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External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings

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List of Abbreviations

AB	Aktiebolag (Swedish limited company on shares)
AG	Advocat General at the European Court of Justice / Amtsgericht (German Local Court)
ALJB	Association Luxembourgeoise des Juristes de Droit Bancaire
All. E.R	All England Law Reports
Am.Bankr.L.J.	American Bankruptcy Law Journal
AnfG	Anfechtungsgesetz (Act on Contestation of the debtor's transactions)
Art. / Art	Article
BB	Betriebs-Berater (German legal journal)
BCC / B.C.C.	British Company Law Cases (British legal journal)
BDT	Bírósági Döntések Tára (Hungarian case law report of the Court Appeals of Hungary)
BeckRS	Beck-Rechtsprechung (German legal journal, collection of court decisions)
BG	Schweizerisches Bundesgericht (Federal Supreme Court of Switzerland)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBI.	Bundesgesetzblatt (Federal Law Gazette)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Collection of the decisions of the Federal Supreme Court of Switzerland)
BGH	Bundesgerichtshof (Federal Supreme Court, Austria / Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Collection of the decisions of the German Supreme Court)
BH	Bírósági Határozatok (Hungarian case law report of the Supreme Court of Hungary)
BOE	Boletín Oficial del Estado
BPIR	Bankruptcy and Personal Insolvency Reports (British legal journal)
BRL	Polish Bankruptcy and Reorganisation Law
B.V. / BV	Besloten vennootschap met beperkte aansprakelijkheid (Dutch private limited liability company)
CA	Companies Act / Cour d'appel
CAO	Collectieve arbeidsovereenkomsten (Bargaining agreement under Belgian law)
CDIP	Code du droit international privé (Belgian Code on Private International Law)
cf.	confer
Ch.	Law Reports, Chancery Division
Ch. Com.	Chambre commerciale de la Cour de Cassation
C.L.J.	Cambridge Law Journal

List of Abbreviations

COMI	Centre of the debtor's main interests (Art. 3 (1) EIR)
Comp. Law	Company Lawyer (British legal journal)
CVA	Company Voluntary Arrangement
DAOR	Le droit des affaires – het ondernemingsrecht (Belgian legal journal)
DEE	Δίκαιο Επιχειρήσεων & Εταιριών (Dikaio Epixeiriseon kai Etairion, Greek legal journal)
DIP	Debtor-in-possession proceedings (Eigenverwaltung)
DStR	Deutsches Steuerrecht (German legal journal)
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (German legal journal)
EBH	Elvi Bírói Határozat (Hungarian law report of the Supreme Court of Hungary)
EC	European Communities
ECFR	European Company and Financial Law Review (German Legal Journal)
ECJ	European Court of Justice
ECL	European Company Law (Dutch legal journal)
ECR	European Court Reports
ed. / ed(s).	edition / editor(s)
EEC	European Economic Community
e.g.	exempli gratia (for example)
EIR	European Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings)
ESUG	Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (Law for the Further Facilitation of the Restructuring of Enterprises)
et al.	et alii (and others)
et seq. / et seqq.	et sequens / et sequentia (and the following)
etc.	et cetera
EU	European Union
EuGH	Europäischer Gerichtshof (European Court of Justice, see ECJ)
EuGRZ	Europäische Grundrechte-Zeitschrift (German Legal Journal)
EuGV(V)O	Europäische Gerichtsstands- (und Vollstreckungsverordnung), Brüssel-I-Verordnung, see JR
EuInsVO	Europäische Insolvenzverordnung (European Insolvency Regulation, see EIR)
EuIPR	Europäisches internationales Privatrecht
EuLF	European Legal Forum (German legal journal)
EuZPR	Europäisches Zivilprozessrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German legal journal)
e.V.	Eingetragener Verein
EvBl.	Evidenzblatt der Rechtsmittelentscheidungen (Austrian legal journal, collection of court decisions)
EWCA Civ	Court of Appeal of England and Wales (Civil Division)

List of Abbreviations

EWHC (Ch)	High Court of Justice (High Court of England and Wales), Chancery Division
EWHC (Comm.)	High Court of Justice (High Court of England and Wales), Commercial Court
EWiR	Entscheidungen zum Wirtschaftsrecht (German legal journal)
EWS	Europäisches Wirtschafts- und Steuerrecht (German legal journal)
Fasc.	Fascicule
FD-InsR	Fachdienst Insolvenzrecht (German legal journal)
FN / Fn	footnote
FS	Festschrift (German for Liber Amicorum)
GmbH	Gesellschaft mit beschränkter Haftung
GPR	Gemeinschaftsprivatrecht (German legal journal)
GWR	Gesellschafts- und Wirtschaftsrecht (German legal journal)
HelHO	Helsingin hovioikeuden osalta (Helsinki Court of Appeal, collection of court decisions)
HGB	Handelsgesetzbuch (German Commercial Code)
i.a.	inter alia (among others)
IA	Insolvency Act (UK)
i.e.	id est (that is)
IFLR	International Financial Law Review
IILR	International Insolvency Law Review
IIR	International Insolvency Review
IL&P	Insolvency Law & Practice
Inc.	Incorporated
InCA	International Caselaw Alert (Legal Journal)
InsO	Insolvenzordnung (German Insolvency Code)
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals
Insolv.Int.	Insolvency Intelligence (British legal journal)
InsRNews	See FDInsR (German legal database)
IO	Insolvenzordnung (Austrian Insolvency Code)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German legal journal)
IPRG	Bundesgesetz über das internationale Privatrecht (Swiss Code of Private International Law)
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (German legal journal, collection of court decisions)
IVA	Individual voluntary arrangement
J.B.L.	Journal of Business Law
J Consum Policy	Journal of Consumer Policy (German legal journal)
J.I.B.L.R.	Journal of International Banking Law and Regulation (British legal journal)
JLMB	Jurisprudence de Liège, Mons et Bruxelles (Belgian legal journal)
JO	Journal officiel de l'Union européenne (see OJ)
JOR	Jurisprudentie Onderneming & Recht (Dutch legal data

List of Abbreviations

	base)
JR	Judgement Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)
JT (Lux)	Journal des tribunaux (Luxembourg) (Luxembourgian legal journal)
juris	Juristisches Informationssystem für die Bundesrepublik Deutschland (German legal database)
jurisPR-InsR	Juris Praxisreport Insolvenzrecht (German legal database)
KFM	Kronofogdemyndighet (Swedish Enforcement Authority)
kft	Korlátolt Felelősségű Társaság (Hungarian limited liability corporation)
KG	Kommanditgesellschaft (German limited partnership)
KTS	Zeitschrift für Insolvenzrecht – Konkurs, Treuhand, Sanierung (German legal journal)
L	Legislation (see Official Journal)
LArbG	Landesarbeitsgericht (Regional Labour Court)
LCE	Loi relative à la continuation des entreprises (Belgium)
LF	Loi sur les faillites (Belgian Bankruptcy Law)
LG	Landgericht (German Regional Court) / Landesgericht (Austrian District Court)
LJN	Landelijk Jurisprudentie Nummer (Dutch legal journal, collection of court decisions)
lit.	litera
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly (British legal journal)
LMK	Lindenmaier-Möhring – Kommentierte BGH-Rechtsprechung (German legal journal)
Ltd.	Limited liability company
NCC	New Civil Code (Romania)
NIPR	Nederlands internationaal privaatrecht (Dutch legal journal)
NIQB	Northern Ireland Queen's Bench Division
NJA	Nytt juridiskt arkiv (Swedish legal journal)
NJW	Neue Juristische Wochenschrift (German legal journal)
NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungsreport (German legal journal)
No / No. / no / no. / nr. / n°m / n°	number
N.V. / NV	Naamloze vennootschap (Dutch public limited liability company)
NZG	Neue Zeitschrift für Gesellschaftsrecht (German legal journal)
NZI	Neue Zeitschrift für Insolvenzrecht (German legal journal)
OGH	Der Oberste Gerichtshof (Austrian Supreme Court)
OHG	Offene Handelsgesellschaft (German general partnership)
OJ	Official Journal of the European Union (see JO)
OLG	Oberlandesgericht (Higher Regional Court, Austria /

List of Abbreviations

	Germany)
Ors	Others
OY	Osakeyhtiö (Finnish limited company)
p(p).	page(s)
para(s)	paragraph(s)
PIL	Private international Law
PLC	Public limited company
Q	Question
r(r)	rule(s)
R.D.C.	Revue de Droit commercial Belge (Belgian legal journal)
RDIPP	Rivista di diritto internazionale privato e processuale (Italian legal journal)
RdW	Österreichisches Recht der Wirtschaft (Austrian legal journal)
Rev.	Revue
Rev.crit.DIP	Revue critique de droit international privé (French legal journal)
Riv.dir.int.priv.proc.	Rivista di diritto internazionale privato e processuale (Italian legal journal)
RIW	Recht der internationalen Wirtschaft (German legal journal)
RSDIE	Revue suisse de droit international et européen
SA / S.A.	Société anonyme / Sociedad Anónima
SARL / Sarl	Société à responsabilité limitée
SAS	Société par actions simplifiée
SchKG	Bundesgesetz über Schuldenbetreibung und Konkurs (Swiss Insolvency Code)
s. / sec. / ss.	section(s)
S.I.	Statutory Instrument
SIA	Sabiedrība ar ierobežotu atbildību (Latvian limited liability company)
SpA	Società Per Azioni (Italian shared company)
s.p.r.l.	Société Privée à Responsabilité Limitée
Srl	Società a Responsabilità Limitata (Italian limited company)
SZ	Sammlung Zivilsachen, Sammlung bürgerlichrechtliche Entscheidungen in Österreich (Austrian Supreme Court Reporter)
TBH	Revue de droit commercial Belge (Belgian legal journal)
TFEU	Treaty on the Functioning of the European Union
TranspR	Transportrecht (German legal journal)
UAB	Uždaroji akcinė bendrovė (Lithuanian closed stock company)
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
URG	Unternehmensreorganisationsgesetz (Austrian Business Reorganisation Act)
v	versus
VAT	Value-Added Tax

List of Abbreviations

VersR	Versicherungsrecht – Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht (German legal journal)
VG	Verwaltungsgericht (Administrative Court)
VIA	Verbraucherinsolvenz aktuell (German legal journal)
viz.	videlicet (namely)
VW	Versicherungswirtschaft (German legal journal)
WM	Wertpapiermitteilungen (German legal journal)
ZEuP	Zeitschrift für Europäisches Privatrecht (German legal journal)
ZFPPIPP	Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (Slovenian Law on Financial Operations, Procedures concerning Insolvency and Compulsory Liquidation)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (German legal journal)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (German legal journal)
ZIK	Zeitschrift für Insolvenzrecht und Kreditschutz (Austrian legal journal)
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (German legal journal)
ZIP	Zeitschrift für Wirtschaftsrecht (German legal journal)
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
Zrt.	Zártkörűen Működő Részvénytársaság (Hungarian private public company)
ZVG	Zwangsversteigerungsgesetz (German Compulsory Auction Act)
ZVI	Zeitschrift für Verbraucher- und Privatinsolvenzrecht (German legal journal)
ZZP	Zeitschrift für Zivilprozess (German legal journal)

1 Introduction

1.1 Methodology, Scope and Aim of the Study

The following study has been conducted by teams of the Universities of Heidelberg and Vienna headed by Professor Burkhard Hess, Professor Paul Oberhammer and Professor Thomas Pfeiffer, the general reporters, with the support of a network of experts representing every Member State of the European Union (with the exception of Denmark). It aims at comprehensively analysing the application and the effects of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings in 26 EU-Member States (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (England/Wales and Scotland)).¹ According to the tender (JUST/2011/JCIV/PR/0049/A4), the scope of the study should encompass the legal practice in the Member States following the time at which the Regulation entered into force. The study's purpose is to demonstrate and to evaluate the practical application of the European Insolvency Regulation in the EU-Member States. The study is based on the authors' own legal research as well as on empirical research carried out on the basis of a comprehensive questionnaire addressing factual and legal questions concerning the Insolvency Regulation.² In addition, the project leaders elaborated detailed guidelines for the interviews conducted with stakeholders engaged in cross-border insolvency proceedings, in particular insolvency practitioners, lawyers, judges and other relevant practitioners, credit institutions, accountants, companies, academics as well as consumer protection associations.³ The study aims at preparing a basis for the Commission's report on the application of the Insolvency Regulation as provided for in Article 46.

¹ Denmark was not included in this study, since the Insolvency Regulation does not apply to Denmark, cf. recital 33.

² The questionnaire is available at: <http://www.ipr.uni-heidelberg.de/InsReg>.

³ General and national reporters conducted written and oral interviews with hundreds of stakeholders. It was the task of the national reporters to choose the stakeholders.

