AVOIDANCE ACTIONS IN SECONDARY OR ANCILLARY PROCEEDINGS: SHOULD THE LAW OF THE COMI APPLY?

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TABLE OF CONTENTS

1. INTRODUCTION

The EU Insolvency Regulation (Recast) ("EIR 2015")[1] enables main insolvency proceedings to be opened in the Member State where the debtor has the center of its main interests ("COMI"). Those main proceedings have universal scope and are aimed at encompassing all the debtor's assets.[2] The EIR 2015 permits secondary insolvency proceedings to be opened to run in parallel with, or under certain circumstances even in the absence of, main insolvency proceedings. Secondary insolvency proceedings[3] may be opened in any other Member State where the debtor has an establishment.[4] The effects of secondary insolvency proceedings are limited to the assets located in that State.[5]

Similarly,[6] the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law (the "UNCITRAL Model Law"), distinguishes between "main proceedings", being proceedings opened in the State where the debtor has its COMI, and "non-main proceedings", being proceedings opened in a State where the debtor has an establishment. Chapter 15 of the US Bankruptcy Code on ancillary and other cross-border cases ("Chapter 15"), which was adopted to incorporate the UNCITRAL Model Law into US Law, also makes this distinction.[7]

Many insolvency laws include provisions concerning avoidance actions. Pursuant to such clauses transactions that the debtor entered into prior to the opening of insolvency proceedings can be avoided if certain conditions are met.[8] In civil law jurisdictions, such avoidance actions are often referred to as the *actio pauliana*. Common law jurisdictions typically refer to them as fraudulent conveyances and preferences. In the context of secondary proceedings, the question arises which law governs such

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1 Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings.

2 Recital 23 of the EIR 2015.

3 ` The EIR 2015 only uses the term "secondary proceedings" for proceedings opened in a Member State other than the Member State where the debtor has its COMI and that are opened *after* main proceedings have been opened in the latter Member State. If such proceedings are opened *before* main proceedings have been opened, which is only possible in limited circumstances, the proceedings are referred to "territorial proceedings". In this paper, the term "secondary proceedings" will be used to refer to all proceedings that are opened in the State where the debtor has an establishment and not its COMI. Depending on the framework, the terminology varies and such secondary proceedings can be referred to as, for example, ancillary proceedings, non-main proceedings, nonmain proceedings and territorial proceedings.

4 "'*Establishment' means 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"* (Article 2(10) EIR 2015).

5 Article 3(2) EIR 2015.

6 This is not surprising since the UNCITRAL Model Law in this respect was guided by one of the EIR 2015's predecessors, the European Convention on Insolvency Proceedings of 23 November 1995 (Council Document CONV/INSOL/X1). *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, Guide to Enactment and Interpretation, in: UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation, United Nations, New York (2014) ("Guide to enactment and interpretation"), p. 44.

7 11 U.S.C. § 1502.

8 *See* UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, UNCITRAL Legislative Guide on Insolvency Law, United Nations, New York (2005), p. 135.

avoidance actions? The answer to this question can be of great importance, since the conditions for avoiding transactions differ from jurisdiction to jurisdiction. A transaction that is subject to avoidance under the laws of one jurisdiction, may not be avoidable under the laws of another.

After a short discussion in paragraph 2 of the background and purpose of secondary proceedings in, paragraph 3 of this paper will discuss the different approaches taken in the EIR 2015, the UNCITRAL Model Law and US Law on the law applicable to avoidance actions in the context of main and secondary proceedings.

Paragraph 4 of this paper critiques these rules in respect of secondary proceedings, and discusses whether a better alternative would be to subject avoidance actions in the context of secondary proceedings to the law of the COMI.

