursuant to the European Communities (Branch Disclosure) Regulations 1993. The sole shareholder sought winding up in Ireland. Liabilities arose from claims against Harley by 158 former patients in respect of cosmetic treatment they had received. Many of those claims arise from breast implant operations using breast implants from PIP, a French registered company. Harley was informed by its insurers that its insurance cover did not extend to product liability claims for products sourced from a third party.

[97] *In the matter of the Harley Medical Group (Ireland) Limited* [2013] IEHC 219.

The patients opposed jurisdiction, and sought to have the case heard in the UK instead: the *lex concursus* would then have been English law, which allegedly would have been more favourable on account of the Third Parties (Rights against Insurers) Act 2010; this would allegedly give the claimants better rights against the insurer. As the High Court correctly held, however:

> The perceived advantage to the Opposing Creditors of this Court declining jurisdiction to wind up the Company is articulated as follows in []'s second affidavit, where it is averred that—
>
> ... the creditors believe their rights under UK legislation with regard to any relevant policies of insurance indemnifying or intended to indemnify the Company against claims such as those of the creditors will be stronger than under Irish law.
>
> The Court was referred to a UK statute entitled Third Parties (Rights against Insurers) Act 2010. That contention is immaterial to the Court's function on this application and it would be inappropriate for the Court to express any view on it. (37)

The High Court swiftly rejected the notion that the Regulation does not apply because of the non-EU incorporation of the company: from the moment the company's COMI is in the EU, the Regulation does apply. Neither does it matter that the company is part of a group of undertakings, and that a company within the group with which it was associated had been placed in administration in the UK: the COMI, per *Eurofood* (notably, upon reference by the Irish Supreme Court), needs to be individually determined per corporation.

The Court subsequently reviewed the rebuttable presumption of the COMI as being the place of incorporation (here: the British Virgin Islands). Per *Interedil*, this requires the court seized to review whether the company's actual centre of management and supervision and of the management of its interests is located in its territory, in a manner that is ascertainable by third parties. Both conditions were fulfilled: On the condition of 'actual centre of management and supervision and of the management of its interests' the High Court accepted the following indices:

The company has never traded in any jurisdiction other than Ireland.
- All surgical treatments had been carried out in Ireland, the operations having been performed by surgeons registered with the Irish Medical Council.

The company was registered as a branch in Ireland and subsequently filed all of the statutory returns as was required by law.
All employees of the company are located in Ireland.
The company's only place of business is at Dublin.
- The company's address for correspondence has at all times been located in Ireland.
- The company is registered with the Irish Revenue Commissioners for VAT, and relevant national insurance payments.
- The company is not tax resident in any other jurisdiction.

The company does not operate any bank account in any other jurisdiction other than Ireland.
- The company board meetings typically took place in Guernsey. However, in the last 14 months, they have taken place either in London or in Dublin.

On the matter of ascertainability by third parties, all of the company's activities had been conducted in Ireland since 1999 and the administration of its interests had been continuously conducted in Ireland, had been readily ascertainable by third parties by conducting a

search in the CRO and an inspection of the documents filed by the company in the CRO in accordance with the law of Ireland.

5.6.1.2.5 Additional Jurisdiction for Member State of COMI for Actions 'Closely Connected' with the Insolvency Proceedings

In *Seagon*, the Court of Justice employed recital 6 of the 2000 Regulation[98] to hold that Article 3(1) must be interpreted as meaning that it also confers international jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is 'closely connected' with them, within the meaning of recital 6 in the preamble to the Regulation.[99] In that judgment the Court of Justice linked its findings directly to the Regulation's aim of discouraging forum shopping. Actions to set a transaction aside by virtue of insolvency, are closely connected to the opening of the proceedings, given that assets transfers in the run-up to insolvency proceedings are probably the oldest trick of the trade to frustrate one's creditors.

A 'close connection' is not present, per *Rastelli*,[100] where a national court seeks to join to the main proceeding, a proceeding concerning a different debtor with its COMI in another Member State and no establishment in the former, simply because the debtor concerned possesses property which is intermixed with the debtor in the main proceeding. Joining to the initial proceedings an additional debtor, legally distinct from the debtor concerned by those proceedings, produces with regard to that additional debtor the same effects as the decision to open insolvency proceedings. The latter cannot be done simply on the basis of a procedural mechanism such as a joinder, but rather requires the national court at issue to carry out a de novo assessment of the conditions of the Regulation: either a main proceeding on the basis of COMI, or a territorial procedure on the basis of locally present assets and 'establishment'.

In *Seagon*, the CJEU ruled that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside (*actio pauliana*) that is brought against a person whose registered office is in another Member State.

Nortel extended this finding to secondary proceedings.[101] In *Seagon*, the Court held that Article 3(1) must be interpreted as meaning that it also confers international jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is 'closely connected' with them, within the meaning of recital 6 in the preamble to the Regulation. In *Nortel*, the Court held that Article 3(2) of that regulation must

[98] Which, paradoxically, speaks of the principle of proportionality which in principle functions as a limiting factor on EU competence: '(6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle.'

[99] Case C-339/07 *Christopher Seagon v Deko Marty Belgium NV* [2009] ECR I-767, paras 19–21.

[100] *Rastelli* (n 93).

[101] *Nortel* (n 39).

be interpreted analogously. Here, the related action seeks a declaration that specified assets fall within secondary insolvency proceedings. It is designed specifically to protect the local interests which justify the very establishment of jurisdiction for the secondary proceedings.

However, such action quite obviously has a direct effect on the interests administered in the main insolvency proceedings. The jurisdiction for the court of the secondary proceedings therefore cannot be exclusive. It is jurisdiction concurrently with the Member State of the COMI. Unobjectionable as the Court's view may be, in practice it may create serious coordination headaches (one for which I do not think even the provisions for coordination in the new Insolvency Regulation provide sufficient answer).

Does *Seagon* also apply where insolvency proceedings have been opened in a Member State, but the place of residence or registered office of the person against whom the action to have a transaction set aside is brought is not in a Member State, but in a third country? The court held that it does in *Schmid v Hertel*,[102] and confirmed these principles in *H v HK*.[103]

Schmid was the German liquidator of the debtor's assets, appointed in the insolvency proceedings opened in her regard in Germany on 4 May 2007. The defendant, Ms Hertel, resided in Switzerland. Mr Schmid brought an action against Ms Hertel before the German courts to have a transaction set aside, seeking to recover €8,015.08 plus interest as part of the debtor's estate. The Brussels I Regulation as noted displays bias in favour of the defendant: *actor sequitur forum rei*. The overall jurisdictional angle of the Insolvency Regulation is different: avoiding forum shopping to the detriment of creditors is its main aim, and its insistence on verifiable and predictable criteria to determine the COMI (which in turns determines jurisdiction) needs to be seen in that light. That non-EU domiciled defendants get caught up in EU proceedings on the basis of COMI is not generally seen as problematic within the context of the Regulation.

The CJEU is rather realistic with respect to the potential recognition and enforcement problems associated with judgments under the Regulation held against non-domicileds. In the absence of assets in the EU held by the non-dom (if there were, enforcement would be straightforward), classic bilateral treaties may come to the rescue and, if there is no such treaty, so be it: in the view of the Court, the Regulation's jurisdictional rules should not be held up by potential problems at the enforcement stage.