The report is based on a comprehensive, legal and empirical approach, which focuses on the relevant case law of the ECJ and the national courts, on statistical data and experiences of various stakeholders involved in the daily application of the Regulation (e.g. insolvency practitioners, lawyers, judges and other relevant practitioners, bankers, accountants and consumer protection associations). However, the collection of statistical data proved difficult as this information is not collected in the EU-Member States on a regular and comprehensive basis.⁴ Accordingly, the study is mainly based on interviews, case law and legal literature. Nevertheless, according to the general reporters' experiences in dealing with comparative studies⁵, interviews with relevant stakeholders are the most efficient way of obtaining reliable information. This experience was confirmed by the discussion carried out with the authors of the report and the national reporters directly with stakeholders in interviews and conferences concerning the most important issues. The general reporter's own research helped to reflect and to evaluate the results of this process.

1.2 Outline of the Study

1.2.1 The Different Parts

The study follows the structure of the tender (JUST/2011/JCIV/PR/0049/A4) and provides for a legal analysis of the application of the EIR, an empirical analysis of the application in each Member State and a synthesis of the empirical and legal analysis. The study evaluates the Regulation and provides for recommendations for its revision.

1.2.2 The Comparative Research

For a better understanding of the study's approach, it seems advisable to briefly outline its unfolding. From March 2012 through April 2012, the general

⁴ The EU-Commission and the authors of the present study were well aware of the difficulties relating to the collection of statistical data. In fact, there are only four Member States (Austria, Poland, Slovenia and the United Kingdom) dealing with a comprehensive collection of relevant data.

⁵ See for example Study No. JAI/A3/2002/02 on making more efficient the enforcement of judicial decisions within the European Union; Study No. JLS/C4/2005/03 on the application of Regulation Brussels I in the Member States and Study No. IP/C/JURI/IIC/2010-076 on the interpretation of the public policy exception as referred to in EU instruments of Private International and Procedural Law.

reporters elaborated a questionnaire (on empirical data, statistical data and for the preparation of the legal analysis), which was distributed among the national reporters. Additionally, the general reporters elaborated guidelines for the interviews to be conducted by the national reporters.⁶

In April 2012, the questionnaires were sent to the national reporters who collaborated in this research as a network of correspondents. The following contributors remained in continuous, close contact with the study's general correspondents and drafted the national reports.

All reporters are specialists in Insolvency Law and in European Law of Civil Procedure: *Mag. Gottfried Schellmann* and *Michael Slonina, LL.M.* (Austria); *Dennis Lievens* (Belgium); *Polina Pavlova* and *Kristina Sirakova* (Bulgaria); *Prof. Dr. Nikolaos Klamaris* (Cyprus); *Dr. Tomáš Richter* (Czech Republic); *Dr. Paul Varul* and *Dr. Signe Viimsalu* (Estonia); *Prof. Dr. Linna Tuula* (Finland); *Prof. Dr. Gilles Cuniberti* (France)⁷; *Prof. Dr. Burkhard Hess*, *Prof. Dr. Thomas Pfeiffer*, *Prof. Dr. Andreas Piekenbrock*, *Christopher Seagon*, *Dr. Björn Laukemann* and *Dr. Robert Magnus* (Germany); *Prof. Dr. Nikolaos Klamaris* (Greece)⁸; *Prof. Dr. Zoltán Csehi* (Hungary); *Dr. Ailbhe O'Neill* (Ireland); *Prof. Dr. Remo Caponi* and *Prof. Dr. Federico Maria Mucciarelli* (Italy); *Veronika Sajadova* (Latvia); *Dr. Laura Kirilevičiūtė* (Lithuania); *Prof. Dr. Gilles Cuniberti* (Luxembourg)⁹; *Dr. Krista Pisani Bencini* (Malta); *Prof. Dr. Michael Veder* (The Netherlands); *Dr. Marek Porzycki* and *Dr. Anna Rachwal* (Poland); *Dr. Carl Friedrich Nordmeier supported by Prof. Dr. Texeiro de Sousa* (Portugal); *Gheorghe-Liviu Zidaru* (Romania); *Slavomír M. Čauder* and *Dr. Ernst Giese* (Slovakia); *Prof. Dr. Aleš Galič*¹⁰ (Slovenia); *Prof. Dr. Francisco J. Garcimartín Alférez*, *Prof. Dr. Iván Heredia Cervantes* and *Prof. Dr. Elisa Torralba* (Spain); *Prof. Dr. Eric Bylander* (Sweden); *Giles Frampton*, *Samantha Bewick* and *Joanna Perkins* (United Kingdom).

⁶ The interview-guidelines are available in English, French, German and Spanish at: <http://www.ipr.uni-heidelberg.de/InsReg>.

⁷ With the assistance of *Fanny Cornette*, *Aurélie Chapon* and *Adrien Bezert*.

⁸ With the collaboration of *Dr. Georgios Michalopoulos*, *Dr. Georgios Triantafyllakis*, *Dr. Dimitrios Tsikrikas*, *Dr. Emmanuel Mastromanolis*, *Dr. Nikolaos Katiforis*, *Dr. Ioannis Delikostopoulos*, *Dr. Efthimia Kinini*, *Dr. Konstantinos Giannopoulos*.

⁹ With the collaboration of *M. Christian Deprez*.

¹⁰ With the assistance of *Nina Orehek*.

The national reporters started their empirical research in May 2012. On the basis of the questionnaire and the interview guidelines, they conducted interviews with stakeholders, who had been identified as having faced difficulties in this field. Every national reporter was requested to conduct a specific number of interviews depending on the size of the respective Member State. At the same time, the general reporters addressed national and foreign experts directly and searched all available databases in the Member States. On June 29th 2012, a first preparatory conference relating to the situation in Austria and Germany was held in Heidelberg. Insolvency practitioners, members of the Registered Association of Insolvency Administrators in Germany (*Verband Insolvenzverwalter Deutschlands e.V.*), a representative of the German Federal Employment Agency (*Bundesagentur für Arbeit*) as well as bankers and a representative of the German Ministry of Justice shared their experience on the application of the Regulation in order to optimize further evaluation strategies. In July 2012, the general reporters received the first drafts of the national reports. From July 27th to 28th 2012, the national reporters, representatives of the EU-Commission as well as representatives of the German and the Swiss Ministries of Justice met in Heidelberg for a second conference in which the results of the comparative research as well as possible improvements of the Regulation were discussed. Following the conference, the national reporters revised their reports and submitted their final version in September 2012. All this was done in close cooperation with the EU-Commission. Moreover, the project leaders took part in the work of the expert group at the EU-Commission in order to obtain a close interaction between the work of this group and the drafting process of this study. Nevertheless, the general reporters express the personal views on the relevant issues in this study only.

According to the information obtained from the national reporters, the following institutions were contacted:

The *Austrian* national reporters contacted numerous insolvency practitioners experienced in dealing with cross-border insolvencies. Furthermore, several judges and company representatives were interviewed.

In *Belgium*, the national reporter contacted practising lawyers specialised in cross-border litigation as well as banks and credit institutions. Furthermore, he addressed insolvency practitioners and judges and examined the relevant case law of Belgian courts.

The *Bulgarian* national reporters contacted academics, liquidators, credit institutions, judges and lawyers with experiences in cross-border insolvency proceedings. Many courts of all instances were contacted (*District Court Burgas, District Court Sliven, District Court Varna, District Court Razgrad, Local Court Sofia, Supreme Court of Cassation*). In addition, the national reporters received information from the Ministry of Justice and the Supreme Judicial Council, especially with regard to relevant case law. It has to be noted that there has only been a limited number of court decisions relating to the Insolvency Regulation since the Bulgarian accession to the European Union on 1 January 2007.

In *Cyprus*, the national reporter addressed several legal practitioners.

In *Estonia*, the national reporters addressed insolvency practitioners, credit institutions, judges and legal practitioners. Moreover, they received information by cooperating with the Estonian Ministry of Justice and the Ministry of Finance as well as the Unemployment Insurance Fund. A comprehensive research of national databases was carried out.

In *Finland*, the national reporter conducted inquiries with legal practitioners and the Finnish Bankruptcy Ombudsman.

The *French* national reporter approached several lawyers engaged in the restructuring team of international law firms as well as numerous insolvency officials (*mandataires* and *administrateurs*) with a special focus on officials practicing in the border regions.

The *German* reporters distributed the questionnaire to the Federal Ministry of Justice and some State Ministries, to the German Federal Supreme Court (*BGH*) and to numerous courts of all instances within all judicial districts including Labour Courts (*Arbeitsgerichte*). In addition, the national reporters approached financial institutions (e.g. *Deutsche Bank* and *HypoVereinsbank*), the German Federal Employment Agency (*Bundesagentur für Arbeit*) and leading law firms in Germany. These interviews included lawyers of

international law firms operating Europe-wide as well as lawyers of smaller firms practising in the border regions. Due to the extensive network provided for by *Christopher Seagon*, a large number of insolvency practitioners could be addressed. Furthermore, *Christopher Seagon* contacted the members of the so-called *Gravenbrucher Kreis*, a prominent association of German insolvency practitioners. Moreover, Mr. *Seagon* provided valuable advice in all stages of the project. Against this background, the general reporters also interviewed several academics and judges directly in order to obtain their personal experiences with the Insolvency Regulation.

In *Greece*, the national reporters interviewed numerous insolvency practitioners and obtained access to the files of the court district of Athens/Piraeus and Thessaloniki, which are the most important districts in Greece. They also contacted the best-known law firms of the country specialised in international litigation.

The *Italian* reporters accessed the courts of Turin and Bologna. They also contacted lawyers practising in the field of cross-border insolvency.

The *Latvian* national reporter interviewed insolvency practitioners, representatives of credit institutions, companies as well as other legal practitioners. In addition, the national reporter contacted several public authorities such as the Association of Certified Insolvency Administrators of Latvia, the Insolvency Administration or the Association of Commercial Banks of Latvia. Information was also received from the Ministry of Justice.

In *Lithuania*, interviews were conducted with several judges at the first instance court and at the Court of Appeal. In addition, the national reporter approached the Chamber of Bailiffs, liquidators as well as a credit institution and lawyers.

In *Luxembourg*, the national reporter approached several commercial judges and lawyers practising in Luxembourg either in the restructuring team of major firms or who had experience as insolvency officials.

The *Maltese* national reporter interviewed several lawyers, credit institutions and companies. The Registry of Companies and an audit firm were also contacted.

The *Dutch* reporter contacted numerous insolvency judges, lawyers specialised in cross-border insolvency proceedings and experienced insolvency practitioners. Additionally, representatives of a financial institution and a public authority were interviewed.

In *Poland*, the national reporters interviewed judges in all instances and contacted practising lawyers as well as insolvency practitioners. They also received a comprehensive reply from a financial institution.

The *Romanian* national reporter interviewed several judges at courts of all instances and approached leading law firms in Romania with extensive experience in dealing with insolvencies. Moreover, several insolvency practitioners were approached.

The *Slovakian* national reporters conducted interviews with insolvency practitioners and academics.

The *Slovenian* reporter especially interviewed judges, legal practitioners and financial institutions.

In *Spain*, the national reporters interviewed numerous lawyers specialised in insolvency matters, in particular from cities with a high number of international cases such as Madrid. Moreover, insolvency practitioners and academics as well as a judge were interviewed.

The *Swedish* reporter conducted interviews with several insolvency practitioners including a member of the Swedish Bankers insolvency group as well as with the Swedish Enforcement Authority. Furthermore, comprehensive replies were received from a judge and several academics.

The *UK* reporters intended to address public authorities such as the Insolvency Service, the Executive Agency of the Department for Business, Innovation and Skills (as part of the UK Government) and several courts. They also approached leading law firms, accounting firms and insolvency practitioners. Other associations, such as the *British Bankers' Association*, the *Chancery Bar Association*, the *Insolvency Lawyers' Association*, the *International Swaps and Derivatives Association* or the *Loan Market Association*, were also contacted. Several personal respondents were interviewed as well.

However, this report is not solely based on the source set forth above, but also on extensive own legal research of the general reporters and their teams reflecting the findings of both case law and legal doctrine all over Europe and the results of said empirical research.

1.2.3 Distribution of responsibilities

The following report is based on the answers to the questionnaires as well as the discussions held at the Heidelberg conferences. The results of the public consultation¹¹ on the future of European Insolvency Law under the auspices of the European Commission were also taken into consideration. However, the general reporters assume exclusive responsibility for all results and proposals of this study. Although the general reporters have jointly elaborated the report, the specific responsibilities were divided as follows: *Professor Burkhard Hess* prepared the parts relating to the Regulation's scope of application, international jurisdiction and related jurisdictional issues. *Dr Björn Laukemann* commented on the part on the interaction between the Insolvency Regulation and the Brussels I Regulation focussing on insolvency-related proceedings. *Professor Thomas Pfeiffer*, *Professor Andreas Piekenbrock* and *Dr Robert Magnus* were responsible for the part on the conflict of laws. *Professor Thomas Pfeiffer* focussed on issues relating to employment contracts, detrimental acts and effects of insolvency proceedings on pending proceedings; *Dr Robert Magnus* focussed on community patents and trademarks and *Professor Andreas Piekenbrock* prepared the parts on third parties' rights *in rem*, set-off, reservation of title, effects on rights subject to registration and protection of third-party purchasers. *Professor Paul Oberhammer* prepared the parts on the coordination of insolvency proceedings and the insolvency of groups of companies. *Dr Christian Koller* and *Michael Slonina LL.M.* elaborated the part on the lodging of claims, researched comprehensively relevant databases and elaborated an extensive compilation of the pertinent case law and the legal literature.¹²

¹¹ For further information on the European Commission's public consultation, please consult: http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm.