2. BACKGROUND AND PURPOSE OF SECONDARY PROCEEDINGS

The distinction between main and secondary proceedings can be tracked back to two doctrinal perspectives that have historically been applied to international insolvency law. The first is known as the principle of *universality* and is based on the idea that insolvency proceedings have universal effect. Pursuant to this perspective, the laws of the State where the insolvency proceedings are opened govern the proceedings and their effects and the insolvency proceedings aim to encompass all the debtor's assets, even if they are spread across various States.[9] The second perspective is contrary to the first and is known as the principle of *territoriality*. In accordance with that principle, the insolvency proceedings will only have legal effects within the jurisdiction of the State in which a court has opened insolvency proceedings.[10]

In practice, these two theories only describe a point of departure. As Wessels put it, many systems "modify or limit the sharp edges of these theories and contain modified or mixed models".[11] These systems generally take the universal effect as a starting point and add features based on the principle of territoriality. This approach is also reflected in the EIR 2015, which takes as a starting point that the courts of the Members State where the debtor has its COMI have jurisdiction to open insolvency proceedings[12] and that the laws of that Member State govern the proceedings and their effect throughout all other Member States,[13] but contains exceptions to this rule. The EU legislator described the reason for these exceptions in recital 22 of the EIR 2015:

"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 throughout the Union. The application without exception of the law of the State of the opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing national laws on security interests to be found in the Member States. Furthermore, the preferential rights enjoyed by some creditors in insolvency proceedings are, in some cases, completely different. (…) This Regulation should take account of such differing national laws in two different ways. On the one hand, provision should be made for special rules on the applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the

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9 *See* Wessels, Bob, International Insolvency Law Part I, Wolters Kluwer, Deventer (2015), nr. 10009.

10 *See* Wessels (2015), nr. 10013.

11 Wessels (2015), nr. 10024.

12 Article 3.1 EIR 2015.

13 Article 7 EIR 2015.

other hand, national proceedings covering only assets situated in the State of the opening of proceedings should also be allowed alongside main insolvency proceedings with universal scope."

Under the EIR 2015, secondary proceedings can be opened by the court of a Member State if a debtor possesses an establishment within the territory of that Member State, but has its COMI in another Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the Member State where the secondary proceedings were opened.[14]

The secondary proceedings essentially have two functions: a *defensive function* and an *auxiliary function.*[15] To explain the first function, Mangano points out that one argument against the application of the principle of universality is that the insolvency laws of the Member State where the debtor has its COMI, *"might not be regarded as sufficiently protective by creditors resident in another Member State who would favour the application of their domestic law"* in relation to assets located in their country of residence.[16] *"The opening of secondary proceedings would, however, enable this to occur."*[17] According to Bork,[18] the option of opening secondary proceedings established an incentive to Member States to *"surrender"* to the universality of the EIR 2015, because otherwise major differences in substantive law would *"fuel the reluctance to accept the application of foreign insolvency law."* The opening of secondary proceedings will 'protect' the creditors against the effects of foreign insolvency law and enable them to benefit from local insolvency law within the scope of the secondary proceedings.[19] This is the defensive function of secondary proceedings. The *auxiliary function* of secondary proceedings is to support the main proceedings.[20] The most common example is that the opening of secondary proceedings may give the insolvency practitioner the opportunity to affect assets located abroad and encumbered with a right in rem.[21] Wessels[22] gives several examples of further advantages of secondary proceedings, including that the laws of the Member State where the secondary proceedings are opened may offer wider powers than the *lex concursus* of the main proceedings,[23] while Mangano[24] refers to *"prescriptions* [in the laws applicable to the secondary proceedings, JvH] *(...) which would prove more advantageous for the general body of creditors"* as an example of the auxiliary effect of secondary proceedings.

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14 Article 3.2 EIR 2015.

15 Virgos, Miguel and Schmit, Etienne, Report on the Convention on Insolvency Proceedings, 1996 ("Virgós/Schmit-report"), nrs. 32 and 33. Mangano, Renato, Secondary Insolvency Proceedings in Bork, R. and Van Zwieten, K. (eds.), Commentary on the European Insolvency Regulation, Oxford University Press, Oxford (2016), nr. 34.05 *et seq.*

16 Mangano (2016), nr. 34.06 with reference to other sources and case law.

17 *Ibid.*

18 Bork, Reinhard, in Bork, R. and Mangano, R., European Cross-Border Insolvency Law, Oxford University Press, Oxford (2016), nr. 7.07.

19 Virgós/Schmit-report, nr. 32.

20 Mangano (2016), nr. 34.07.

21 Such right in rem remains unaffected by the main proceedings if the assets where located abroad at the time of opening of the main proceedings (Article 8 EIR 2015). Virgós/Schmit-report, nr. 33.