5.6.1.2.6 The Relevant Date for the Purpose of Locating the Centre of the Debtor's Main Interests, and Transfer after Lodging of Request to Open a Proceeding

The Regulation does not contain any express provisions concerning the specific case involving the transfer of a debtor's centre of interests. Per *Interedil*, in the light of the general terms in which Article 3(1) of the Regulation is worded, the last place in which that centre was located must therefore be regarded as the relevant place for the purpose of determining the court having jurisdiction to open the main insolvency proceedings.[104] This is also indicated by the use of the present tense: jurisdiction is granted to the courts of the Member State within the territory of which the centre of a debtor's main interest *is* situated.[105]

[102] Case C-328/12 *Ralph Schmid v Lilly Hertel* ECLI:EU:C:2014:6.
[103] Case C-295/13 *H* v *HK*, ECLI:EU:2014:2410.
[104] *Interedil* (n 89) para 54.
[105] See also Moss et al (n 4) 47

Where the centre of a debtor's main interests is transferred after the lodging of a request to open insolvency proceedings, but before the proceedings are opened, the courts of the Member State within the territory of which the centre of main interests was situated at the time when the request was lodged retain jurisdiction to rule on those proceedings.[106] However where the COMI has been transferred before a request to open insolvency proceedings is lodged, the centre of the debtor's main interests is therefore presumed, in accordance with the second sentence of Article 3(1) of the Regulation, to be located at the place of the new registered office and, accordingly, it is the courts of the Member State within the territory of which the new registered office is located which, in principle, have jurisdiction to open the main insolvency proceedings, unless the presumption in Article 3(1) of the Regulation is rebutted by evidence that the centre of main interests has not followed the change of registered office.[107]

The Court's case-law on the timing of determination of COMI is made all the more relevant given the case-law on the freedom of establishment (see elsewhere in this volume), which has given rise to an increase in corporate mobility in the EU.[108] The resulting room for forum shopping (both in the case of a group of companies, and in the event of a single company seeking to take advantage of advantageous insolvency proceedings) prima facie sits uneasily of course with the Regulation's declared intent of combatting forum shopping, however, as the cases above illustrate, the result of the Court's case-law on COMI is that any change in COMI most certainly cannot be carried out on a whim.[109]

5.6.1.2.7 The Provisions of the EIR 2015: Determination of COMI and 'Look Back' Periods

The COMI, as noted, is now defined in the EIR proper:

> The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties. (Article 3(1))

The EIR 2015 has expanded and clarified the presumptions of COMI and has also provided a qualified look-back period for change of COMI. Both corporations and individuals can and do of course legitimately move their COMI. However, one of the main drivers of the Regulation is to avoid abusive forum shopping, whereby debtors move COMI simply to shop for a regime which will be attractive to them but not to their creditors.

[106] Case C-1/04 *Staubitz-Schreiber* [2006] ECR I-701, para 29, with specific reference to the need to avoid forum shopping.

[107] *Interedil* (n 89) para 56.

[108] Whether the increase reflects a permanent rise and recurring phenomenon, is more difficult to ascertain: see also W Brattonn, J McCahery and E Vermeulen, 'How Does Corporate Mobility Affect Lawmaking? A Comparative Analysis', Law Working Paper No 91 (European Corporate Governance Institute, 2008). To be sure, in the immediate aftermath of the *Centros* and related case-law (reviewed below), there was quite a bit of corporate mobility, especially into the United Kingdom. However arguably a lot of that potential has now been 'mopped up', especially in view of the regulatory competition that followed, leading to more inviting corporate requirements in those Member States which saw a lot of corporations disappear. See also L Enriques and M Gelter, 'How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law', European Corporate Governance Institute (ECGI), Law Research Paper Series, No 63/2006.

[109] Incidentally I disagree with the suggestion (Ringe, n 72) that the 'fuzziness' of COMI (a phrase said to be first used by H Eidenmüller in 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 *European Business Organization Law Review* 423 428) contributes to its alleged incompatibility with the Treaty's freedom of establishment.

To assist genuine change in the COMI, recital 28 of the 2015 EIR emphasises, in line with the main principles recalled above, the relevance of ascertainability by third parties also in the event of a shift in COMI. It adds a number of practical precautions which the debtor could take to ensure that an intended shift in COMI actually will be recognised as such:

> This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

More generally, the EIR 2015 has expanded COMI presumptions as follows:

> The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.
>
> In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. That presumption shall only apply if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.
>
> In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings. (Article 3(1))

Rather than just the one presumption in the former EIR for companies or legal persons, the EIR 2015 introduces presumptions of COMI for all three categories of insolvable persons. For neither of the three categories does the Regulation introduce a negation of move of COMI within a prescribed period. Rather, it introduces look-back periods (three months for corporations and individuals exercising an independent business or professional activity; six months for individuals not carrying out such activity) in which the presumption will no longer hold. Change of COMI in that period immediately preceding a filing for insolvency can still be substantiated, however, by simply following the COMI criteria of Article 3(1), recalled above.

5.6.1.2.8 The Insolvency of Groups of Companies and 'Group Coordination Proceedings'

The Entity-by-Entity Approach is Maintained

In *Eurofood*,[110] as noted, the Court of Justice insisted on determination of the COMI for each separate undertaking. The CJEU therefore defers to the corporate veil and in my view

[110] *Eurofood* (n 86).

is right to do so. Of note is of course that the finding in *Eurofood* does not exclude that the COMI for highly a integrated groups of companies may be found to be in one and the same place. Ad hoc rebuttal of the registered office presumption in favour of the registered office of the holding company is most definitely a possibility.

The European Commission did not in principle question the what it calls 'entity-by-entity' approach for determining COMI. Instead, it proposed better coordination between the insolvency proceedings, using in particular procedural safeguards to enable liquidators of the various companies of the group to have a say in each other's procedure. The European Parliament strengthened the coordination element by inserting 'group coordination proceedings', which I further review below.

The Regulation (Article 2(13)) defines a 'group of companies' as:

> a parent undertaking and all its subsidiary undertakings.

A 'parent undertaking' in turn is defined as:

> an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. An undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking.

The rather detailed rules for groups of companies, most of them speaking for themselves, take the form of a whole new Chapter in the Regulation, dealing with what the Regulation calls on the one hand 'cooperation and communication', and on the other hand 'coordination'. Each of these apply to both courts and insolvency practitioners.

Of note is also that the EIR 2015 strengthens cooperation and communication between insolvency practitioners and courts in the event of one single company (in that case coordination between main and secondary proceedings being the obvious aim).

Cooperation and Communication for Groups of Companies

As far as cooperation and communication is concerned, the proof of the Group of Companies Chapter will lie in both the goodwill and the procedural limits to which courts and practitioners in the Member States are subject. The Chapter in relevant part talks of the standing of the insolvency practitioners in each other's proceedings, of exchange of information, of the option to conclude agreements to all these effects, etc. However, each of these possibilities (with the exception of group coordination proceedings: see below) is qualified by reference to both national procedural law, to conflict of interest and to the sound administration of justice. In other words there are likely to be plenty of remaining options for recalcitrant jurisdictions to refuse to cooperate. In fairness, in many such group proceedings practitioners and courts currently already explore cooperation. The clear instructions to that effect in the Regulation undoubtedly will assist in stretching current procedural options in the Member States to assist further cooperation.

Group Coordination Proceedings

The one innovation backed up by hard law provisions in the Regulation is the introduction of 'group coordination proceedings'.

As noted, it was the European Parliament which suggested these proceedings. Parliament had also suggested assigning group coordination to the jurisdiction of the COMI

of the member of the group which performs 'crucial functions'. Parliament's proposed amendment on this issue read:

> Opening of group coordination proceedings
>
> Group coordination proceedings may be brought by an insolvency representative in any court having jurisdiction over the insolvency proceedings of a member of the group, provided that:
>
> — insolvency proceedings with respect to that member of the group are pending; and
> — the members of the group having their centre of main interests in the Member State of the court seised to open the group coordination proceedings perform crucial functions within the group.
>
> Where more than one court is seised to open group coordination proceedings, the group coordination proceedings shall be opened in the Member State where the most crucial functions within the group are performed. To that extent the courts seised shall communicate and cooperate with each other in accordance with Article 42b. Where the most crucial functions cannot be determined, the first court seised may open group coordination proceedings provided that the conditions for opening such proceedings are satisfied.
>
> Where group coordination proceedings have been opened, the right of insolvency representatives to request a stay of the proceedings in accordance with point (b) of Article 42d(1) shall be subject to the approval of the coordinator. Existing stays shall remain in force and effect, subject to the coordinator's power to request the cessation of any such stay.[111]

'Crucial functions within the group' in turn were defined as

> the ability, prior to the opening of insolvency proceedings with respect to any member of the group, to take and enforce decisions of strategic relevance for the group or parts of it; or
>
> the economic significance within the group, which shall be presumed if the group member or members contribute at least 10 per cent to the consolidated balance-sheet total and consolidated turnover.