¹² Although the general reporters have intensively cooperated in the course of the project and have discussed many relevant issues, finally every general reporter authored his part individually without seeking the consent from the project leaders for the respective contents.

In Heidelberg, *Robert Arts, Lars Bierschenk, Adriani Dori LL.M., Friederike Dorn, Georgia Koutsoukou, Sarah Pott, Stefanie Spancken* and *Carl Zimmer* assisted in preparing the general report by ascertaining the national reports, conducting additional research and preparing the drafting of the general report. The team equally organised the conferences held in Heidelberg. In Vienna, the general reporters were assisted by *Petra Peirleitner, Mag. Gottfried Schellmann, Mag. Florian Scholz, Lukas Schubert* and *Mag. Clara Steinhardt*.

2 Executive Summary

The main findings of the study can be summarised as follows:

2.1 General Assessment

The Insolvency Regulation is generally regarded as a successful instrument for the coordination of the insolvency proceedings of the EU-Member States. Its uniform application in the European Judicial Area is guaranteed by the case law of the *ECJ*, which has been largely accepted by the legal practice. Therefore, it seems appropriate not to change the fundamental structures and underlying policies of the EU-instrument, which coordinates the national insolvency laws of EU-Member States in cross-border situations, but rather to improve the present system and to correct the most obvious shortcomings.

2.2 The Scope of the Regulation

2.2.1 Main Issues

Stakeholders agree that, in 2001, the main objective of the Regulation was to implement the principle of universality of (national) insolvency proceedings in the European Judicial Area. However, ten years later, the perspective has changed: Modern insolvency law is marked by the objective to restructure businesses and to discharge private debtors from unbearable debts, to avoid formal insolvency and give a new chance to struggling businesses and insolvent individuals. In the last decade, most of the Member States adapted their national laws and introduced restructuring proceedings and proceedings for the discharge of private debtors. Accordingly, there is a need to enlarge the scope of the EIR to pre-insolvency proceedings and to include hybrid proceedings.

2.2.1.1 The Definition of Insolvency Proceedings

The fundamental definition of “*insolvency proceedings*” as provided for in Article 1 (1) EIR corresponds to the traditional concept of insolvency which presupposes lacking liquidity or a negative balance sheet of the debtor being unable to pay his creditors. Traditionally, insolvency proceedings mainly aim

at the distribution of the (remaining) assets among the creditors and not at the restructuring of businesses in financial difficulties.

However, today the perspective has changed: Major objectives of insolvency laws are the restructuring of businesses and the discharge of insolvent individuals in order to give them a chance to start afresh. At present, most national insolvency laws in Europe¹³ provide for pre-insolvency proceedings. Their common feature consists in initiating quasi-collective proceedings under the supervision of a court or an administrative authority for the purpose of enhancing corporate restructuring efforts to prevent the commencement of insolvency proceedings. Most of these proceedings are not listed in the Annex A of the EIR and according to the case law in the EU-Member States these proceedings do not fall within the scope of the Regulation. Therefore, the recognition of pre-insolvency proceedings and their effects in other Member States has been referred to as the main source of problems.

A second issue is the discrepancies between the procedures listed in the Annexes and the definition of insolvency in Article 1 (1) EIR. Two cases pending before the *ECJ* clearly demonstrate the underlying problems: (1) Does the Regulation apply to a national insolvency procedure which is not listed in the Annexes, but which corresponds to the definition of Article 1 (1) EIR?¹⁴ (2) Does the Regulation apply to national procedures which are listed in the Annex, but do not correspond to the definition of Article 1 (1) EIR?¹⁵ A third issue relates to situations in which national procedures in the Annexes are changed by the Member States without any notice of the amendment being provided to the EU-Commission. In such events, it is unclear whether

¹³ In the following Member States the national law provides for pre-insolvency proceedings: Austria, Belgium, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Spain, Sweden and United Kingdom.

¹⁴ *ECJ*, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, Opinion of AG Sharpston, 9/13/2012. In its judgment of 11/8/2012, the *ECJ* followed the line of arguments of the AG, *ECJ*, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, paras 23 et seq.

¹⁵ *ECJ*, case C-116/11, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.* Opinion of AG Kokott, 5/24/2012, paras 48 – 52. AG Kokott expressed doubts whether French *sauvegarde proceedings* correspond to Article 1 (1) EIR, but finally followed the explanation of the French government that these proceedings were insolvency proceedings in the sense of Article 1 (1) EIR. In its judgment of 11/22/2012 the *ECJ* endorsed the view of the AG, *ECJ*, case C-116/11, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.*, paras 31 – 35.

the amended or new procedures of the Member States correspond to the definition of Article 1 (1) EIR.

2.2.1.2 The insolvency of private individuals and self-employed persons

The national reports have revealed common principles as most of the national laws grant a complete discharge of residual debt for over-indebted individuals and self-employed persons. However, discrepancies among the national insolvency laws (especially with regard to the time periods of a discharge) are strong incentives to engage in so-called insolvency tourism.¹⁶ Several Member States provide for the attempt to reach out-of-court agreements prior to open insolvency proceedings against individuals. However, the uncertainty with regard to their recognition in other Member States can impair their effectiveness. In addition, Annex A does not contain an exclusive list of all insolvency proceedings against natural persons, which might give rise to the application of different rules on recognition to similar proceedings.

2.2.1.3 The exception rule of Article 1 (2) EIR

The EIR does not apply to insurance undertakings, credit institutions, investment undertakings, which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. These debtors are subject to special arrangements and to the supervision of competent national regulatory authorities. These instruments are structured similarly to the EIR, as they provide for rules on the international jurisdiction over the adoption of reorganisation measures or the commencement of winding up proceedings, the applicable law and the recognition of the proceedings. Nevertheless, they depart from the basic structure of the EIR as they adhere for policy reasons more strictly to the principles of universality and unity of the reorganisation or winding up proceedings: the commencement of secondary proceedings is not allowed. However, in the present financial crisis, the cooperation among national authorities proved to be insufficient. Another point of critique are the high public and private costs of these proceedings.

¹⁶ See *Wright/Fenwick*, IILR 2012, 45; *Hoffmann*, J Consum Policy 2012, 461 et seqq.; *Walters/Smith*, IIR 2010, 181 et seqq.

2.2.1.4 Absence of provisions for the recognition of insolvency proceedings opened outside the EU or the coordination between proceedings inside and outside the EU

Most of the National Reporters assert that the lack of provisions for the recognition of insolvency proceedings opened outside the EU or regarding the coordination between proceedings inside and outside the EU in the EIR has not caused any problems in practice. Nonetheless, some of the participants referred to national legislation or case law indicating problems arising from the interaction between European legal acts and the legal order of Denmark or non-EU Member States (especially Switzerland).

2.2.2 Policy options and recommendations

2.2.2.1 The definition of insolvency proceedings

Article 1 (1) EIR should be amended in the sense that the definition of “*collective insolvency proceedings*” includes pre-insolvency proceedings aimed at rescuing or reorganising the debtor’s estates. The new definition should be based on the following criteria: The procedures covered should apply to a debtor in substantial financial difficulties; the procedures must be collective and be conducted under the supervision of a court.¹⁷ This amendment shall adapt the Regulation to recent legal developments and ensure that (new) proceedings of the Member States aimed at the restructuring of debtors in financial difficulties are coordinated by the EIR. However, it must be mentioned that the exceptions for financial institutions (Article 1 (2) EIR) considerably reduce the practical impact of the Regulation.

2.2.2.2 The coordination between Article 1 (1) EIR and Annex A

It seems advisable to improve the coordination between Articles 1 (1) and 2 (a) EIR and to clarify the function of Annex A. One option is to provide for a clear hierarchy between the Annex and the definition in the sense that the definition of Article 1 (1) EIR prevails over the information in the Annexes. In

¹⁷ Supervision may also be exercised when the court approves the arrangement between the debtor and the creditors at the end of insolvency proceedings. In this event, negotiations between the debtor and the creditors concerning a reorganization of debts cannot trigger a bar to concurrent insolvency proceedings in another Member State, since these proceedings are not formally opened at their beginning.

this respect, Article 2 (a) should clarify that Annex A exemplifies procedures falling within the scope of the Regulation. As Annex A is regarded as a helpful guidance for the application of the Regulation, it should be maintained as a regulatory tool. However, it seems to be recommendable to improve the procedure for the amendment of the Annex (Article 45 EIR). In this respect, the Commission should be empowered to amend the Annex and to control whether the information on the national laws adheres to the requirements of Article 1 (1) EIR.¹⁸ The initiative for amending the Annex should lie with the Commission and the Member States. If the Commission envisages amending the Annex with regard to the procedures of a specific Member State, the Member State should be heard. However, the final word on the compatibility of national proceedings listed in the Annex A with Article 1 (1) EIR should lie with the *ECJ*.

2.2.2.3 The exception rule of Article 1 (2) EIR

The exclusion of credit institutions and insurance undertakings from the scope of the EIR should be assessed positively, as the enactment of special rules tailored to the peculiarities of these debtors and their significance for the national economy could enable the efficient reorganisation of such institutions and, therefore, the prevention of systemic risks. However, the financial crisis demonstrates that an improvement of the parallel instruments is necessary.

2.3 Pre-insolvency and hybrid proceedings not listed in the Annex A of the EIR

The national reporters referred to the following pre-insolvency proceedings, which are not found in the Annex A:

- | | |
|---------|--|
| Austria | - Proceedings under the Business Reorganization Act of 1997 (<i>Reorganisationsverfahren</i>) |
| Belgium | - Commercial investigation (<i>Handelsonderzoek / enquête commerciale</i> ; Article 8 et seq. LCE (Loi relative à la continuation des entreprises)) |
| | - Appointment of a mediator (<i>Aanstelling</i>) |

¹⁸ This solution corresponds to the general empowerment of the Commission with regard to delegated acts (Article 290 TFEU).

	<i>ondernemingsbemiddelaar / Désignation d'un médiateur d'entreprise; Article 13 LCE)</i>
	- Appointment of a <i>mandataire de justice</i> (<i>Aanstelling gerechtsmandataris / Désignation d'un mandataire de justice; Article 14 LCE</i>)
	- Out-of-court agreement (<i>Minnelijk akkoord / Accord amiable; Article 15 LCE</i>)
	- Judicial reorganisation by way of individual agreement (<i>Gerechtelijke reorganisatie door een minnelijk akkoord / Réorganisation judiciaire par accord amiable; Article 43 LCE</i>)
	- Appointment of a provisional administrator (<i>Aanstelling voorlopig bestuurder / Désignation d'un administrateur provisoire; Article 28 LCE</i>)
Estonia	- Reorganisation proceedings for legal entities (Estonian Reorganisation Act)
	- Debt adjustment proceedings for natural persons (Debt Restructuring and Debt Protection Act)
France	- <i>Mandat ad hoc</i> (L 611-3 Code de commerce)
	- <i>Conciliation proceedings</i> (L 611-4 et seq. Code de commerce)
Germany	- Protective shield proceedings (<i>Schutzschirmverfahren</i> , sec. 270b InsO) ¹⁹
Greece	- Procedure of reorganization (διαδικασία εξυγίανσης/ diadikasia eksigiansis; Articles 99 et seq. of the Greek Bankruptcy Code, as amended by Article 234 of the recent Law No. 4072/2012)
Italy	- <i>Accordo di ristrutturazione dei debiti</i> (Article 182 bis of the Italian Insolvency Act)
	- <i>Piano di risanamento attestato</i>
Latvia	- Out-of court legal protection proceedings (provided in the Insolvency Law of 26 July 2010)
Malta	- Statutory scheme of compromise or arrangement (<i>Rikostruzzjonijiet ta' Kumpaniji</i>)
	- Company Recovery Procedure

¹⁹ The current situation is unclear: As Annex A generally refers to proceedings of the Insolvency Act, the protection shield proceedings seem to be included. However, there is still an uncertainty whether these proceedings correspond to the definition of Article 1 (1) EIR.