22 Wessels, Bob, International Insolvency Law Part II, Wolters Kluwer, Deventer (2017), nr. 10838a.

23 I.e. the law of the State where the debtor has its COMI.

24 Mangano (2016), nr. 34.07.

As mentioned before, the UNCITRAL Model Law contains a similar distinction between main and secondary proceedings. Since the UNCITRAL Model Law in this respect was guided by one of the EIR 2015's predecessors, the European Convention on insolvency proceedings,[25] this choice was apparently made for similar reasons. The same seems to apply to US Chapter 11.

3. PROVISIONS CONCERNING THE LAW APPLICABLE TO AVOIDANCE ACTIONS

3.1 EIR 2015

Article 7(1) of the EIR 2015 provides that, save as otherwise provided in the EIR 2015, 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 (the 'State of the opening of proceedings'). Art. 7(2)(m) of the EIR 2015 provides that the laws of the State of the opening of the insolvency proceedings, govern "*the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors."* Article 16 of the EIR 2015 provides that *"Article 7(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

- the law of that Member State does not allow any means of challenging that act in the relevant case."

This system, often referred to as the "double test", dictates that the stricter of the two laws (i.e. the least favourable for avoidance) determines the vulnerability of the act to avoidance.[26] The system aims to protect the counterparty and to uphold its legitimate expectations of the validity of the act in accordance to the law normally governing it.[27]

Article 34 of the EIR 2015 provides that the effects of secondary insolvency proceedings shall be restricted to the assets of the debtor situated within the territory of the Member State in which those proceedings have been opened. Article 35 of the EIR 2015 merely reproduces the contents of Article 4(1) EIR 2015 providing that the secondary insolvency proceedings are governed by the laws of the Member State of opening of the secondary proceedings, save as provided otherwise in the EIR 2015. Albeit that Article 35 EIR 2015 does not contain a non-exhaustive list of topics governed by the *lex concursus* as is contained in Article 7(2) EIR 2015, this list is deemed to apply, including Article 7(2)(m) concerning voidable transactions.[28] The same applies to the limitations contained in Article 16 of the EIR 2015.[29]

This means that the laws of the State of opening of the secondary insolvency proceedings govern avoidance actions where damage has been caused to the debtor's assets located in the Member State

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25 *See* Guide to enactment and interpretation to UNCITRAL Model Law on Cross-Border Insolvency, p. 44.

26 Mangano (2016), nr. 16.04.

27 Virgós/Schmit-report, nr. 138. *See* Guide to enactment and interpretation to UNCITRAL Model Law on Cross-Border Insolvency, p. 71

28 Mangano (2016), nr. 35.06.

29 Mangano (2016), nr. 35.10.

of opening of the secondary proceedings.[30] Virgós and Schmit give the example that the relevant legal act (sale, establishment of a right in rem) concerns an assets that was located in that State "*at the relevant time"*. According to Wessels, *"the latter moment in time most likely refers to the time that the act was constituted and not to the (relevant) time of the opening of the insolvency proceedings."*[31] As mentioned, the "double test" of Article 16 EIR 2015 also applies in the event that the laws of the State of opening of the secondary insolvency proceedings govern the avoidance action.

3.2 UNCITRAL Model Law

Article 15 UNCITRAL Model Law provides that a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative was appointed. Pursuant to Article 17(2) UNCITRAL Model Law, a foreign proceeding that meets the necessary requirements will be recognized as a foreign main proceeding if it takes place in the State where the debtor has its COMI; or as a foreign non-main-proceeding if the debtor has an establishment in the foreign State.

Article 23 UNCITRAL Model Law relates to avoidance actions. It provides:

"1. Upon recognition of a foreign proceeding, the foreign representative has standing to initiate [refer to the types of actions to avoid or otherwise render ineffective acts detrimental to creditors that are available in this State to a person or body administering a reorganization or liquidation].

2. When the foreign proceeding is a foreign non-main proceeding, the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding."