It is clear that the 'crucial functions' criterion was likely to drag this innovation of the Parliament's into practical controversy. Consequently Council (and Commission) supported the idea of group coordination proceedings, bar the 'crucial functions' jurisdictional trigger. In the absence of choice of court, Article 62 now instead has a strict *lis alibi pendens rule*:

> Without prejudice to Article 66, where the opening of group coordination proceedings is requested before courts of different Member States, any court other than the court first seised shall decline jurisdiction in favour of that court.

Combined with Article 61's rule that such proceedings may be requested before any court having jurisdiction over the insolvency proceedings of a member of the group, inevitably Article 62 will trigger race to court for the establishment of the group coordination proceedings. However this was seen as preferable to the difficult determination of 'crucial functions'.

Article 63 obliges the court seized to check the request to open group coordination proceedings against the following criteria:

— the opening of such proceedings is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members;

[111] EP legislative resolution of 5 February 2014, P7_TA(2014) 0093.

— no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings; and the proposed coordinator fulfils the requirements laid down in Article 71.

Article 71 in turn insists inter alia that the coordinator cannot be chosen from among the midst of the insolvency practitioners involved in each of the members of the group's insolvency.

Among these criteria, the proviso that 'no creditor of any group member expected to participate in the proceedings is likely to be financially disadvantaged by the inclusion of that member in such proceedings' is likely to be the toughest to apply. It presumably requires an overall assessment of the net return after insolvency, rather than just an assessment in absolute terms. However, how exactly 'competing' insolvency regimes (for jurisdiction to a large degree also leads to applicable law) are to be compared in this assessment is not at all clear.

It is only after being satisfied that Article 63's criteria are met that the court seized gives notice of the request to all other insolvency practitioners of the group. The court seized has to give all insolvency practitioners involved the opportunity to be heard. Article 63 does not state so in so many words; however, presumably after having heard the practitioners concerned, the Court has to revisit its assessment of Article 63's criteria.

The reference in Article 62 to Article 66 is to that Article's choice of court provisions:

1. Where at least two-thirds of all insolvency practitioners appointed in insolvency proceedings of the members of the group have agreed that a court of another Member State having jurisdiction is the most appropriate court for the opening of group coordination proceedings, that court shall have exclusive jurisdiction.
2. The choice of court shall be made by joint agreement in writing or evidenced in writing. It may be made until such time as group coordination proceedings have been opened in accordance with Article 68.

Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court.

The request for the opening of group coordination proceedings shall be submitted to the court agreed in accordance with Article 61.

Article 66's two-thirds majority rule applies therefore even if one of the objecting insolvency practitioners has won the race to court. It avoids the proceedings being hijacked by a minority. This effectively amounts to cram-down of choice of court for group coordination proceedings.

Interestingly, Article 66 does not mention the need for the choice of court to have to abide by the aforementioned criteria of Article 63. This gives the two-thirds majority of insolvency practitioners a much wider remit to select the exclusive jurisdiction.

Finally, it is worth mentioning that the exclusive jurisdiction provision in this title applies to group coordination proceedings only. The underlying jurisdiction for main or secondary proceedings is not affected.

If and when a group coordinator is assigned, the EIR assigns him or her overall coordination and planning tasks (Article 72) as well as a wide remit to request information, to be heard and to provide input into all national proceedings.

5.6.1.3 Universality of the Proceedings Opened in the COMI Member State

The main proceedings are always universal. This has a number of important legal consequences:

(a) Assets located outside the State of opening are also included in the proceedings and sequestrated as from the opening of proceedings on a world-wide basis;
(b) All creditors are encompassed;
(c) Proceedings opened in one [Member State] will produce effects throughout the whole territory of the [Member States] (ie the [Union]). The recognition of the effects of the proceedings in other [Member States] is automatic, by force of law, without the need for an exequatur, and is independent of publication; However, enforcement of judgments will require prior limited control by the national courts, through an exequatur. If the conditions set out by the [Regulation] are satisfied, the national Courts are obliged to grant it.
(d) The liquidator appointed in the main proceedings has authority to act in all the other [Member States], without the need for an exequatur. He may remove assets from the State in which they are located. In exercising these powers (granted by the State of opening), the liquidator must comply with the laws of the State concerned. This is particularly the case if coercion is necessary to gain control of the assets (he must then request the assistance of the local authorities);
(e) Individual execution is not possible against the assets of a debtor located in any [Member State];
(f) There is a legal duty to surrender to the insolvency proceedings the proceeds recovered by individual execution or obtained from the debtor's voluntary payment out of assets located abroad.[112]

The impact of the main proceedings and the corresponding powers of the liquidator, within the constraints of (old) Article 18 ff, are at their highest for as long as no secondary proceedings have been opened. 'Only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings' (*MG Probud*)[113]

The impact of this priority, must not be underestimated, especially given the link (detailed below) with applicable law. Because of the universal effect which all main insolvency proceedings must be accorded, main insolvency proceedings encompass all of the debtor's EU assets. The law of the State of opening of the main proceedings determines not only the opening of insolvency proceedings, but also their course and closure. On that basis, that law is required to govern the treatment of assets situated in all Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject—inevitably of course leading to a race to court just as under the Brussels I Regulation by virtue of that latter Regulation's *lis alibi pendens* rule. The insolvency Regulation however does not have a 'guillotine-like'[114] *lis alibi pendens* rule. (old) Article 16's (now Article 19) priority rule, reviewed below, has required flanking measures (in particular the limited scope for refusal of recognition) and the firm hand of European Court of Justice case-law (in particular the emphasis on the principle of mutual trust, see the para just below) to render it relevant in practice.

[112] Virgos–Schmit Report, para 19, 15 ff.
[113] Case C-444/07 *MG Probud Gdynia sp z oo* [2010] ECR I-417, para 24.
[114] Wautelet (n 85) 77

Given the impact of the opening of the main proceedings: may the jurisdiction assumed by a court of a Member State to open main insolvency proceedings be reviewed by a court of another Member State in which recognition has been applied for? The rule of priority laid down in Article 16(1) (old) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust. This element of mutual trust is of exactly the same nature as the corresponding provisions and case-law under the Jurisdiction Regulation (per *Gasser*, *Turner*, etc: reviewed elsewhere in this volume). It is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction, ie examine whether the centre of the debtor's main interests is situated in that Member State. In return, as the (old) 22nd recital of the Regulation emphasises, the principle of mutual trust requires that the courts of the other Member States recognise the decision opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction: any challenge of that view has to be brought in the courts of the Member State which has detected a COMI and has upheld jurisdiction (*Eurofood*).[115]

5.6.1.4 *When is an Insolvency Procedure 'Opened' within the Meaning of the Regulation?*

In particular, given the drastic impact of the opening of (main) proceedings, is there some kind of active review required by the relevant court whether the substantive conditions for insolvency have been met, or can a near-automatic trigger of the proceedings suffice, in particular following initiative by one of the creditors?

The conditions and formalities required for opening insolvency proceedings are a matter for national law, and vary considerably from one Member State to another. In some Member States, the proceedings are opened very shortly after the submission of the application, the necessary verifications being carried out later. In other Member States, certain essential findings, which may be quite time-consuming, must be made before proceedings are opened. Under the national law of certain Member States, the proceedings may be opened 'provisionally' for several months. it is necessary, in order to ensure the effectiveness of the system established by the Regulation, that the recognition principle laid down in the first subparagraph of Article 16(1) of the Regulation, be capable of being applied as soon as possible in the course of the proceedings. The mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period. In those circumstances, a 'decision to open insolvency proceedings' for the purposes of the Regulation 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, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a

[115] *Eurofood* (n 86) paras 38 ff.