The Netherlands	- <i>Schuldsaneringsregeling</i> which applies to natural persons (Article 287a of the Dutch Bankruptcy Act)
Poland	- Rehabilitation proceeding (<i>Postępowanie naprawcze</i> ; Article 492 – 521 of the Bankruptcy and Rehabilitation Law)
Romania	- <i>Mandat ad-hoc</i> (<i>mandatul ad-hoc</i> ; Article 7 et seq. Law No. 381/2009) - <i>Concordat preventif</i> (<i>concordatul preventiv</i> ; Article 13 et seq. Law No. 381/2009)
Spain	- <i>Homologación de los acuerdos de refinanciación</i> (4 th Additional Provision of the Law No. 38/2011 amending the Spanish Insolvency Act)
Sweden	- Debt relief proceedings (<i>skuldsanering</i> ; Sec. 4 of the Law on debt relief) applicable to private individuals
UK	- Schemes of arrangement (Part 26 of the Companies Act 2006)

2.4 Article 3 EIR

The overview of the practice in the Member States in general demonstrates that the case law of the *ECJ*, especially in *Eurofood* and *Interedil*, has clarified the definition of the COMI in Article 3 (1) EIR. The COMI must be determined in accordance with the circumstances of each individual case; according to the objective approach of the *ECJ* it must be identified by reference to criteria ascertainable by third parties. In general, these criteria are fulfilled at the place where the debtor performs his business activities or where his main administration is located. The reported case law of the Member States shows that the national courts follow the lines of the *ECJ*. There is therefore no need to change the basic structure of Article 3 (1) EIR; however, the wording of the provision should be clarified in light of the criteria developed by the *Court of Justice*. Furthermore, it seems advisable to provide for minimum procedural rules in order to discourage so-called abusive relocations of COMI.

2.4.1 The COMI of corporations

At present, Article 3 (1) EIR distinguishes between the COMI of corporations and of individuals. This distinction seems to be appropriate as Article 3 (1), 2nd sentence provides for a rebuttable presumption of the COMI of legal persons to be located at their place of registration (which usually does not apply to individuals). Since the national reports revealed considerable and also inconsistent case law, it seems advisable to clarify this provision in alignment with the case law of the *ECJ*.

In order to provide more guidance to national courts, the wording of recital 13 should be implemented into Article 3 (1) EIR. The text of Article 3 (1) EIR itself should therefore state that the COMI is to be assessed by objective criteria ascertainable by third parties. In addition, it seems suitable to incorporate the criteria elaborated by the *ECJ* in *Interedil*²⁰ in a new recital 13.

2.4.2 The COMI of natural persons

The present wording of Article 3 (1) EIR does not address the COMI of individuals. In this respect, the national reports show inconsistencies in the practice of EU-Member States. Some courts applied a presumption to individuals that the COMI was located at the debtor's domicile, whereas other courts simply applied national concepts to the COMI of individuals. It therefore seems advisable to provide more guidance with regard to the COMI of individuals in a new subparagraph. The centre of main interests should usually be located at the place of habitual residence.²¹ However, the COMI of individuals exercising professional activities should be their place of business.²² Furthermore, the Regulation should not include a presumption of the COMI of individuals. As these persons can easily relocate their habitual residence, the requested court must carefully assess the place of the COMI in each individual case. The wording of the new subparagraph should clarify that

²⁰ *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*.

²¹ Generally, it seems to be advisable not to refer to the domicile (a term applied differently in the national laws), but to the (objective) concept of the habitual residence, *Hess/Pfeiffer/Schlösser*, The Heidelberg Report on the Regulation Brussels I, para. 172 et seq.; *Pannen*, in: *Pannen* (ed.) *Europäische Insolvenzverordnung* (2007), Article 3, para. 22.

²² This definition corresponds to Article 19 (1) of the Rome I Regulation and to Article 23 (2) of the Rome II Regulation.

the debtor (or any other person) filing for the opening of insolvency proceedings must prove the factual conditions of his or her COMI.

2.4.3 Improving the procedural framework

The most important proposal for practical improvement with regard to the COMI is to provide for the procedural framework for the examination of the jurisdiction by the requested court. At present, the Regulation does not address this issue, which is dealt with by the procedural laws of the Member States and by the general principles of efficiency and non-discrimination. However, the national reports show that the jurisdiction under Article 3 is assessed differently by the national courts. In some Member States, the opening of insolvency proceedings is based on the information provided by the debtor, without any further factual inquiries of the court. In other Member States, the courts examine *ex officio* whether the factual requirements of Article 3 (1) EIR are met or appoint a provisional liquidator for the necessary inquiries. As a result, the duration of opening proceedings varies considerably in the Member States.

From the perspective of European Union law, the different procedural standards hamper the coherent application of Article 3 EIR. However, the principles of efficiency and of mutual trust among the Member States require, as the cornerstones of the Regulation²³, that the courts of the Member States carefully assess the COMI of the debtor, since the decisions opening insolvency proceedings are recognized in other Member States without any review (see Article 16 EIR). In practice, however, the main problem for the court assessing jurisdiction under Article 3 EIR is the limited information which is usually provided by the applicant (often the debtor). This factual situation encourages “*insolvency tourism*”, e.g. the relocation of the COMI to Member States where debtors expect a more favourable insolvency regime (a quicker discharge of debts). Sometimes, applications for the opening of main insolvency proceedings are based on false or misleading statements concerning the COMI.

Against this backdrop, an improvement seems necessary. The Regulation should provide for a procedural framework which empowers and obliges the

²³ See also recital 22 EIR.

court seized to comprehensively assess its jurisdiction. It seems advisable to provide for the following procedural tools: Firstly, an obligation of the court to examine its jurisdiction *ex officio* and to motivate its decision. Secondly, it seems advisable to provide for additional procedural safeguards when the debtor relocated its COMI to another Member State in the eve of the insolvency proceedings.²⁴ Accordingly, the debtor should be obliged to inform the court as to whether it has relocated its residence within a period of six months before filing for insolvency proceedings and to indicate its main creditors. This information (which could be provided on a standard form) will enable the court to contact (informally) the main creditors prior to the opening of the insolvency proceedings. Therefore, the decision on the opening of the main insolvency proceedings will be based on a comprehensive hearing of the most important interested parties (i.e. the debtor and the main creditors).²⁵ Finally, the creditors and the debtor should be entitled to challenge the decision opening the main insolvency proceedings within a specified period of time. Accordingly, Member States should be obliged to introduce a remedy in their national laws and to provide information for the Judicial Atlas of the European Union.

The proposed improvements are not unusual: Providing for a procedural framework is not a new legislative step in the European law of civil procedure. The Brussels Convention of 1968 introduced a specific obligation of the court seized to control the service of the document initiating the proceedings in the event that the defendant should be in default. In the context of the recognition of judgments from other EU-Member States, the Convention (now the Regulation) introduced common procedures on the recognition of foreign judgments. Against this model, the introduction of procedural minimum standards (and safeguards) cannot be regarded as a deviation from the usual legislative techniques in the European law of civil procedure.

²⁴ Some authors proposed a look back period (of six months or even a year) according to which only the courts at the former COMI should be competent for the opening of insolvency proceedings (cf. the proposal of INSOL Europe for the revision of the EIR, 43 – 44). However, this proposal does not seem to comply with Articles 45 and 49 TFEU as it would amount to a considerable impediment to the fundamental guarantees of free movement and establishment, ECJ, case C-378/10, 7/12/2012, *VALE Építési kft*; ECJ, case C-461/11, 11/8/2012, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, paras 30 et seq.

²⁵ Before opening insolvency proceedings, the court must hear the debtor and the main creditors on its own initiative, as it shall assess its jurisdiction *ex officio*.

2.4.4 Territorial proceedings (Articles 3 (2) – (4) EIR)

With regard to territorial proceedings, the national reports reveal that these proceedings (especially secondary proceedings) are often used in order to shield domestic creditors from the effects of foreign insolvency proceedings. However, secondary proceedings can entail considerable costs and delay in the coordination of parallel proceedings. The experience reported from the Member States therefore demonstrates the necessity of a reassessment of secondary proceedings.

For these reasons, the right to apply for secondary proceedings should be limited to those in need of protection. In the European law of civil procedure, employees and consumers (and not every local creditor) are usually granted special protection. From that perspective, Article 29 lit. b) EIR should be amended and limited to specific creditors. However, the entitlement of the liquidator in the main proceedings to request the opening of secondary proceedings (Article 29 lit. a) EIR) should remain unchanged. Further, the limitation of secondary proceedings to winding-up proceedings in Article 3 (3), 2nd sentence EIR should be deleted and the main liquidator should be empowered to use secondary proceedings for the restructuring of insolvent businesses which operate establishments in other Member States.

2.5 Insolvency-related actions (Article 3a EIR)²⁶

2.5.1 Main Issues

As to insolvency-related actions, the case law of the *ECJ* has provided legal certainty in particular fields, notably with regard to avoidance claims. Moreover, the *ECJ*'s ruling in *German Graphics*²⁷, which excluded actions to segregate from the scope of the EIR, has been strongly supported. Despite these clarifications, the case law of the Member States reveals that major delimitation problems arise in situations at the interface of insolvency law, general civil law and in particular company law. In this context, the *Gourdain*-formula has often proven to be imprecise. Further specification is therefore required, particularly with respect to the different types of actions and claims

²⁶ This part is authored by Dr *Björn Laukemann*, Maître en Droit (Aix-en-Provence).

²⁷ As for criticism on the *Alpenblume* decision of the *ECJ* see *infra* 4.2.5.1 and 4.2.5.2.

within the substantive law of the Member States. This equally applies to the nature of the *vis attractiva concursus*-rule as establishing exclusive or elective jurisdiction as well as for its applicability to cases connected with third states.

2.5.2 Policy options and recommendations

The national reports show a need to insert a new head of jurisdiction for insolvency-related actions which should be modelled according to the case-law of the *ECJ*: Judgments on civil actions are to be classified as insolvency-related when they derive directly from insolvency proceedings and are closely linked to them. This delimitation formula, as established by the *ECJ* in *Gourdain v Nadler*²⁸, reiterated in 2009 in *Seagon v Deko Marty*²⁹ for jurisdiction under the EIR and codified in Article 25 (1) subpara. 2 EIR with regard to recognition should explicitly be regulated in a new Article 3a determining international jurisdiction over insolvency-related actions. This new provision should thereby apply irrespective of whether the action is related to main, secondary or territorial proceedings.

A *vis attractiva concursus* within the meaning of Article 3a new version is justified, on the one hand, in case its purpose is to improve the efficiency and to accelerate the administration of cross-border insolvency proceedings and provided it does not infringe predominant general jurisdictional interests. On the other hand, the respective action should serve an insolvency-specific procedural purpose, i.e. it should aim at protecting the rights of the general body of creditors by adjusting rules and principles of general civil law or other areas of substantive law or by compensating insolvency-conditioned detriments. A corresponding formulation should be adopted as new sentence 3 in recital 6 of the EIR.³⁰ Additionally, the passage “*In accordance with the principle of proportionality this Regulation should be confined to provisions*” in recital 6 sentence 1 should be replaced with: “*This Regulation should encompass provisions on the jurisdiction*” [...].

Article 3a new version should provide for an exclusive jurisdiction of the courts of the Member State in which insolvency proceedings are initiated.

²⁸ *ECJ*, case 133/78, 2/22/1979, *Henri Gourdain v Franz Nadler*, ECR 1979, 733.

²⁹ *ECJ*, case C-339/07, 2/12/2009, *Seagon v Deko Marty Belgium NV*, ECR 2009 I-767.

³⁰ It seems not to be advisable, however, to enumerate individual insolvency-related actions within the recitals of the EIR.

Exceptionally, in case of the accumulation of related claims the liquidator should be entitled to file the insolvency-derived action optionally before the courts of the Member State within the territory of which the defendant is domiciled, if and to the extent to which said courts have jurisdiction over the connected claim in civil and commercial matters under the provisions of the Regulation No 44/2001. The same should apply if the liquidator files an insolvency-related counterclaim before a foreign *forum*. A recommendation for a formulation of a new Article 3a EIR can be found at page 219 et seqq. of this Report.

2.6 Groups of Companies³¹

The legislator of the EIR should respect the applicable company law. Therefore, the reform of the EIR should not at all aim to achieve “*substantive consolidation*” with respect to groups of companies. There are a number of possibilities for improving the coordination of transnational insolvency proceedings of groups of companies. On one hand, one might draw upon the model of the coordination between main and secondary proceedings, with the proceedings of the parent company being the “main proceedings” and the proceedings of the subsidiary company the “secondary proceedings”. On the other hand, one might also consider amending the rules of jurisdiction by adopting a “group COMI approach”. Both solutions are not alternatives, but could also be taken cumulatively.

There is no reason not to improve the communication and the more or less voluntary coordination and cooperation between the liquidators and the courts involved in any group of companies scenario. Therefore, it is strongly recommended to enact such provisions.

Measures such as a stay of certain proceedings in part or as a whole or a proposal for a group rescue plan could dramatically improve the coordination of all proceedings involved and create a situation in which measures such as the restructuring or sale of the group business as a whole can be better achieved. Nothing, however, indicates that the liquidator of a parent or other “*leading*” company should be entitled to make such decisions and impose them on the liquidators of the other group members or that this should only

³¹ Authored by Professor Paul Oberhammer.

apply in specific hierarchies of companies. Unlike the situation resulting from secondary proceedings in the sense of Article 27 et seq. EIR, there is no “*natural*” “*main liquidator*” here representing pre-existing overall interests of the creditors of one company as a whole in contrast with the subordinate “local interests” represented by the secondary liquidator and protected by international insolvency law only.