This Article merely provides that the foreign representative has standing to initiate avoidance actions. The Article deliberately does not provide which law is applicable to such avoidance actions and neither does it address the right of a foreign representative to bring such an action under the law of the State in which the foreign proceeding is taking place.[32]

The Guide to Enactment and Interpretation does not specify when assets *"should be administered in the foreign non-main proceeding."* According to Berends,[33] this refers to assets that were located in the State of opening of the foreign non-main proceeding at the time of opening of these proceedings or should have been there, but for the detrimental act.

3.3 US Chapter 15

As mentioned, US Chapter 15 is based on the UNCITRAL Model Law and its purpose is to incorporate the UNCITRAL Model Law into US Law.[34]

11 U.S.C. §1521(a)(7), which is based on Article 21 UNCITRAL Model Law, explicitly excludes avoidance actions available to US bankruptcy trustees (§ 547 on Preferences, § 548 on Fraudulent transfers and obligations, § 550 on Liability of transferee of avoided transfer) from the types of relief

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30 Virgós/Schmit-report, nr. 91(m). Wessels (2017), nr. 10628.

31 *Ibid.* In the same sense: Bork (2016), nr. 7.67.

32 Guide to Enactment and Interpretation, nr. 201.

33 Berends, A.J., Grensoverschrijdende insolventie, Uitgeverij Paris, Zutphen (2017), p. 306. Berends was involved on behalf of the Kingdom of the Netherlands in the negotiations on the UNCITRAL Model Law.

34 11 U.S.C. § 1501(a).

that the courts can grant on request of the foreign representative. 11 U.S.C. §1523 relates to avoidance actions and provides:

"(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding."

In other words, once US insolvency proceedings are opened, the foreign representative has standing to initiate avoidance actions under the US Bankruptcy Code, e.g. an action for a preference or a fraudulent conveyance. The same applies in respect of secondary proceedings, but subject to the limitation that such an action can only relate to assets that, under United States law, should be administered in the foreign non-main proceedings.

Does this mean that the foreign representative cannot use the law of the State of opening of the foreign proceedings to avoid a transaction under Chapter 15? In *Fogerty v. Petroquest (In re Condor Ins. Ltd. ("Condor")*[35], bankruptcy proceedings were opened in respect of Condor Insurance Limited in St. Kitts & Nevis which were recognized in the United States as foreign main proceedings under Chapter 15. The foreign representatives commenced an avoidance action in the United States based on St. Kitts & Nevis law. The US Court of Appeals for the Fifth Circuit ruled that US courts have the authority to permit foreign representatives to initiate avoidance actions based on the laws of the State of opening of the insolvency proceedings. In the UNCITRAL report *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective*,[36] it is pointed out that a similar interpretation had been approved in Atlas Shipping.[37]

It is subject to discussion whether the *Condor* rule is correct and, if so, whether its scope should or should not be limited to insurance companies since US law prohibits insurance companies from filing for insolvency and commencing avoidance actions under federal law, including under Chapter 7 or Chapter 11 of the US Bankruptcy Code.[38] This discussion falls outside the scope of this paper. In this paper it will be assumed that the *Condor* rule properly reflects US law.

Since *Condor* relates to main proceedings, it does not relate to the question which law is applicable to avoidance actions brought in the context of secondary proceedings. In *Condor*, the court held:

"Though the language [of Chapter 15, JvH] *does not explicitly address the use of foreign avoidance law, it suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions. And this silence is loud given the history of the statute including the efforts of the United States to create processes for transnational businesses in extremis."*

This reasoning might likewise be applied to secondary proceedings, causing that in the context of secondary (or nonmain in the terminology of Chapter 15) proceedings, avoidance actions can be based

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35 601 F.3d 310 (5th Cir. 2010).

36 UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective, United Nations, New York (2012), p. 46.

37 404 B.R. 726 (Bankr. S.D.N.Y. April 2009)

38 *See* Schorr, Segaal, Avoidance Actions Under Chapter 15: Was Condor Correct?, Fordham International Law Journal 2016, vol. 35 Issue 1, Article 1.

on the *lex concursus* of the secondary proceedings provided that these actions relate to assets that, under United States law, should be administered in the foreign non-main proceedings.