> case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to in Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present.[116]

5.6.2 Secondary and Territorial Insolvency Proceedings

Secondary and territorial proceedings may only be opened if the debtor possesses an establishment within the territory of that other Member State, and only vis-à-vis the debtor's assets in that State. Article 2(h) of the 2000 Regulation defined 'establishment' as

> any place of operations where the debtor carries out a non-transitory economic activity with human means and goods

which the Court of Justice specified in less philosophical terms as (*Interedil*)[117]

> a structure with a minimum level of organisation and a degree of stability for the purpose of pursuing an economic activity.

basically this is a combination of pursuit of an economic activity and the presence of human resources. This has to be determined in the same way as the location of the centre of main interests, namely on the basis of objective factors which are ascertainable by third parties.[118]

In *Burgo Group*,[119] the CJEU held that, per *Interedil*, the fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment'. On the other hand, the definition does not refer to the place of the registered office of a debtor company or to the legal status of the place in which the operations in question are carried out.[120] The Member State where the company has its registered office clearly is not excluded from the definition: otherwise local interests would be denied the opportunity of seeking protection, which would exist in other Member States where an establishment is present.

A good illustration is *Olympic Airways*,[121] in which the Court of Appeal for England and Wales combined *Interedil* and further CJEU guidance with respect to COMI, as well as

[116] Ibid, paras 51 ff.

[117] *Interedil* (n 89) para 62.

[118] Ibid, para 63.

[119] *Burgo Group* (n 88).

[120] On 21 April 2008, the Commercial Court, Roubaix-Tourcoing (France) placed all the companies in the Illochroma group—including Illochroma, established in Brussels (Belgium)—into receivership and appointed Maître Theetten as agent. On 25 November 2008, it placed Illochroma in liquidation and appointed Maître Theetten as liquidator. Burgo Group, established in Altavilla-Vicentina-Vicenza (Italy), is owed money by Illochroma for the supply of goods. On 4 November 2008, Burgo Group presented Maître Theetten with a statement of liability in the amount of €359,778.48. Maître Theetten informed Burgo Group that the statement of liability could not be taken into account because it was out of time.

Burgo Group then requested the opening of secondary proceedings in respect of Illochroma. The referring court (the Brussels Court of Appeal) observed that the Insolvency Regulation defines 'establishment' as any place where the debtor carries out a non-transitory economic activity with human means and goods, which is the situation in the present case. Illochroma is a company with two establishments in Belgium, where it is the owner of a building, buys and sells goods, and employs staff. Illochrama and the liquidator contend that, since Illochroma has its registered office in Belgium, it cannot be regarded as an establishment within the meaning of Regulation 1346/2000. They argued that secondary proceedings are restricted to establishments without legal personality.

[121] *Olympic Airways* [2013] EWCA Civ 643.

extensive reference to the Virgos–Schmit Report, the CA held that for there to be an establishment, the mere presence of the company in the territory of the Member State is not enough: there has to be genuine 'external economic activity. In the words of Sir Bernard Rix:

> The definition is clearly intended to lay down a rule that the mere presence of an office or branch, a 'place' at which the debtor is located, is not sufficient. It has to be a place 'of operations': human and physical resources have to be involved in those operations; and there has to be 'economic activity' involving those resources. (33)

He also emphasised that this economic activity needs to be 'external', ie market oriented. Of note is also the temporal element: per *Office Metro*[122] the possibility to open up secondary proceedings requires there to be such establishment at the time of the request for opening of such proceeding. The UK Supreme Court later confirmed this judgment.[123]

The EIR 2015 now defines 'establishment' 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'. 'Assets' replaces 'goods', which is quite helpful especially in a services economy. Moreover the three-month period is another way in which the Regulation discourages forum shopping.

The opening of secondary or territorial proceedings is subject to different conditions according to whether or not main proceedings have already been opened. In the first situation (main proceedings have already been opened), the proceedings are described as 'secondary proceedings' and are governed by the provisions of Chapter III of the Regulation (mainly designed to ensure proper coordination with and in effect subordination to, the main proceedings: for as noted below, the Regulation does encourage collectivity of the proceedings). In the second situation (no main proceeding has been opened), the proceedings are described as 'territorial insolvency proceedings' and the circumstances in which proceedings can be opened are determined by Article 3(4) of the Regulation. If and when the main proceedings have been opened, the 'territorial' procedure becomes 'secondary'.

5.6.2.1 Territorial Insolvency Proceedings

Article 3(2) ff concerns two situations: first, where it is impossible to open main proceedings because of the conditions laid down by the law of the Member State where the debtor has the centre of its main interests and, secondly, where the opening of territorial proceedings in the Member State within the territory of which the debtor has an establishment is requested by certain creditors having a particular connection with that territory.

Recital 17 (old; now 37) to the Regulation hints at restrictive interpretation: 'cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary.' This is compounded by the need for coordination which is also emphasised in recital 12 (old; now 23 and 24), in fine: 'Mandatory rules of coordination with the main proceedings satisfy the need for unity in the [Union].' Such coordination cannot be ensured if main proceedings have not been opened, and hence the Court held in *Zaza Retail* that cases where under Article 3(4)(a) the opening of territorial insolvency proceedings can be requested before that of the main insolvency

[122] *Office Metro* [2012] EWHC 1191 (Ch).
[123] *The Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airways SA* [2015] UKSC 27.

proceedings are limited to what is absolutely necessary.[124] In particular, the requirement of 'conditions' present in that Article, cannot be extended to conditions excluding particular persons (such as the public prosecutor) from the category of persons empowered to request the opening of such proceedings. Hence they are limited to substantive conditions of insolvency, such as whether one needs to be a trader to be declared insolvent etc. In the case at issue, the Belgian public prosecutor, empowered under Belgian law to request insolvency in the general interest, had wanted to open territorial proceedings in Belgium prior to opening of the main proceedings in the Netherlands, were Zaza had its COMI.

In the same restrictive vain, a party has to have a claim of its own to lodge against the debtor's estate, for it to be a 'creditor' within the meaning of Article 3(4)(b). A claim in the general interest is not enough.[125]

> Local insolvency proceedings opened in accordance with the [Regulation] limit the universal cope of the main proceedings. Assets located in the [Member State] where a court opens local insolvency proceedings are subject only to the local proceedings. However, the universal character of the main proceedings reveals itself through the mandatory rules of coordination of the local proceedings with the main proceedings, which include some specific powers of intervention given by the [Regulation] to the liquidator of the main proceedings ... and the transfer of any surplus in the local proceedings to the main proceedings.[126]

5.6.2.2 Secondary Insolvency Proceedings

Here, locus standi is more flexible: see Article 29 of the Regulation.

It is only in relation to territorial proceedings that the right to request the opening of proceedings is limited by the Regulation to creditors who have their domicile, habitual residence or registered office within the Member State in which the relevant establishment is situated, or whose claims arise from the operation of that establishment. Any other conclusion would amount to indirect discrimination on the grounds of nationality, since non-residents are in the majority of cases foreigners (*Burgo Group*).[127]

The Regulation grants broad discretion, with regard to the opening of secondary proceedings, to the court before which an action seeking the opening of secondary proceedings has been bought. Article 28 (old; now Article 35) of the Regulation determines in principle as the law applicable to secondary proceedings that of the Member State within the territory of which those secondary proceedings are opened. Whether opening of the proceedings is 'appropriate' has to be determined by that applicable law. EU law does have an impact on that assessment though: in deciding appropriateness, Member States must not discriminate on the basis of place of residence or registered office; the Regulation's motifs for allowing secondary proceedings must be respected (in the main: protection of local interests, given that universal proceedings may be preferred even though these often lead to practical difficulties);

[124] Case C-112/10 *Zaza Retail*, [2011] ECR I-11525.