It is pointless to search for a formula to identify the relevant hierarchies and, accordingly, the “*leading proceedings*” here. Rather, all relevant liquidators should be entitled to request measures such as a stay in the sense of Article 33 EIR or propose a composition arrangement in the sense of Article 34 EIR in case they can show that such measures are in the best interest of all companies and, accordingly, all creditors involved. Therefore, simply the liquidator taking the initiative and offering the best solution should have the lead as a consequence; it is highly unlikely anyway that this will be done by the liquidator of a small subsidiary company. In this market economy oriented approach to group of company insolvencies, private initiative prevails and the best solutions will succeed. Therefore, the EIR should give all liquidators involved the right to apply for measures in the sense of Article 33 EIR in all other proceedings; the court should only order such measures in the event they are in the mutual interest of all proceedings involved. Moreover, every liquidator should be entitled to propose measures in the sense of Article 34 EIR and, again, the best solution shall succeed.

One might be of the opinion that *Interedil* is a sufficient basis to develop a flexible approach taking into account group COMI considerations in order to improve the coordination of groups of companies insolvencies; however, one could also argue that even the *Interedil* wording is not sufficient and, therefore, Article 3 (1) EIR should be amended or clarified by an amendment of today’s recital 13.

In any event, the legislator should not introduce changes that would result in a dropping behind the *Interedil* approach.

Moreover, it is worth discussing whether Article 3 (1) EIR could be amended in a manner, which demonstrates that such “head office” considerations can actually be taken into account in group of companies situations. It is suggested to either include such an amendment of the wording of Article 3 (1)

EIR or, as an alternative, the inclusion of such a wording in one of the recitals of the EIR (e.g. in today's recital 13, which is the basis for the interpretation of Article 3 (1) EIR by the *ECJ* already today).

2.7 Applicable Law³²

2.7.1 Article 4 EIR

The general choice of law provision in Article 4 (1) EIR complies with generally recognized principles of private international law. There is no need for any changes or amendments with regard to this provision.

Several national reports mention questions arising with regard to qualification or characterization. However, answering such questions is part of the responsibilities of the national court systems or, if necessary, the *ECJ*. Consequently and quite correctly, it has been said by one national reporter that these questions should not even be regarded as “problems”.

2.7.2 Articles 5 and 7 EIR

In the overwhelming majority of Member States, Articles 5 (1) and 7 (1) EIR are currently interpreted to be “substantive restriction rules”. According to this understanding, the opening of insolvency proceedings in one Member State has no effects on *rights in rem* on assets situated in a Member State other than the State of the opening of proceedings, unless secondary proceedings are opened in the latter Member State. This interpretation may (in certain cases) lead to results which are not in line with the policy goals pursued by Articles 5 (1) and 7 (1) EIR.

As regards the amendment of Articles 5 (1) and 7 (1) EIR, the European legislator has three different options: Firstly, Articles 5 (1) and 7 (1) EIR can be left unchanged as “substantive restriction rules”. Secondly, they can be transformed into “choice of law rules”. Finally, the European legislator can opt for “opposition rules” permitting the secured creditor to oppose more favourable substantive rules of the *lex rei sitae*. All in all, the opposition rule seems to be the most appropriate solution.

³² The proposals relating to Articles 4, 9, 10, 13 and 15 EIR have been prepared by Professor *Thomas Pfeiffer*. The part on Articles 5-8, 11 and 14 EIR has been prepared by Professor *Andreas Piekenbrock*. Article 12 EIR has been prepared by Dr *Robert Magnus*.

2.7.3 Article 6 EIR

The application of Article 6 EIR to third-state-cases has not been settled satisfactorily thus far. It seems to be advisable to clarify the issue in accordance with Article 17 of the Regulation (EC) No 593/2008. Therefore, it is recommended to consider an amendment of EIR recital 26 including the new parenthesis “*(including the law of a Non-Member State)*” after the words “*if possible under the law applicable to the claim of the insolvent debtor*”. EIR recital 27 should be updated and refer to the Directive 2002/47/EC.

2.7.4 Article 8 EIR

No amendments are needed with regard to Article 8 EIR.

2.7.5 Article 9 EIR

The national reports do not mention any specific problems with regard to Article 9 EIR. INSOL Europe has presented a proposal for a more precise wording of this provision. This may have some merit and bring about more clarity; however, the national reports do not reveal any urgent need for a change in this regard.

2.7.6 Article 10 EIR

Concerning Article 10 EIR, different labour law standards may hinder an insolvency administrator from simply taking the same actions with regard to employees in all Member States. It may very well be that a reorganisation or liquidation of companies would be made easier if an administrator could take the same actions in relation to the employees in all Member States. However, the present situation is a mere consequence of the different social policies and standards in the Member States, which cannot be abolished by changes made to the EIR. Furthermore, complaints concerning the interplay between labour law and insolvency have been limited. Moreover, labour law is deeply rooted in specific national traditions so that any harmonization would be very difficult to achieve. Harmonizing national labour law – even if limited to insolvency situations – would go beyond a mere evaluation and adaption of the EIR.

If any legislative action with regard to Council Directive 2001/23 on the transfer of undertakings should be considered, it would be more advisable to either include such a rule into the Rome I Regulation or into Directive 2001/23.

Several national reports address the question of the interplay between insolvency law and guarantee institutions under Directive 2002/74 (or its predecessor instrument Directive 80/987). Apart from any answers by the judiciary, a serious improvement would best be dealt with by changes with regard to the national substantive laws governing these institutions or with regard to national insolvency laws. A solution by the EIR would require, for example, that substantive powers of the liquidator would be extended beyond those provided under the applicable insolvency law (Article 4 (2) (c) EIR). Again, the General Reporter refrains from proposing any specific amendment to the EIR. Any legislative action in this respect would require a 27x27 analysis, i.e. an analysis of all national insolvency systems against the background of all national guarantee systems.

2.7.7 Article 11 EIR

No amendments are needed with regard to Article 11 EIR.

2.7.8 Article 12 EIR

Although Article 12 EIR seems to be either of limited practical use or to work satisfactorily in most of the cases and consequently there is no urgent need for any amendments, some clarification may be helpful. A proposal for an amendment can be found at page 309 of this Report.

2.7.9 Article 13 EIR

The complexity that results from Article 13 EIR with regard to avoidance claims is necessary in order to achieve appropriate results with regard to the legitimate expectations of the parties. In this respect, mere protection against changes of the COMI would not suffice. By contrast, a full application of the *lex causae* in relation to avoidance claims would render avoidance even more complicated and is not recommendable.

2.7.10 Article 14 EIR

The applicability of Article 14 EIR in third-state-cases should be clarified in a recital.

2.7.11 Article 15 EIR

Article 15 EIR causes no serious problems. Most or all Member State laws have a rule or tendency to provide for a priority of insolvency proceedings over individual litigation or proceedings. With regard to some uncertainty concerning the applicability of Article 15 EIR on arbitration proceedings, it would be rather easy and may be advisable to simply add the words “*or an arbitration proceeding*” to Article 15 EIR.

2.8 Coordination of Proceedings³³

As already pointed out in the chapter on jurisdiction, a provision requiring the court to examine its jurisdiction *ex officio* is an important measure to prevent *forum shopping* and to improve coordination.

Creditors should have access to remedies against a decision wrongfully opening insolvency proceedings.

Coordination of insolvency proceedings also requires that the European legislator provides that, in the event of insolvency, pursuant to the EIR, at least one insolvency law applies in any event. There should be no situations in which neither the *lex fori concursus* nor the insolvency law of the *situs* state applies. Situations in which no insolvency law applies in an international insolvency case are an obvious failure of coordination. Therefore, it is strongly recommended to do away with the idea that Article 5 EIR provides for anything other than a conflicts of law rule.

Secondary proceedings did not turn out to be the tool for the main liquidator described in recital 19 of the EIR. There seems to be only a relatively small number of cases where it was the main liquidator who actually applied for the opening of secondary proceedings. Rather, they were used (and abused) for different reasons, in particular, as a tool for the protection of local interests and as an instrument in jurisdictional conflicts where the opening of

³³ Authored by Professor Paul Oberhammer.

secondary proceedings was regarded so to say as the second-best solution to the opening of main proceedings in a specific Member State. The disadvantages of secondary proceedings are clearly more significant than their advantages. This is already true where the secondary liquidator acts in a cooperative fashion, but is even more obvious where this is not the case. However, abandoning secondary proceedings altogether would be the best choice in order to improve the coordination of insolvencies. However, this does not seem to be a realistic option from a political perspective. A legislator striving for better coordination therefore has to reflect alternative solutions in order to reduce the negative effects of parallel proceedings. There are two groups of such measures: On one hand, one may try to limit the number of cases in which such parallel proceedings are opened; on the other hand, the coordination and cooperation between the main and secondary proceedings could be further improved.

It would be a simple measure to make the EIR both more coherent and more effective to also apply the limitation set forth in Article 3 (4) (b) EIR to the request for the opening of secondary proceedings, since the interest to have such territorial proceedings opened does not of course require more (but actually less) protection in cases in which the main proceedings are already pending. The EIR should include a rule expressly providing for the participation of the main liquidator in the proceedings for the opening of secondary proceedings.

Today's law does not provide for specific rules on the procedure for the opening of secondary proceedings. In particular, there is no express provision requiring the court to examine its jurisdiction *ex officio*; moreover, it is not clear that the main liquidator must be heard before the opening of the secondary proceedings.

The main liquidator should be empowered to make a binding offer to the creditors who might apply for secondary proceedings promising that he or she would respect all preferential rights such creditors would enjoy in secondary proceedings in order to prevent them from actually applying for such secondary proceedings. It might be a very promising approach to create uniform law entitling the main liquidator to enter into such an undertaking. In addition, the opening of secondary proceedings should be prohibited as soon

as the main liquidator enters into such an undertaking guaranteeing that the rights which local creditors would have had if secondary proceedings were opened will be respected in the main proceedings. Moreover, such offers should also be possible at a later stage of the secondary proceedings, since the main liquidator might need some time to evaluate the claims which are relevant in this context. Therefore, an additional rule could provide that secondary proceedings shall be closed in the event that the main liquidator should make such an offer.

It is obvious that the *duties* under Article 31 EIR are rather vague and might, therefore, be made more specific. In particular, they do not clearly refer to restructuring measures, but rather only to “*measures aimed at terminating the proceedings*”. However, the cooperation between the liquidators is of specific importance in restructuring cases. Therefore, it might be useful to include an express reference to restructuring measures in this context. Moreover, it is not completely clear today that measures for the realization of the debtor’s estate need to be coordinated between the liquidators. Therefore, it might be useful to include an express reference to such realization measures in Article 31 which go beyond the main liquidator’s current option of making proposals in this respect.

The EIR only provides for cooperation and communication duties between the liquidators and not between courts or liquidators and courts. It is suggested that such duties be included into the EIR as well.

Such duties should not be limited to mere communication of information, but should also include measures such as the coordination of the proceedings between the courts and communication and coordination with respect to court decisions approving measures such as the administration and realization of assets or “protocols”.

In this context, the wording of the revised EIR should make as clear as possible that a maximum extent of cooperation and coordination is required of the courts. Judicial independence cannot be an excuse for an idiosyncratic approach to the handling of cooperation between courts or courts and liquidators.

It seems advisable to include a broader definition of the measures which can be subject for an application under Article 33 (1) EIR. The reference to the

“process of liquidation” should be replaced (or augmented) by *“all measures in the secondary proceedings”* or simply by *“the secondary proceedings”*.

It would be very useful to include a power of the main liquidator to request the court of the secondary proceedings to actually prohibit or to order certain measures in the secondary proceedings.

Coordination of main and secondary proceedings requires that decisions taken in the secondary proceedings are responsive to the overall purpose of the main proceedings represented by the main liquidator. This is correctly reflected in the standard that needs to be applied by the court of the secondary proceedings as a basis for the decision provided for under Article 33 (1) EIR, i.e. that such an application of the main liquidator may only be rejected if it is *“manifestly of no interest to the creditors of the main proceedings”*. A similar wording should be included in Article 33 (2) EIR, since today’s wording is inconsistent with Article 33 (1) EIR. One should think of a power of the main liquidator to issue a (*interim*) veto against certain measures until the court has decided upon an application under Article 33 (1) EIR.

One might think of further improving the wording of Article 33 (1) EIR (and, consequently, the wording of Article 33 (2) EIR) by more clearly shifting the burden of proof to the parties (such as the secondary liquidator or creditors involved in the secondary proceedings) opposing the application of the main liquidator. Therefore, it is suggested to replace *“only if it is manifestly of no interest to the creditors in the main proceedings”* with *“only if it is proven by the party opposing the main liquidator’s request that it is manifestly of no interest to the creditors in the main proceedings”*; identical wording should be included in Article 33 (2) EIR (*“only if it is proven by the party applying for such termination that such stay [or prohibition or order] is manifestly of no interest to the creditors of the main proceedings”*).

It seems to be generally accepted that the reform of the EIR should do away with the provision of Article 3 (3) 2nd sentence EIR that secondary proceedings must be winding-up proceedings.