4. AN ALTERNATIVE APPROACH: LAW OF THE COMI

Further to the discussion in paragraph 3 above, under both the EIR 2015 and US Chapter 15, avoidance actions relating to assets that fall or should fall within the scope of the secondary proceedings, can be governed by the laws of the State of opening of the secondary proceedings.

The question arises whether this deviation from the principle of universality is just and fair and whether a better alternative would be to apply the law of the COMI to avoidance actions where the assets concerned fall or should fall within the scope of the secondary proceedings.

An example. Debtor A has its COMI in the Netherlands and an establishment in Germany. On date X Debtor A sells certain assets under a sales agreement governed by French law to Counterparty B. Counterparty B only deals with Debtor A's head offices in the Netherlands and is not aware of its establishment in Germany. The sold assets are located in the Netherlands, France and Germany at the time of the signing and closing of the sales transaction. Several weeks after date X, insolvency proceedings are opened in respect of Debtor A in the Netherlands. These are main proceedings because Debtor A has its COMI in the Netherlands. Several weeks thereafter, on application of one of A's smaller local creditors, secondary insolvency proceedings are opened in respect of A in Germany.

The Dutch insolvency practitioner initiates an avoidance action against Counterparty B seeking to avoid the sales transaction. Due to the secondary proceedings, such an avoidance action can only relate to the assets that were located in the Netherlands and France. The secondary proceedings act as a "shield" over the assets located in Germany, in which respect the German insolvency practitioner has exclusive standing to initiate avoidance actions based on in insolvency law.

Pursuant to Article 7(1)(m) EIR 2015, Dutch law governs the avoidance actions brought by the Dutch insolvency practitioner. The conditions for avoidance under Dutch law are met, and Counterparty B cannot prove that French law (which governed the sales agreement) does not allow any means of challenging the relevant act within the meaning of Article 16 EIR 2015, so the "double test" does not provide an escape to Counterparty B. Hence, the avoidance action in respect of the Dutch and French assets is successful.

Enticed by the successful avoidance action initiated by her Dutch counterpart, the German insolvency practitioner also commences an avoidance action, which relates to the assets that were located in Germany at the relevant time. Pursuant to Article 35 EIR 2015 in conjunction with Article 34 final sentence EIR 2015, German law applies to that avoidance action. Unfortunately, it appears that German law is stricter (i.e. less favourable for avoidance) under the given circumstances and the conditions for avoidance under German law are not met. Therefore, the avoidance action in respect of the German assets is not successful.

Under different circumstances, the opposite outcome would also be possible: being unaware of A's establishment in Germany, Counterparty B could be confronted with a successful avoidance action under German law in respect of the German assets (provided that French law governing the sales transaction is not or not sufficiently less favourable for avoidance), whereas the sale of the Dutch and French assets remains unaffected because the Dutch law requirements for avoidance are not met.

This is a result of the fact that the rules concerning the law applicable to avoidance actions in the context of secondary insolvency proceedings deviate from the principle of universality. If the principle of universality would be applied, the laws of the COMI (in the example: Dutch law) would also be applicable to avoidance actions brought in the context of secondary proceedings.

There is little case law and literature on the law applicable to avoidance actions in the context of secondary proceedings. The reasons for the deviation from the principal of universality in this context seem to include the following. As mentioned previously in paragraph 2, the defensive function of secondary proceedings entails giving the comfort to local creditors (and Member States) that they can benefit from the protection provided by local insolvency law and that they cannot be required to accept less protection provided by foreign insolvency law in respect of local assets. This rationale also applies to the protection provided by avoidance actions. The auxiliary function of secondary proceedings will allow the insolvency practitioner in the main proceedings to request the opening of local proceedings if the avoidance provisions under the laws of the secondary proceedings are more favourable to avoidance than those under the laws of the COMI.[39]