[125] Ibid, para 31. Note the contrast with secondary proceedings, where Art 29 allows for a much wider category of persons to request the opening of such.

[126] Virgos–Schmit Report, para 20, 17

[127] *Burgo Group* (n 88).

and finally the principle of sincere cooperation implies that the court assessing the secondary proceedings must have regard to the objectives of the main proceedings (*Burgo Group*).[128]

Local insolvency proceedings following the activities of a debtor in that locality, but with its COMI elsewhere, continue to be treated with caution in the EIR. Their inclusion at all in the Regulation upsets the universality of the proceedings in the Member State of the COMI. On the other hand they clearly can be of use in assisting with the main proceedings, especially in the realisation of local assets (this would be more challenging to organise entirely from the Member State of the COMI). Moreover they protect creditors in Member States other than that of the COMI in the event the laws of that Member State do not (yet) allow for opening of the proceedings.

In an attempt to limit the impact on universality, the former EIR attached different conditions to local proceedings depending on whether proceedings in the Member State of the COMI had already been opened. If that is not the case, then the local proceedings, aimed at the assets located in that territory, are referred to as 'territorial' insolvency proceedings. From the moment proceedings are opened in the Member State of the COMI, any 'territorial' proceedings are renamed 'secondary proceedings'. Precisely because they are also required in the event the laws of the Member State of the COMI do not allow for opening of proceedings, local creditors deserve the protection of local insolvency proceedings: these territorial proceedings therefore can be both winding-up and restructuring proceedings. The former EIR, however, prescribed that secondary proceedings, by contrast, always had to be winding-up proceedings: see in this respect very clearly Article 3(3) in fine: 'These latter proceedings must be winding-up proceedings.'

I found the philosophy behind this never quite satisfactorily explained, in spite of the valiant efforts of scholarship.[129] The net result, it is suggested, is that a restructuring effort in the Member State of the COMI may quite effectively be undermined. At the very least the negotiation position of relevant parties is seriously strengthened, by the creditors' insistence, indeed threat, that they will open secondary proceedings. Such move effectively lifts the assets in that Member State from the restructuring effort. (Although the courts in the secondary State may be able to apply local conditions for winding-up in a way which does not jeopardise such coordination.)

It is this negative impact on the proper restructuring effort in the Member State of the COMI that has now led to the EIR 2015 dropping the condition that secondary proceedings must be winding-up proceedings. The aforementioned sentence no longer features in the EIR 2015.

5.7 Applicable Law

Article 4

Law applicable

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings"

[128] Ibid.

[129] See Moss et al (n 4) 51; and Virgos and Garcimartin (n 30) 157–58.

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
   (a) against which debtors insolvency proceedings may be brought on account of their capacity;
   (b) the assets which form part of the 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 liquidator;
   (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 lawsuits pending;
   (g) the claims which are to be lodged against the debtor's 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;
   (i) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
   (j) creditors' rights after the closure of insolvency proceedings;
   (j) who is to bear the costs and expenses incurred in the insolvency proceedings;
   (j) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 4 of the Regulation is the general rule: unless otherwise stated by the Regulation, the law of the State of the opening of proceedings is applicable. *Renvoi* is not specifically excluded by the Regulation however it is safe to assume that it is.[130] To avoid doubt, Article 28 reiterates the same conflict rule for secondary proceedings. The Regulation has omitted doing the same for territorial proceedings however the *lex concursus* rule may be viewed as the general conflicts rule of the Regulation and is hence arguably also valid for territorial proceedings[131] (validly opened).

The list of issues part of the applicable law, included in Article 4, is non-exhaustive. Many of the issues listed are more specifically dealt with or at least additionally referred to in other parts of the Regulation.

5.7.1 Exceptions

The general rule of Article 4 inevitably had to be softened for quite a number of instances. As noted in the introduction, insolvency proceedings involve a wide array of interests.

[130] See also Virgos–Schmit Report, para 87, 63.
[131] Ibid, para 89, 64.

The expediency, efficiency and effectiveness craved inter alia by recital 2 (old; now 3) of the Regulation, has led in particular to the automatic extension of all the effects of the application of the *lex concursus* by the courts in the State of opening of the proceedings. That could not be done without there being exceptions to the general rule:[132]

1. In certain cases, the Regulation excludes some rights over assets located abroad from the effects of the insolvency proceedings (as in Articles 5, 6 and 7).
2. In other cases, it ensures that certain effects of the insolvency proceedings are governed not by the law of the State of the opening, but by the law of another State, defined in the abstract by Articles 8, 9, 10, 11, 14 and 15. In such cases, the effects to be given to the proceedings opened in other States are the same effects attributed to a domestic proceedings of equivalent nature (liquidation, composition, or reorganization proceedings) by the law of the State concerned. Of particular note are Article 5 on third parties' rights in rem, Article 10 on employment contracts, and Article 13 on 'detrimental acts'.

The latter is a good example of the European harmonisation of the *Vorfrage*, alluded to elsewhere in this volume. Within the context of the insolvency Regulation, the *Vorfrage* takes on a specific form in Article 13 on 'detrimental' acts, in conjunction with its Article 4(2)(m) on 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors' (Virgos–Schmit Report).[133]

The basic rule of the Regulation is that the law of the State of the opening governs, under Article 4, any possible voidness, voidability or unenforceability of acts which may be detrimental to all the creditors' interests. This same law determines the conditions to be met, the manner in which the nullity and voidability function (automatically, by allocating retrospective effects to the proceedings or pursuant to an action taken by the liquidator, etc) and the legal consequences of nullity and voidability.

Article 13 represents a defence against the application of the law of the State of the opening, which must be pursued by the interested party, who must claim it. It acts as a "veto" against the invalidity of the act decreed by the law of the State of the opening. Article 13 provides that the rules of the law of the State of the opening shall not apply when the person who has benefited from the contested act provides proof that:

1. the act in question (eg a contract) is subject to the law of a Contracting State other than the State of the opening of the proceedings; and

2. the law of that other State does not allow for this act to be challenged by any means.

By 'any means it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act (eg to the contract referred to in paragraph (1)). "In the relevant case" means that the act should not be capable of being challenged in fact ie after taking into account all the concrete circumstances of the case. It is not sufficient to determine whether it can be challenged in the abstract.

The aim of Article 13 is to uphold legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law, against interference from a different "lex concursus". From the perspective of the protection of legitimate expectations, the operation of Article 13 is justified with regard to acts carried out prior to the opening of the insolvency proceedings, and threatened by either the retroactive nature of the insolvency proceedings opened in another country or actions to set aside previous

[132] Ibid, para 92, 68 ff. The Virgos–Schmit Report contains details of each of the exceptions.
[133] Ibid, paras 135 ff, 87 ff.

> acts of the debtor brought by the liquidator in those proceedings. After the proceedings have been opened in a Member State, the creditor's reliance on the validity of the transaction under the national law applicable in non-insolvency situations is no longer justified. Thenceforth, all unauthorised disposals by the debtor are in principle ineffective by virtue of the divestment of his powers to dispose of the assets and such effect is recognised in all Member States. Article 13 does not protect against such an effect of the insolvency proceedings and it is not applicable to disposals occurring after the opening of the insolvency proceedings.

It is noteworthy that Articles 8–15 do not affect the international workings of the Regulation: as noted, in relation to third States, the Regulation does not impair the freedom of the Member States to adopt the appropriate rules. Consequently, where the relevant applicable law as determined by Articles 8–15 is not that of a Member State, the law of the State of the opening of proceedings does not slot in by default: 'The need to protect legitimate expectations and the certainty of transactions is equally valid in relations with non-[Member] States' (Virgos–Schmit Report).[134] The Regulation is restricted to the intra-EU effect of insolvency proceedings and Member States are therefore free to decide which rules they deem most appropriate in other cases.