2.9 Lodgement of claims – main findings³⁴

2.9.1 Substantial issues

At present, the Regulation only partially addresses the lodging of claims, since it does not regulate issues of substantive law. Issues not covered by Article 32 (1) EIR, in particular the ranking of claims, are determined for each of the proceedings by the *lex fori concursus*, Article 4 (2) EIR.

However, Article 32 (1) EIR entitles a creditor to lodge his claims in several (the main and secondary) proceedings.³⁵ Therefore, a creditor with preference in Member State A which has a non-preferential claim according to the law of Member State B, may lodge its claim in Member State A, even if it does not have any connection to Member State A. In this case, it does not have to return “*what it has obtained*” (Article 20 (1) EIR). However, it cannot obtain dividends in other proceedings as long as other creditors of the same ranking and category in Member State B have not received an equivalent dividend (Article 20 (2) EIR). This mechanism ensures the equal treatment of creditors and prevents the multiple satisfaction of the same claim. But it does not prevent the situation in which a creditor acquires more in Member State A than in Member State B.

Legal literature discusses a specific problem regarding the multiple lodging of claims. According to Article 32 (2) EIR, the liquidator may exercise the creditor’s right and lodge the latter’s claim in another proceeding. In cases in which both the liquidator and a creditor lodge identical claims in one proceeding, it remains unclear from the wording of the EIR how the Regulation deals with such cases. The predominant view in legal literature favors the application of Article 4 (2) (h) EIR, leading to the application of the *lex fori concursus*. However, the domestic laws provide for solutions in such cases.³⁶ Besides, the National Reports did not show any practical importance of this problem.

³⁴ This part was authored by Professor *Burkhard Hess*, Dr *Christian Koller* and *Michael Slonina*, LL.M.

³⁵ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 235.

³⁶ England: Insolvency Rules 1986, rr 2.22(6), 4.67(6), and 6.93(6) (added by the Insolvency (Amendment) Rules 2002); Cf. *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.369; Germany: *Beck*, NZI 2007, 1, 5.

2.9.2 Procedural issues

Practical issues relate to concrete aspects of lodging claims in a cross-border situation, i.e. language barriers, costs of the proceedings, delays and lack of information. Articles 39 – 42 EIR only provide for minimum rules enabling foreign creditors to lodge their claims, but do not set a comprehensive procedural framework. Compared to other EU-instruments on judicial cooperation, it seems possible to implement a higher degree of standardization for the lodging of claims. Improvements seem to be possible with regard to language requirements, time-limits and the general information of the creditors.

Regarding language requirements, Article 42 (2) EIR allows creditors to lodge claims in the official language(s) of the State of the opening of proceedings or of the State of their habitual residence, domicile or registered office. However, pursuant to Article 42 (2), 2nd sentence EIR the creditor may be required to provide a translation into the official language(s) of the State of the opening of proceedings. The national reports have revealed that, in some Member States, requiring the translation has become the rule. For that reason, national reporters suggested the abolishment of the translation requirement in the event the claim was lodged in a commonly understood language (English, French, - maybe - German). For the event the translation requirement is to be kept, creditors should be allowed to lodge their claim in any official language of the European Union. Under these circumstances, for example, creditors would be free to lodge their claim in English, even if their domicile is not in England, and the proceedings are not opened in England. Furthermore, the translation requirement should only apply to supporting documents when the claim is contested.

This issue is also related to procedural costs. The national reporters commonly criticized high translation costs. Due to high costs, creditors may choose to forgo a debt, especially when it involves a small amount of money. This phenomenon mainly affects small and medium-sized businesses as well as private individuals.³⁷ These costs and time constraints will be remedied by

³⁷ It equally affects big stakeholders who will simply make an economic decision and forgo their claims.

introducing a European template.³⁸ Therefore, it seems advisable to elaborate a standard form for the lodging of claims available in all languages. Ideally, the form should be filled out by simply checking boxes³⁹.

The most convenient and efficient way of lodging claims is via the internet. However, the introduction of electronic communication largely depends on the infrastructure of the courts and judicial authorities of the EU-Member States.

Some Member States require the retaining of a local lawyer for lodging the claim. These costs lead to the same effects: creditors do not lodge, but forgo their claims. In this respect, the Regulation should clarify that the lodging of a claim does not require involving a lawyer.

National reporters often emphasized that the application of foreign law leads to difficulties, especially regarding deadlines, the proof of claims, the specific procedures of lodging etc. In this area of law, harmonization at the European level may remedy the present inconsistencies. As a first step, it seems advisable to set a minimum deadline (of one – three months).⁴⁰ This timeframe would improve legal certainty, since all creditors will be aware of time limits and know that they dispose of a minimum of time (which might be one to three months).

Article 40 EIR obliges the court opening insolvency proceedings or the appointed liquidator to provide EU-creditors with the relevant information concerning the lodging of claims. However, national reporters mentioned that there is a general problem regarding the access to and the exchange of information, in particular with regard to foreign creditors. This information deficit concerns the entire procedure, i.e. the information on the opening of proceedings, the appointment of the liquidator and the formalities of the foreign law. In this respect, Member States should be obliged to provide for forms sent to known creditors (abroad) where the most important information is available.

³⁸ Some Member States provide for forms for the lodging of claims – these forms also offer information on the insolvency procedures.

³⁹ The form could also contain necessary information about the applicable insolvency law.

⁴⁰ If translations are not required, the time limit may be reduced.

In order to facilitate the access to and the exchange of information, the creation of an online platform where national insolvency registers are interlinked could be helpful.

3 Scope of the Regulation⁴¹

3.1 Underlying Policies

The main objective of provisions on the scope is to describe and to delineate the subject matter of the respective EU instrument. The Regulation (EC) 1346/2000 applies to “insolvency proceedings” as defined by Article 1 (1) EIR. According to this provision, insolvency proceedings are collective proceedings entailing the partial or total divestment of a debtor and the appointment of a liquidator. In addition, Article 2 (a) EIR states that “insolvency proceedings” correspond to the term of collective proceedings referred to in Article 1 (1) EIR and that these proceedings are listed in Annex A. Annex A provides a list of national proceedings which have been communicated by the EU Member States according to Article 45 EIR. Annex A is considered to be an integral part of the Regulation.⁴² All decisions given in proceedings contained in Annex A are recognised under Articles 16 and 25 EIR.

The objectives of Article 1 EIR are manifold: On one hand, the definition contained in the first paragraph of the provision shall positively describe the subject matter and (indirectly) the objective of the Regulation, which is to coordinate the autonomous insolvency procedures of the EU Member States in cross-border cases. However, as an instrument for the coordination of national procedures, the EIR is only one of several EU instruments aimed at coordinating the judicial systems of the EU Member States; other instruments generally apply to civil procedure (especially judgments)⁴³ and family matters;⁴⁴ additional instruments apply more specifically to payment orders,⁴⁵

⁴¹ I am grateful to *Lars Bierschenk, Adriani Dori (LL.M.), Stefanie Spancken* and *Carl Zimmer* who assisted me in the preparation of this part.

⁴² *Riedemann*, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 1, para. 3; *Wessels*, *International Insolvency Law* (3rd ed. 2012), para. 10518.

⁴³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1.

⁴⁴ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338/1.

⁴⁵ Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/1.

uncontested claims⁴⁶ etc. In this respect, the EIR must be delineated from other EU-instruments, especially the Brussels I Regulation (EC 44/2001), but also with respect to more specific instruments on the insolvency of banks, funds and insurances (see Article 1 (2) EIR). The third regulatory issue in this context relates to the applicability of the EIR to Non-EU-Member States: Although the Regulation mainly aims at coordinating insolvency proceedings within the Area of Freedom, Security and Justice, cross-border insolvencies often include assets located in and debtors from third states.⁴⁷ The question therefore arises as to whether the application of the Regulation to third states should be addressed positively – which is not the case in the present instrument.

At the outset, it should be noted that the scope of the present Regulation does not sufficiently meet its objectives: The substance of the Regulation seems to be insufficiently defined, since pre-insolvency proceedings are not included in the definition of Article 1 EIR; in addition, the regulatory technique is misleading, as the relationship between the (autonomous) definition of Article 1 (1) EIR and its systematic relationship to Article 2 (a) EIR and the Annex A is unclear. In this context, the application of the Regulation to bankruptcy proceedings of individuals proved to be incomplete. Furthermore, the relationship of the Regulation to third states is partly addressed with regard to the applicable law, but not with respect to the jurisdictional rules and the rules on the recognition and coordination of main and secondary proceedings.⁴⁸

3.2 Main Issues

3.2.1 The Definition of Insolvency Proceedings

The fundamental definition of “insolvency proceedings” as provided for in Article 1 (1) EIR consists of four elements: (1) the collective character of the

⁴⁶ Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143/15.

⁴⁷ Prominent examples were BenQ (involving a Taiwanese Holding) or Lehman Brothers (involving several Delaware Corporations, but also subsidiaries in most EU Member States).

⁴⁸ Recently, the *BGH* referred the question to the *ECJ* whether Article 3 EIR applies to avoidance action against debtors in third states, *BGH*, 6/21/2012, ZInsO 2012, 1439, annotated by *Laukemann*, LMK 2012, 339261.

proceedings; (2) the ground of the proceedings must be the “insolvency” of the debtor (e.g. his inability to pay); (3) the opening of the proceedings must entail the divestment of the debtor and (4) the appointment of a (provisional) liquidator empowered to administer and to dispose of the debtor’s assets. This definition corresponds to the traditional concept of insolvency, which presupposes lacking liquidity or a negative balance sheet of the debtor being unable to pay his creditors.⁴⁹ Further, the definition underlines the collective character of the proceedings which include all creditors (but does not exclude a ranking of creditors).⁵⁰ The third element of the definition is the divestment of the debtor who can no longer dispose of his assets. The divestment leads to the appointment of a liquidator (fourth element of the definition) who shall distribute the remaining means among the creditors. The elements of this definition correspond to the model of typical insolvency proceedings in the late 1980s: Traditionally, insolvency proceedings mainly aim at the distribution of the debtor’s (remaining) assets among the creditors and not at the restructuring of businesses in financial difficulties and at the discharge of insolvent individuals in order to give them a chance of a new start.⁵¹ However, since the Millennium and as a consequence of the financial crises of the last decade, insolvency law has changed. Today, major objectives of insolvency laws are the restructuring of businesses and providing help for individuals in financial difficulties. At present, most national insolvency laws in Europe⁵² have introduced pre-insolvency proceedings,⁵³ the majority of which are not listed in Annex A of the EIR. According to the case law in the EU Member

⁴⁹ The EIR does not provide for any definition of insolvency.

⁵⁰ *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10500.

⁵¹ *Thole*, Gläubigerschutz durch Insolvenzrecht (2010), 51 et seq.

⁵² In the following Member States, the national law provides for pre-insolvency proceedings: Austria, Belgium, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Spain, Sweden and United Kingdom.

⁵³ In this respect, the findings of the Heidelberg and Vienna Study contradict those of the Report of DG Enterprise and Industry titled “Business Dynamics: Startups, Business Transfers and Bankruptcy”, January 2011, 123, (available at http://ec.europa.eu/enterprise/policies/sme/business-environment/files/business_dynamics_final_report_en.pdf) according to which all Member States with the exception of the Czech Republic provide for out-of-court settlements. The Deloitte Report-Insolvency Group Legal Network addressing Belgium, Bulgaria, Czech Republic, France, Germany, Hungary, Italy, Norway, Poland, Romania, Spain, Sweden, Switzerland, Ukraine stated that only Bulgaria, Germany and Netherlands have no pre-insolvency or hybrid proceedings.

States and to the predominant opinion in the legal literature, these proceedings do not fall within the scope of the Regulation.⁵⁴

The main reason for this discrepancy between the realm of national proceedings and the scope of the Regulation is the definition in Article 1 (1) EIR, which does not correspond to the legal development of the last decade. Modern pre-insolvency proceedings deviate from the traditional prerequisites of insolvency proceedings in several aspects: These proceedings at issue do not presuppose the (substantive) insolvency of the debtor, but instead tend to avoid this situation and apply when the debtor faces severe financial difficulties. They are aimed at debt restructuring and are therefore initiated much earlier than in an actual insolvency of the debtor.⁵⁵ Their common features consist of initiating quasi-collective proceedings under the supervision of a court or an administrative authority⁵⁶ for the purpose of enhancing corporate restructuring efforts and, therefore, shall prevent the commencement of insolvency proceedings. They do not necessarily comprise the collective whole of all creditors of the debtor.⁵⁷

Although national insolvency laws are considerably divergent in this area, most of them provide for a divestment (or restructuring) of the debtor to be supported by a majority of the creditors involved and subject to a formal approval by the competent judicial authority.⁵⁸ However, these procedures vary considerably with regard to other legal consequences such as the interruption of pending legal proceedings, the stay of enforcement measures, the intervention of a trustee or an administrator, the supervision of the court and the binding effect of a final agreement concluded between the (majority of the) creditors and the debtor and on its (binding) effect on dissenting creditors (cram down). From the perspective of the Regulation, these instruments give

⁵⁴ *Garcimartín*, IILR 2011, 321, 325 et seq.