That being said, the choice for applicability of the laws of the State of opening of the secondary proceedings has significant downsides. As illustrated by the example, the assessment of one and the same transaction can lead to different outcomes depending on the location of the relevant assets. Insolvency proceedings and proceedings concerning avoidance actions might be less efficient because one and the same transaction must be assessed by reference to the laws of at least two (in the example three) jurisdictions. The counterparty can be confronted with the laws of the jurisdiction in which the debtor has an establishment if the relevant assets are located in that jurisdiction. That can come unexpected to the counterparty, because the counterparty might not be aware of the establishment of the debtor; the place of the COMI needs to be ascertainable by third parties,[40] but an establishment does not. It can even be that the counterparty is unaware that the relevant assets are located abroad at the relevant time. To certain extent this is mitigated under the EIR 2015, but not under US Law, by the "double test" of Article 16 EIR 2015. Due to that provision, the counterparty can be certain that the transaction will be upheld if it verifies that the transaction cannot be challenged under the laws applicable to the transaction (in the example French law). Nevertheless, this uncertainty and unpredictability form a serious downside since one of the primary functions of proper conflict-of-law rules is to be predictable and to protect legitimate expectations.[41]

The current rules concerning avoidance actions in secondary proceedings can also have negative consequences to the position of the creditors in the main proceedings. Due to the opening of secondary proceedings, avoidance actions that would otherwise have been governed by the laws of the COMI, shall be governed by the laws of the State of opening of the secondary proceedings to the extent they relate to 'local assets'. As in the example, the laws of the State of opening can be less favourable to avoidance causing that transactions that could be successfully challenged without secondary proceedings, might no longer be successfully challenged once secondary proceedings are opened. Since the secondary proceedings may be requested not only by the insolvency practitioner in the main proceedings, but by anyone empowered to do so under the *lex fori secundarii*,[42] the secondary proceedings may be contradictory to the interests pursued by the insolvency practitioner in the main

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39 *See* Mangano (2016), nr. 34.07.

40 Article 3(1) EIR 2015.

41 *See* for instance Regulation (EC) nr. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), recital 6: *"The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought." See* EIR 2015, recital 67: *"To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule."*

42 Article 37(1) EIR 2015. US Law will materially lead the same result.

proceedings.[43] Under the EIR 2015, this risk is to certain extent mitigated by the provision in Article 38 EIR 2015 that the court shall, at the request of the insolvency practitioner in the main proceedings, not open secondary insolvency proceedings if (i) that insolvency practitioner has given an undertaking that when distributing the assets located in the Member State in which secondary proceedings could be opened, or the proceeds of such assets, it will comply with the distribution and priority rights under the laws of the location of the relevant assets;[44] and (ii) the court is satisfied that the undertaking adequately protects the general interests of local creditors.

Some of the arguments that can be made against applicability of the laws of the State of opening of secondary proceedings to avoidance actions, apply to secondary proceedings in general.[45] Nevertheless, a choice for the laws of the State of the COMI would lead to a straight forward and for all parties involved predictable outcome, including the debtor's counterparty, that is preferable over the downsides of the current system adopted by the EIR 2015 and US Law. The main disadvantage of the suggested alternative approach would be that the creditors can no longer benefit from laws of secondary proceedings that are more favourable to avoidance than the laws of the COMI. This disadvantage seems, however, to be outweighed by the advantages of this approach.

5. CONCLUSION

The UNCITRAL Model Law does not contain conflict-of-laws provisions regarding the law applicable to avoidance actions brought by an insolvency practitioner. Under the current rules of the EIR 2015 and US Chapter 15, such actions are or can be governed by the laws of the State of opening of the foreign proceedings. When secondary proceedings have been opened in a State where the debtor has an establishment, such actions are governed by the laws of the State of opening of the secondary proceedings to the extent that the assets were located at the relevant time in that State. Under the EIR 2015, the counterparty to the challenged transaction can escape an otherwise successful challenge, if it can prove that the transaction was governed by the laws of another Member State and such laws do not allow challenging that act in the relevant case.

This system can lead to uncertain and unpredictable outcomes, also because the counterparty might not be aware that the debtor has an establishment and might not be aware of the location of the assets at the relevant time. A choice for the laws of the State of the COMI would lead to a straight forward and predictable outcome for all parties involved, including the debor's counterparty and would therefore be preferable over the current system adopted by the EIR 2015 and US Law.

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43 Bork (2016), nr. 7.10

44 Article 36 EIR 2015.

45 *See* Bork (2016), nr. 7.10-11.

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