An important application of Article 13 (now Article 1) was made by the CJEU in *Lutz*.[135] This case illustrates the increasing relevance of the *actio pauliana* in protecting creditors from their debtor's insolvency. The core underlying issue for *Lutz* is that, in the absence of considerable capital in companies (arguably a direct result indeed of the regulatory competition in Member States' corporate law following the CJEU's case-law on freedom of establishment: see the relevant chapter), civil law mechanisms have become more relevant than classic recourse to companies' liability.

If one relies on more classic modes of securitisation, one may want to have more predictability in what law will apply to those securitised agreements. That is where the Insolvency Regulation comes in, in providing for a mechanism which allows parties to indeed give parties the freedom to choose applicable law for the relevant agreements. Article 4(2)m of the Insolvency Regulation (in the new Regulation this is Article 7(m)—unchanged) as noted makes the *lex concursus* applicable in principle: the *lex concursus* applies to '(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.'

However, Article 13 (16 new—unchanged) insulates a set of agreements from the *actio pauliana*:

> Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
>
> — the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
> — that law does not allow any means of challenging that act in the relevant case.

[134] Ibid, para 93, 69.

[135] Case C-557/13 *Hermann Lutz v Elke Bäuerle, acting as liquidator of ECZ Autohandel GmbH* ECLI:EU:C:2015:227.

The crucial consideration in *Lutz* was whether the absence of means of challenge in the *lex causae*, relates to substantive law only, or also to procedural law. The time-line and relevant distinction in German and Austrian law was as follows:[136]

> 17 Mar 2008—Austrian court issues an enforceable payment order in favour of Mr Lutz against the debtor company
> 18 April 2008—debtor files application for German insolvency proceedings
> 20 May 2008—attachment of three Austrian bank accounts of the company
> 4 August 2008—German insolvency proceedings opened (as main proceedings) in respect of the company
> 17 Mar 2009—Austrian bank pays monies to Mr Lutz
>
> Under German law, any enforcement of security over the debtor's assets during the month preceding the lodging of the application to open proceedings is legally invalid once proceedings are opened. Under Austrian law, an action to set aside a transaction must be brought within one year after the opening of proceedings, failing which it becomes time-barred. By contrast, the limitation period under German law is three years. Although the attachment order was granted before the application to open main proceedings was filed, the actual attachment itself took place after that filing and the subsequent payment of monies by the bank took place after main proceedings were opened in Germany. Mr Lutz argued that art 13 applied and that the payment could no longer be challenged by the German liquidator under Austrian law as the one-year limitation period had expired.

Essentially, the Court expressed sympathy for the cover of procedural limits to fighting detrimental acts to be determined by the *lex causae*. (It dismissed any relevance of Article 12(1)d of the Rome I Regulation, which provides that prescription and limitation of actions are governed by 'the law applicable to a contract': the Insolvency Regulation is most definitely *lex specialis*).

However, leaving the matter up to the *lex causae* would cause differentiated application of the Insolvency Regulation across the Member States. Consequently the CJEU opts for autonomous interpretation, ruling that

> Article 13 of Regulation No 1346/2000 must be interpreted as meaning that the defence which it establishes also applies to limitation periods or other time-bars relating to actions to set aside transactions under the lex causae. (49)

The judgment essentially confirmed the EFTA Court's views on the similar proviso in Directive 2001/24 on the winding-up of credit institutions (*LBI hf v Merrill Lynch*).[137]

Following *Lutz*, application of the rule for *lex causae* in the context of detrimental acts/*actio pauliana* was also made in *Nike*, Case C-310/14.[138] Nike (incorporated in The Netherlands) had a franchise agreement with Sportland Oy, a Finnish company. This agreement is governed by Dutch law (through choice of law). Sportland paid for a number of Nike deliveries. Payments went ahead a few months before and after the opening of the insolvency proceedings. Sportland's liquidator attempts to have the payments annulled, and to have Nike reimburse them.

[136] K Stones, 'CJEU Guidance on Detrimental Acts', 22 April 2015, http://blogs.lexisnexis.co.uk/randi/cjeu-guidance-on-detrimental-acts/, accessed 22 September 2015.
[137] Case E-28/13 *LBI hf v Merrill Lynch International Ltd*, [2014] EFTA Ct Rep 970.
[138] C-310/14 *Nike European Operations Netherlands v Sportland Oy*, ECLI:EU:C:2015:690.

Under *Finnish law,* paragraph 10 of the Law on Recovery of Assets provides that the payment of a debt within three months of the prescribed date may be challenged if it is paid with an unusual means of payment, is paid prematurely, or in an amount which, in view of the amount of the debtor's estate, may be regarded as significant. Under *Netherlands law,* according to Article 47 of the Law on Insolvency (Faillissementswet), the payment of an outstanding debt may be challenged only if it is proven that when the recipient received the payment he was aware that the application for insolvency proceedings had already been lodged or that the payment was agreed between the creditor and the debtor in order to give priority to that creditor to the detriment of the other creditors.

Nike first of all argued, unsuccessfully in the Finnish courts, that the payment was not 'unusual'. The Finnish courts essentially held that under relevant Finnish law, the payment was unusual among others because the amount paid was quite high in relation to the overall assets of the company. Nike argued in subsidiary order that Dutch law, the *lex causae* of the franchise agreement, should be applied. Attention then focussed (and the CJEU held on) the burden of proof under Article 13, as well as the exact meaning of 'that law does not allow any means of challenging that act in the relevant case.'

Firstly, the Finnish version of the Regulation seemingly does not include wording identical or similar to 'in the relevant case' (Article 13 *in fine*). Insisting on a restrictive interpretation of Article 13, which it had also held in *Lutz*, the CJEU held that all the circumstances of the cases need to be taken into account. The person profiting from the action cannot solely rely 'in a purely abstract manner, on the unchallengeable character of the act at issue on the basis of a provision of the lex causae'.[139]

Related to this issue the referring court had actually quoted the Virgos Schmit report, which reads in relevant part (at 137): 'By "any means" it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act'. This interpretation evidently reduces the comfort zone for the party who benefitted from the act. It widens the search area, so to speak. It was suggested, for instance, that Dutch law in general includes a prohibition of abuse of rights, which is wider than the limited circumstances of the Faillissementswet, referred to above.

The CJEU surprisingly does not quote the report however it does come to a similar conclusion: at 36: 'the expression "does not allow any means of challenging that act ..." applies, in addition to the insolvency rules of the lex causae, to the general provisions and principles of that law, taken as a whole.'

Attention then shifted to the burden of proof: which party is required to plead that the circumstances for application of a provision of the *lex causae* leading to voidness, voidability or unenforceability of the act, do not exist? The CJEU held on the basis of Article 13's wording and overall objectives that it is for the defendant in an action relating to the voidness, voidability or unenforceability of an act to provide proof, on the basis of the *lex causae*, that the act cannot be challenged. The defendant has to prove both the facts from which the conclusion can be drawn that the act is unchallengeable and the absence of any evidence that would militate against that conclusion (at 25).

However, (at 27) 'although Article 13 of the regulation expressly governs where the burden of proof lies, it does not contain any provisions on more specific procedural aspects. For instance, that article does not set out, inter alia, the ways in which evidence is to be elicited,

[139] See above (n 9) at 21.

what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it'.

'(T)he issue of determining the criteria for ascertaining whether the applicant has in fact proven that the act can be challenged falls within the procedural autonomy of the relevant Member State, regard being had to the principles of effectiveness and equivalence.' (at 44)

The Court therefore once again bumps into the limits of autonomous interpretation. How concrete (as opposed to 'in the abstract': see the CJEU's words, above) the defendant has to be in providing proof (and foreign expert testimony with it), may differ greatly in the various Member States.