⁵⁵ *Flessner*, Early Debt Restructuring Under the European Debt Insolvency – A Comment on INSOL Europe's Draft on Article 1 – paper presented in Dresden, 14 September 2012, 1.

⁵⁶ In some Member States, the court intervenes at the end of the restructuring proceedings for controlling and approving a reached settlement.

⁵⁷ *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10500 (referring to Dutch proceedings, which do not apply to specific creditors such as taxation and social security authorities).

⁵⁸ Modern insolvency laws do not necessarily require the divestment of the debtor, but rather permit the restructuring of a debtor in possession, see the Dutch *sureance van batailing* where the debtor is allowed to operate with the approval of a *bewindvoerder*, *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10505.

rise to numerous questions concerning the jurisdiction of the court seized, the applicable law and the (possible) recognition of a final (and binding) decision in other Member States. Recent case law reported by the national reporters demonstrates that these issues have become an urgent matter to be resolved by the EIR:

The most prominent examples are the English company voluntary arrangement (sec. 1 – 7B Insolvency Act 1986)⁵⁹ and the scheme of arrangement (sec. 896 – 901 Companies Act 2006)⁶⁰. These pre-insolvency instruments permit the restructuring of debts by way of a compromise between the company in financial difficulties, its shareholders and the creditors (including the secured creditors), which are divided into classes on how they are affected by the future insolvency. The scheme of arrangement procedure does not require the insolvency of the debtor and it does not entail the divestment of the debtor. It mainly aims at the restructuring of the debtor's obligations under a loose supervision of the court without the appointment of any insolvency professionals. If the court confirms the scheme, it binds all parties, including dissenting creditors (sec. 899 (3) CA 2006).⁶¹

Recently, the *BGH*⁶² decided on the recognition of a scheme of arrangement with respect to a life insurance contract (*Equitable Life*).⁶³ In the 1990s, promising contracts of an English life insurance company had been sold to German customers. When the life insurance company got into financial difficulties, it initiated the restructuring of the contracts by a scheme of arrangement. The claimant sued for the payment of the sum as originally promised by the insurance contract. The defendant argued that the scheme had to be recognised under European law and asserted that the claim was precluded by the sanctioned scheme. The *BGH* held that the recognition was not subject to Articles 16 and 25 of the Insolvency Regulation, since the

⁵⁹ Bork, *Rescuing Corporations in England and in Germany* (2012), paras 6.02 et seq.; Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), para. 12-24.

⁶⁰ Bork, *IILR* 2012, 477 et seqq; Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), paras 12-26 et seqq.

⁶¹ Bork, *IILR* 2012, 477, 486; Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), para. 12-24.

⁶² *BGH*, 2/15/2012, *NJW* 2012, 2113 = *NZI* 2012, 425, annotated by *Paulus*.

⁶³ Relating to *Equitable Life* see further decision of *BGH*, 4/18/2012, *NJW* 2012, 2352; *LG Potsdam*, 10/22/2008, *BeckRS* 2011, 15245. In 2006, the European Parliament initiated an inquiry, cf. Inquiry committee on the *Equitable Life Assurance Society* (2006/2199(INI)).

scheme of arrangement was not listed in the Annex A. The Court decided that autonomous German international insolvency law (Articles 343 et seqq. InsO) was not applicable, due to the fact that the scheme of arrangement neither presupposes any insolvency of the debtor nor institutes collective proceedings. Consequently, the Court concluded that the scheme did not qualify as an insolvency procedure. Although the *BGH* did not explicitly decide whether such proceedings fall within the scope of the Brussels I Regulation, the judgment further stated that even if the Articles 32 et seqq. of the Brussels I Regulation (JR) were applicable, Article 35 JR would the recognition of the English order sanctioning the scheme of arrangement. This was due to the fact that the plaintiff had concluded the insurance contract as a consumer and the English court had not applied the mandatory jurisdictional rules of Articles 8 and 12 (1) of the Brussels I Regulation. The judgment demonstrates the interplay between the Insolvency Regulation and the Judgments Regulation: Proceedings, which do not qualify as insolvency in the sense of Article 1 (1) EIR, are in the scope of the Judgments Regulation.⁶⁴ However, it remains to be seen whether mutual recognition under the latter Regulation is the appropriate instrument for cross-border effect of these proceedings.⁶⁵ Similar case law has been reported from other EU Member States.⁶⁶

Another issue relates to the unclear relationship between the definition of Article 1 (1) EIR and the description of insolvency proceedings in Article 2(a) and in Annex A. At present, the relationship between these provisions seems to be unsettled. According to a prevailing view, only insolvency proceedings listed in the Annex are considered to be covered by the EIR. However, several national reporters emphasized that Member States have already listed in Annex A pre-insolvency proceedings, which do not correspond to the definition of insolvency proceedings laid down in Article 1 (1) EIR and elaborated by the *ECJ*.⁶⁷ What matters in practice is not the definition in Article 1 (1) EIR, but rather the listing in the Annexes. This conclusion is

⁶⁴ The *BGH* did not answer the question as to whether the enforcement of schemes for other companies is permissible under the Judgments Regulation, *Bork*, IILR 2012, 477, 488.

⁶⁵ See *infra* 4.2.4.

⁶⁶ Cf. 3.3.1.15.

⁶⁷ See the examples quoted by the Belgian, the French and the Luxembourgian National Reports.

supported by the one of Advocate General Kokott in the case C-116/11⁶⁸ in which she (correctly) held that the French conciliation proceedings⁶⁹ did not entirely meet the standards of Article 1 (1) EIR. However, as the French conciliation was expressly mentioned in the Annex A, the AG came to the conclusion that the Regulation was applicable.⁷⁰ If this finding were to be correct, Article 1 (1) EIR would be without any substantive meaning and it would be advisable to simply delete Article 1 (1) EIR and to refer to the Annex. However, simply referring to the Annex would entail severe consequences: On one hand, the Member States would determine (at their discretion) the scope of the Regulation when they transmit information on their national insolvency proceedings to the Commission according to Article 45 EIR. On the other hand, parties would not be able to rely on the cross-border effect of insolvency proceedings which are not listed in the Annex. At present, the EU Commission does not verify whether the proceedings listed in the Annexes correspond to the criteria of Article 1 (1) EIR.

A further unresolved issue relates to the time of the opening of insolvency proceedings. In *Eurofood*, the *ECJ* held that the opening of insolvency proceedings presupposes the divestment of the debtor and the appointment of an administrator for the estate.⁷¹ This autonomous interpretation of Article 1 (1) has created uncertainty in some Member States with regard to the question of whether collective proceedings involving the designation of a provisional insolvency practitioner can be regarded as an opening of “insolvency proceedings” under the EIR.⁷² The precise determination of this moment is important for the delineation of concurring main proceedings. According to the *ECJ*, the decision on the opening of insolvency proceedings must be recognised under Article 16 EIR. Consequently, this decision bars any opening of additional main proceedings in other EU Member States. In

⁶⁸ *ECJ*, case C-116/11, *Bank Handlowy and Adamiak*, Opinion of AG Kokott, 5/24/2012, para. 49.

⁶⁹ L 611-4 et seqq. Code de commerce, see French National Report, answers to Q 3 and Q 5.

⁷⁰ The *ECJ* followed the line of arguments of the AG and held that the listing in the Annex is decisive for the applicability of the Insolvency Regulation, *ECJ*, case C-116/11, 11/22/2012, *Bank Handlowy and Adamiak*, paras 32 and 33.

⁷¹ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, paras 54, 58.

⁷² See *Thole*, in: Festschrift Simotta (2012), 613, 616; *Marquette*, R.D.C. 2006, 804, 809; *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10505.

this respect, further clarification of the case law of the *ECJ* seems to be necessary.

3.2.2 The Insolvency of Private Individual and Self-Employed Persons

According to recital 9, the EIR applies to insolvency proceedings regardless as to whether or not the debtor is a natural or legal person, a trader or an individual. The basic scope of the Regulation is therefore very broad as it includes all variations of insolvency proceedings of the EU Member States. When the EIR entered into force, the legal situation in the Member States with regard to the insolvency against individuals was diverse. However, over the last decade, most Member States introduced specific insolvency proceedings against individuals. The vast majority of the national reports (21) stated that their national laws contain rules on the over-indebtedness of private individuals and self-employed persons. Only four Member States⁷³ do not provide for specific proceedings. Among the Member States regulating such issues, 18 Member States⁷⁴ provide for proceedings for both over-indebted private individuals/consumers and self-employed persons⁷⁵.

The national reports have revealed common principles insofar as most of the national laws provide for a complete discharge of residual debt with only a few exceptions, especially with regard to maintenance claims concerning minors. Moreover, several Member States require an attempt to reach an out-of-court agreement prior to the initiation of insolvency proceedings against individuals. However, it should be pointed out that there are considerable differences among the laws of the Member States concerning the conditions upon which such proceedings can be opened as well as their objectives (relief of the debtor or mere payment of debts to creditors etc.). In practice, the most important difference relates to the time period of the discharge ranging from one year (England) to six years (Germany). The different time periods are a major incentive for *forum shopping* of individual debtors.⁷⁶

⁷³ Bulgaria, Hungary, Romania and Spain.

⁷⁴ Austria, Belgium, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia and UK.

⁷⁵ In Luxembourg, the over-indebtedness of self-employed persons not engaged into commercial activities is not addressed. No answers have been given from Ireland and Sweden with regard to self-employed individuals.

⁷⁶ See *infra* 3.3.4.

With regard to pre-insolvency proceedings, there exists substantial uncertainty in the Member States. In order to mitigate the impact of the ongoing financial crisis on the income and the solvency of natural persons, many Member States introduced or enlarged existing pre-insolvency proceedings for individuals. However, Annex A does not contain an exclusive list of all insolvency proceedings against natural persons,⁷⁷ potentially giving rise to disparity over the recognition regime of similar proceedings.

A pertinent example of the present shortcomings is the case *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm*⁷⁸, recently decided by the ECJ. In her Conclusions, Advocate General Sharpston dealt with the question of whether the residence requirement of the Swedish Law on Debt Relief⁷⁹ prevents EU-citizens from leaving Sweden in the exercise of the fundamental freedom of movement and therefore conflicts with Article 45 TFEU.⁸⁰ However, the case also relates to the question of whether a Swedish debt relief decision (*skuldsanering*) can be recognised (either under the EIR or under the Brussels I Regulation). According to the Advocate General, the Insolvency Regulation does not apply as the Swedish debt relief proceeding is not listed in Annex A of the EIR. The Brussels I Regulation is not applicable to the debt relief decision at issue, because the decision was rendered by an administrative body not fulfilling the criteria of a court in the sense of Article 32 JR either. As a result, the AG concluded that Swedish insolvency law was not covered by the pertinent EU instruments, although the case under consideration clearly related to cross-border insolvency in the Internal

⁷⁷ See for instance the Austrian *Zahlungsplanverfahren*, the French *procédure de surendettement des personnes physiques*, the Italian *procedimento per la composizione delle crisi da sovraindebitamento*, the Swedish *skuldsanering* as well as the Estonian, Finnish, Greek and Luxembourgian proceedings against natural persons.

⁷⁸ ECJ, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, Opinion AG Sharpston, 9/13/2012.

⁷⁹ Cf. sec. 4 of the *skuldsaneringslagen* (Law on Debt Relief): *Debt relief may be granted to a debtor who is resident in Sweden and a natural person, if: 1. the debtor is insolvent and so indebted that he or she cannot be presumed to have the means to pay his or her debts within a foreseeable period and 2. it is reasonable, considering the debtor's personal and economic situation, that he or she should be granted debt relief.*

A person who is registered in the population register in Sweden shall be regarded as being resident in Sweden for the purposes of application of subparagraph 1. (...).

⁸⁰ ECJ, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, Opinion AG Sharpston, 9/13/2012, paras 26 et seqq.

Market.⁸¹ In its judgment of November 8, 2012, the ECJ endorsed the findings of the Conclusions.⁸²

3.2.3 The Exception Rule of Article 1 (2) EIR

The European Insolvency Regulation does not apply to insurance undertakings, credit institutions, investment undertakings involving the holding of funds or securities for third parties, or to collective investment undertakings⁸³. According to recital 9 of the EIR, these debtors do not fall within its personal scope, since they are subject to special regulatory regimes and to the supervision of the competent national regulatory authorities.⁸⁴ The excluded entities are not defined in the EIR, but rather in other European instruments.⁸⁵

In the context of financial regulation, the European Union has enacted special rules on the reorganisation and winding up of insurance undertakings (Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings) and credit institutions (Directive 2001/24/EC on the reorganisation and winding up of credit institutions⁸⁶) authorised in EU Member States; EU-branches of third-country institutions are also included within the scope of the Directives. The legal basis of both Directives is

⁸¹ If the EIR was applicable to the case, the outcome of the conclusions might have been different: According to Article 3 EIR, the debtor had moved his COMI from Sweden to Belgium. Accordingly, the Swedish authorities had no jurisdiction to open insolvency proceedings under the EIR. Against this background, the domicile requirement of the Swedish insolvency law seems at least justified.

⁸² ECJ, 11/8/2012, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, paras 23 et seqq.