The applicable law identified by the Regulation is a national law (as signalled above, typically albeit not always of one of the Member States). The Regulation harmonises jurisdiction and choice of laws rules on insolvency *proceedings*. It does not harmonise insolvency law. One important common principle of insolvency law is however promoted by the Regulation, namely the principle of collective satisfaction. A creditor who, after the opening of proceedings, obtains total or partial satisfaction of his claim individually breaches the principle of collective satisfaction on which the insolvency proceedings are based. Hence, the obligation to return 'what has been obtained'. The liquidator may demand either the return of the assets received or the equivalent in money, as provided for in Article 20:

> Article 20
>
> Return and imputation
>
> 1. A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7.
> 2. In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

5.8 Recognition and Enforcement of Insolvency Proceedings

> To recognize foreign judgments is to admit for the territory of the recognising State the authority which they enjoy in the State where they were handed down. (Virgos–Schmit Report)[140]

The Regulation accords immediate recognition of judgments concerning the opening, course and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings.[141] Within the system of the Regulation, therefore, recognition is automatic. It requires no preliminary decision by a court of the requested State. The automatic recognition however only applies to 'judgments'. Non-judicial proceedings which, as noted above, may be covered by the Regulation, are not subject to its provisions on recognition and enforcement.

[140] Virgos–Schmit Report, para 143, 92.
[141] Ibid.

5.8.1 Judgments Concerning the Opening of Insolvency Proceedings

With respect to the *opening* of the proceedings, the rule is laid down in Article 16 (Article 19 of the 2015 EIR, however, in substance unaltered), and the effects of the recognition is regulated in Articles 17–24 (Articles 22 ff of the 2015 EIR).

> Article 16
>
> Principle
>
> 1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.
> This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.
> 2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

The automatic recognition of the judgments opening insolvency proceedings has practical impact mostly in that it means an 'occupation of the field', and fixation of applicable law.

The law of the State of the opening of proceedings provides for the relevant trigger: the automatic recognition requires that the judgment opening insolvency proceedings become 'effective' in the State of opening. It is not necessary for it to be 'final': even if it is a provisional opening, eg subject to appeal in the State of opening, the judgment still enjoys recognition under Article 16. That insolvency proceedings cannot be brought in the State of recognition on account of the debtor's capacity (one imagines in particular: those Member States which do not have in insolvency procedure for natural persons who are not acting in a professional ('trader') capacity), is specifically ruled out as relevant by the second para of Article 16(1). Article 26 adds moreover specifically that the State requested can in such instance not invoke public policy in its territory to oppose recognition on those grounds.

Article 17 distinguishes between the recognition of main compared to territorial proceedings:

> Article 17
>
> Effects of recognition
>
> 1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.
> 2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Article 17 is now Article 20 of the 2015 EIR, however, in substance the regime is unaltered. The Regulation uses what is known as the 'extension' model: proceedings in another Member State will not, as regard their effects, be simply equated with national proceedings of the State where recognition is sought. Rather, they will be recognised in those States with the same effects attributed to them by the law of the State of opening, and subject to the

limitations outlined above under applicable law: insolvency proceedings have both procedural as well as substantive effects and the latter operate within the limits of applicable law (see Articles 5 ff of the Regulation—now Article 8 ff).

The main proceeding cannot produce its effects in respect of the assets and legal situations which come within the jurisdiction of territorial proceedings opened: that is the result of Article 17(2) and it is of course logical given the very existence of those proceedings. These proceedings may generate effects in other Member States, in particular, they may lead to other Member States having to enforce the return of assets which were abroad without authorisation, after the opening of the territorial proceedings. In that respect, the territorial proceedings limit the reach of the main proceedings.

The main proceedings are not however without any relevance at all for the assets included in any territorial proceedings. In particular, the former Regulation includes a number of coordination and supervision requirements in Articles 31–37 which, as noted, have been significantly strengthened in the 2015 EIR.

5.8.2 Other Judgments in the Course of Insolvency Proceedings

Article 25 of the Insolvency Regulation (Article 32 in the 2015 EIR) concerns, in particular, the recognition and enforceability of judgments other than those directly concerning the *opening* of insolvency proceedings.

1. The first subparagraph of Article 25(1) (Article 32(1) in the 2015 EIR), applies to judgments which concern the 'course and closure' of such proceedings.
2. The second subparagraph of Article 25(1) (Article 32(1) in the 2015 EIR) applies to 'judgments deriving directly from insolvency proceedings and which are closely linked to them', and
3. The third subparagraph applies to judgments relating to preservation measures taken after the request for the opening of the proceedings. Finally
4. Article 25(2) (Article 32(2) in the 2015 EIR) applies to judgments other than all the above, however presumably with some kind of more or less remote link to the insolvency proceeding.

The latter may or may not be covered by the Jurisdiction Regulation. Where they are, the court concerned evidently has to apply the relevant rules of the Brussels I Recast Regulation.[142]

Article 25(3) provides that Member States are not obliged to recognise or enforce a judgment covered by Article 25(1) which might result in a limitation of personal freedom or postal secrecy. This has been deleted in the 2015 EIR.

5.8.3 Defences Against Recognition and Enforcement

As reviewed above in the analysis of COMI, the Regulation is based on the principle of Union trust and consequently on the general assumption that a foreign judgment is valid.

[142] Case C-292/08 *German Graphics* [2009] ECR I-8421.

Article 26's provision on public policy therefore is formulated in a restrictive sense—the identical provision is Article 33 in the 2015 EIR:[143]

> Article 26
>
> Public policy
>
> Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

The only ground for opposing recognition is that the foreign judgment is contrary to the public policy of the requested State. Consequently (Virgos–Schmit Report):[144]

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1. The foreign judgment cannot be the subject of review as regards its substance (*révision au fond*). All questions regarding the substance must be discussed before the courts of the State of the opening of proceedings. In the State where recognition or enforcement is requested, the court may only decide whether the foreign judgment will have effects contrary to its public policy.
2. The [Regulation] contains no provisions as to the verification of the international jurisdiction of the court of the State of origin (the court in the State of the opening of proceedings which has jurisdiction under Article 3 of the [Regulation]). The courts of the requested States may not review the jurisdiction of the court of the State of origin, but only verify that the judgment emanates from a court of a [Member] State which claims jurisdiction under Article 3 of the [Regulation].

5.9 Powers of the Liquidator/Insolvency Practitioner

Article 18 (old; now 21), too, uses the extension model: the liquidator's powers, their nature and their scope are determined by the law of the State of the opening of the proceedings in respect of which he was appointed. That law also establishes the liquidator's obligations (the exercise of which moreover is influenced by the limitations to the applicable law under Articles 7 ff). Articles 31–37 (now 41–51) confer powers on the liquidator of the main proceedings to coordinate those proceedings and any secondary proceedings (which, by virtue of Article 37 (new), he may himself request in the Member State(s) concerned.

Frustration is aired by many commentators that the supervision, cooperation and coordination provisions of the Regulation apply to and between liquidators only, not, at least not formally, to and between courts. While such requirement of cooperation may be assumed to be implied in the Regulation, it would nevertheless have been useful to have had specific instructions to that effect: that is now addressed by a whole set of provisions in the Regulation which aim at encouraging cooperation.

[143] Portugal issued a Declaration to this Article, see [2000] OJ C183/1.
[144] Virgos-Schmit Report, para 202, 126.

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

European Union Regulation on Insolvency Proceedings

Professor Michael Veder, Radboud University and RESOR NV, The Netherlands

Road map

- Introduction
- Scope
- Modified universalism
- COMI
- COMigration
- The reach of the courts of the Member States
- Secondary proceedings
- Groups of companies
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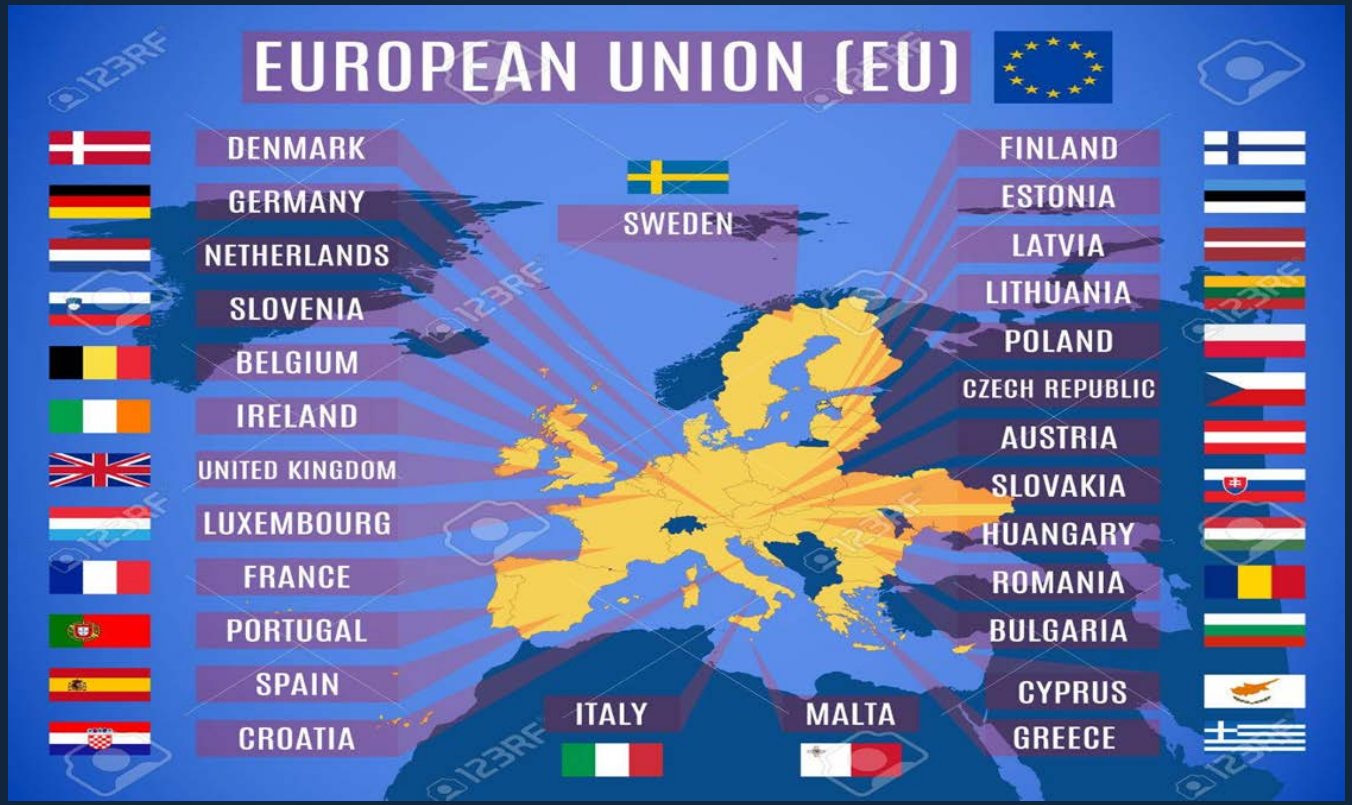
EUROPEAN UNION (EU)
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Introduction

- European insolvency framework
- The Insolvency Regulation is binding in its entirety and directly applicable in all Member States (except Denmark) without the need (or possibility) for ratification or implementation by domestic legislation.
- The Insolvency Regulation does not harmonise substantive or procedural insolvency law in Europe. It is a private international law instrument that contains uniform rules on (i) jurisdiction, (ii) applicable law, and (iii) recognition.
- Mutual trust

• Regulation 1346/2000	Regulation 2015/848
• (from 31 May 2002)	(from 26 June 2017)

- For EU legislation and case law, see www.eur-lex.europa.eu

Scope

- Territorial scope:
  - The Insolvency Regulation applies only to insolvency proceedings where the centre of the debtor's main interests (COMI) is located in the EU.
  - If a debtor's COMI is located outside the EU, the Insolvency Regulation does not apply and courts are free to apply their own domestic private international law rules.
  - If a non-EU corporate debtor's COMI is located in the EU, the Regulation applies!
    - E.g. BRAC Rent-A-Car International Inc

Scope

- The Insolvency Regulation applies to public collective proceedings based on laws relating to insolvency: art 1(1).
  - former Insolvency Regulation was restricted to proceedings in which a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, i.e. proceedings within Art 1(1)(a).
  - The scope of the Insolvency Regulation has been extended to include hybrid and pre-insolvency proceedings
  - NOT the UK scheme of arrangements (Recital 16)

- Annex A

- Certain entities are excluded: art. 1(2)

Modified universalism

- Main proceedings with universal effect
  - Centre of main interests (COMI) (art. 3)
  - Automatic recognition in other Member States (art. 19 and 20)
  - Insolvency proceedings and their effects are governed by the law of the Member State where the proceedings have been opened (art. 7, with exceptions in art. 8-18)
  - Insolvency practitioner can exercise his powers in other Member States (art. 21)
  - Publicity (art. 24-30)

- Secondary proceedings with territorially limited effect in Member States where the debtor has an establishment
  - Establishment (art. 3 (2), 2 (10))
  - Effects restricted to assets situated in that Member State (art. 3(2), 34)
  - Limits the 'universal' effect of main proceedings
- Rules to localise assets: art. 2(9)
- Cooperation and Communication (art. 41 et seq.)

COMI

- Jurisdiction to be determined by the court *ex officio* (art. 4 (1))
- Art. 3 (1)
  - For incorporated debtors: presumption that COMI is at registered office
  - How to rebut the presumption?
    - CJEU re Eurofood (case C-341/04)
    - CJEU re Interedil (case C-396/09)
- Recitals, par. 28 and 30
- COMI to be determined on the basis of the facts at the time of the request to open proceedings
  - CJEU re Staubitz-Schreiber (case C-1/04)
- COMI determination binding on courts of other Member State
  - CJEU re Eurofood (case C-341/04) , see also Recitals, par. 65


airberlin
airberlin
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D-ABFL
NIKI
DOUBLE SATISFACTION
OE-LEO
GlobeGround
Berlin

COMIgration

- Forum shopping not looked at favourably
  - Recitals, par. 5

- Practice: COMI-shifts
  - Change of registered office
  - Change of ”centre of management and supervision”

- Regulation seeks to provide safeguards against fraudulent or abusive forum shopping
  - Recitals, par. 29, 31, 32
  - Art. 3(1), 5

The reach of the courts of the Member States

- The courts of the Member State where proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them
  - Art. 6(1)
  - See e.g. CJEU re NK/BNP Paribas Fortis (case C-535/17)

- Judgements are automatically recognised and can be enforced in other Member States (art. 32)

- Jurisdiction extends to defendants outside of the EU
  - E.g. CJEU re Schmid/Hertel (case C-328/12)

- If an action is determined to be within the scope of the Insolvency Regulation, the conflict of laws rules of the Regulation apply
  - CJEU re Kornhaas/Dithmar (case C-594/14): German directors' liability rules apply to a UK company

Secondary proceedings

- Objectives (Recitals, par. 40)
  - Protection of local interests (e.g. priority rights)
  - Efficient administration of the estate
- Risks
  - E.g. CJEU re Bank Handlowy (case C-116/11)

- Novalties in the EIR (recast)

- Secondary proceedings no longer necessarily liquidation proceedings
- “Synthetic” secondary proceedings (art. 36)
- Postponement of the opening of secondary proceedings in view of negotiations on a rescue plan (art. 38)

Groups of companies

- Each entity within a group is a separate debtor
- Group COMI?
  - Recitals, par. 53
- Chapter V (Insolvency Proceedings of Members of a group of Companies)
  - Obligations of cooperation and communication (art. 56-60)
  - Group coordination proceedings (art. 61-77)

BREXIT