⁸³ See also the following judgments: *Cour d'appel de Versailles*, 7/16/2009, n° 09/02917, cited by the French National Reporter and *Corte di Cassazione*, 7/28/2004, no 14348, RDIPP 2005, 441 et seq., which concern insolvency of credit institutions and the decision of the BGH, 2/15/2012, NZI 2012, 425, annotated by *Paulus*, with regard to the insolvency of insurance undertakings.

⁸⁴ For more details, see *Wessels*, J.I.B.L.R. 2006, 301, 302; *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9, paras 67 et seq.; *Béguin/Menjuq*, *Droit du commerce international* (2005), 788 and *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), paras 54 – 55.

⁸⁵ See *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), paras 56 et seq. The term “insurance undertakings” is defined in Article 1 of the Directive 73/239/EEC, the term “credit institution” in Article 1 (1) of Directive 77/780/EEC, the term “investment undertaking” in Article 1 (2) of the Directive 93/22/EEC and the term “collective investment undertaking” in Article 1 of the Directive 85/611/EEC.

⁸⁶ Complementary to the rules on the insolvency of credit institutions are the provisions of the EU-Directive on Settlement Finality in payment and securities settlement systems (98/26/EC) and the EU Financial Collateral Directive (2002/47/EC).

Article 53⁸⁷ of the TFEU (formerly Article 47 (2) of the EC-Treaty) as they primarily aim at eliminating obstacles to the freedom of establishment and the freedom to provide services.⁸⁸ These instruments are structured, similarly to the EIR, as they contain rules on international jurisdiction for reorganisation measures or the commencement of winding up proceedings, on the applicable law and on the recognition of decisions issued in these proceedings. Nevertheless, they depart from the basic structure of the EIR, since they adhere more strictly to the principles of universality and unity of the reorganisation proceedings. The commencement of secondary proceedings is therefore not allowed.⁸⁹ To this purpose, jurisdiction lies with the courts of the home Member State which applies its *lex fori concursus* and the decisions of this court are automatically recognised in all other Member States.⁹⁰

The exclusion of credit institutions and insurance undertakings from the scope of the EIR should be assessed positively, as the enactment of special rules tailored to the peculiarities of these debtors and their significance for the national economy could enable the efficient reorganisation of such institutions and, therefore, the prevention of so-called systemic risks.⁹¹ As far as the reorganisation and winding up of credit institutions are concerned, the existing regulatory framework has enhanced legal certainty.⁹² Nevertheless, it has proved to be insufficient in the current financial crisis.⁹³ In particular, the inefficiency of the cooperation system among national authorities and the failure to reduce public and private reorganisation costs are the main sources of an on-going discussion.

⁸⁷ The Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings is also based on former Article 55 EC-Treaty/ Article 62 TFEU.

⁸⁸ See recital 1 of the Directive 2001/24/EC and recital 1 of the Directive 2001/17/EC; further Wessels, J.I.B.L.R. 2007, 555, 556.

⁸⁹ On reorganisation or winding up for credit institutions, see Wessels, American Bankruptcy Journal, 2005, 65 et seq.; Güneysu-Güngör, Comp. Law. 2005, 258 et seq.; for reorganisation or winding up of insurance undertakings, see Hess, Europäisches Zivilprozessrecht (2010), § 9, paras 73 et seq.

⁹⁰ Hess, Europäisches Zivilprozessrecht (2010), § 9, paras 67 et seq.

⁹¹ Torremans, Cross-border insolvencies in the EU, English and Belgian law (2002), 145.

⁹² Pilkington, IFLR 2004, 45.

⁹³ Regarding the cases *Fortis*, *Dexia*, *Lehman* and *Kaupthing* see Coleton, J.I.B.L.R. 2012, 63, 70 et seq.

3.2.4 Absence of Provisions for the Recognition of Insolvency Proceedings Opened outside the EU or the Coordination between Proceedings inside and outside the EU

Most of the national reporters assert that the lack of provisions for the recognition of insolvency proceedings opened outside the EU or the coordination between proceedings inside and outside the EU in the Insolvency Regulation has not caused many problems in practice. This can, in part, be attributed to the fact that most national laws contain provisions concerning the recognition or coordination of insolvency proceedings commenced outside the EU. In many Member States, these provisions largely copy the model of the EIR. Nonetheless, some of the national reporters referred to national legislation or case law indicating problems arising from the interaction between European legal acts and the legal order of Denmark or non EU-Member States, namely the lack of provisions concerning the recognition of such proceedings or the fact that their recognition in some Member States⁹⁴ does not prevent the opening of main insolvency proceedings. In the latter case, problems could arise in other EU Member States with regard to the recognition of proceedings initiated in third States.⁹⁵

3.3 National legislation and case law

Against the backdrop of the on-going discussion on the inclusion of pre-insolvency proceedings into the scope of the EIR, the general reporters asked the national reporters to summarise the existing pre-insolvency proceedings in their respective jurisdictions. The following overview shall permit an assessment of the potential consequences when extending the Regulation to pre-insolvency proceedings.

⁹⁴ See, for example, Austria and Italy.

⁹⁵ In *Rubin and another v Eurofinance SA & Ors and New Cap Reinsurance Corporation (in Liquidation) and another v AE Grant & Ors* [2012] UKSC 46, the UK Supreme Court recently held that judgments for the avoidance of transactions coming from third states are not automatically recognised in England. The court noticed that its conclusion departed from the principle of universality, but considered that a legislative initiative in this area of law would be more appropriate than judicial activism. In legal literature, the cautious approach of the UKSC has been criticised.

3.3.1 Pre-insolvency and hybrid proceedings in EU-Member States

3.3.1.1 Austria

The national reporters referred to a type of pre-insolvency proceedings provided for by the Business Reorganisation Act (URG)⁹⁶, which is not listed in the Annexes of the EIR.

The proceedings under the URG seem to be rarely used and inefficient⁹⁷ as the URG comprises no instrument facilitating the debtor's restructuring efforts such as provisions on the discharge of residual debt. Nonetheless, they are relevant with respect to the liability of the managing directors in the event that the company subsequently files an insolvency petition.

In these proceedings, the debtor facing financial difficulties submits a restructuring plan to the competent court. Proceedings are commenced if the equity ratio is under 8% and the fictitious period of debt redemption is longer than 15 years. The opening of the proceedings affects neither civil lawsuits or enforcement proceedings nor the execution of contracts. The debtor can benefit from restructuring loans granted during the proceedings under the URG. The issue of whether such proceedings are recognised in other Member States remains to be unsettled.⁹⁸

3.3.1.2 Belgium

The Belgian legal system provides for six different pre-insolvency and hybrid proceedings not listed in Annex A to the EIR.⁹⁹

The *Commercial investigation (Handelsonderzoek/enquête commercial, Article 8 et seq. LCE¹⁰⁰)* constitutes an enquiry into the economic viability of both natural and legal persons purporting to detect financial difficulties at an early stage in order to increase the likelihood of the success of future restructuring efforts. The enquiry is commenced *ex officio* without any formal court decision if there are no doubts about the enterprise's continuity. The

⁹⁶ Unternehmensreorganisationsgesetz (URG), Bundesgesetzblatt I No. 114/1997.

⁹⁷ Thole, Festschrift Simotta (2012), 613, 615. The Austrian National Reporters did not quote any case law.

⁹⁸ Thole, Festschrift Simotta (2012), 613, 615.

⁹⁹ Verougstraete, Manuel de la continuité des entreprises et de la faillite (2010), 93 et seq.

¹⁰⁰ Loi relative à la continuation des entreprises, 31 January 2009.

procedure, which is non-collective and does not entail the divestment of creditors, is structured in the following phases: The competent judge assumes the role of making restructuring proposals himself or assessing those made by the debtor. The court may advise the debtor to consider filing a request for the appointment of a mediator or an application for judicial restructuring. The judge reports back to the chamber, which can, *inter alia*, transfer the file to the court competent for the opening of insolvency proceedings, in the event that the debtor is presumably insolvent, or designate a mediator in accordance with a respective request of the solvent debtor. The decisions issued by the chamber are not considered to be judgments and are not subject to appeal.

The appointment of a mediator (*Aanstelling ondernemingsbemiddelaar / Désignation d'un médiateur d'entreprise*, Article 13 LCE) serves as a preservation measure contingent on the informal and voluntary request of the still solvent debtor. The latter leads to the appointment of an independent mediator entrusted with the duty to negotiate an agreement on claim repayment schemes with creditors in order to safeguard the future profitability of the enterprise currently suffering losses. In addition, the request is typically preceded by a commercial enquiry, while the mediator acts confidentially and reports back to the debtor in lieu of the court. Finally, it has to be stressed that no assessment of the debtor's insolvency status occurs and the latter cannot be divested of his assets.

Upon request of any interested party, the court may appoint a *mandataire de justice* (*Aanstelling gerechtsmandataris / Désignation d'un mandataire de justice*, Article 14 LCE), for the event that the still solvent debtor has acted in a manner, which has gravely endangered the continuity of the enterprise, and the appointment of such an official could preserve it. An order for the divestment of the debtor's assets can be issued optionally. Despite the fact that the *mandataire de justice* is included in Annex C, he is not considered to be a liquidator within the meaning of Article 2 (b) EIR, as he does not manage the company and cannot liquidate the debtor's assets unless explicitly delegated by the appointment order.

The Minnelijk akkoord / Accord amiable (Article 15 LCE) aims at an out-of-court agreement between the still solvent debtor and its creditors. It requires the consent of at least two creditors and has to illustrate in its content the

purpose of the company or debt restructuring. This instrument is therefore designed to allow a maximum level of flexibility to the debtor. The agreement and the payments made in compliance therewith are only opposable to creditors who have not signed it if the debtor deposits the agreement at the competent commercial court. Nonetheless, there are no court proceedings verifying the approval of the agreement, so that the *accord amiable* does not constitute a collective procedure and does not entail the divestment of the debtor's assets, as no insolvency practitioner is appointed.

The Judicial reorganisation by way of individual agreement (*Gerechtelijke reorganisatie door een minnelijk akkoord/Réorganisation judiciaire par accord amiable*, Article 43 LCE) constitutes a judicial reorganization procedure that can be commenced upon the debtor's request, if the continuity of the enterprise is threatened in the short or long term. The debtor does not need to be solvent, whilst the request impedes the opening of insolvency proceedings. During the moratorium imposed by the court, no individual enforcement measures on the debtor's immovable or movable property and no opening of insolvency or judicial liquidation can take place. Additionally, the opening of reorganisation proceedings does not entail the divestment of the debtor's assets. During the proceedings, the court allows the debtor to negotiate with two or more creditors under the supervision of a delegated judge. Should an agreement be concluded, the debtor can request its judicial approval, which is granted by the court without examining its content. In addition, the latter is confidential unless the debtor agrees on its publication. The agreement is not binding for creditors who did not sign it, but avoidance claims can be brought only to a limited extent. In the event that the negotiations fail, the debtor can request that the court decide whether and to what extent the debtor can delay payment towards its creditors.

The Appointment of a provisional administrator (*Aanstelling voorlopig bestuurder/ Désignation d'un administrateur provisoire*, Article 28 LCE) can be ordered upon request of the BPPS (Belgian Public Prosecution Service) or any interested party. The upholding of the request presupposes that judicial reorganisation proceedings have been initiated subsequent to the filing of a request for their opening and the debtor has committed manifest wrongful actions, which endanger the viability of its enterprise. This kind of

appointment entails the total divestment of the debtor's assets so that the provisional administrator takes over control over the debtor's estate. Although Annex C to the EIR explicitly mentions the provisional administrator as "*liquidator*" in the sense of Article 2 (b) EIR, the appointment procedure is not listed in Annex A to the EIR, as is the case with the provisional administrator appointed under Article 8 LF.

The *Court of Appeal Liège*¹⁰¹ had to decide in the *SARL Delos France* case, on the basis of an appeal against the commencement of a *procédure de réorganisation judiciaire* in Belgium over a French subsidiary of the SA Delos Group, whether the proceedings in question constitute insolvency proceedings falling within the scope of the EIR. The appellant argued that the *procédure de réorganisation judiciaire* is listed in Annex A to the EIR, but does not correspond to the definition of insolvency proceedings, as the debtor is not divested of his assets. The court held that the application of the EIR presupposes both the inclusion in Annex A to the EIR and the fulfilment of the requirements laid down in Article 1 EIR. According to the court, the term "*divestment*" is to be interpreted in a broad manner, so as to encompass not only the total divestment of the debtor, but also the partial and time-limited divestment, as is the case with the *procédure de réorganisation judiciaire*. Consequently, it held that the relevant proceedings in question are subject to the EIR. Furthermore, the court was confronted with the question of whether the appointment of a provisional liquidator without any request for the opening of insolvency proceedings but in context of the appointment procedure according to Article 28 LCE, is included within the scope of the EIR. It held that, in view of the *ECJ* ruling in the *Eurofood* case, the appointment of a provisional liquidator only constitutes the opening of insolvency proceedings in cases in which an insolvency petition is filed against the debtor. As the appointment procedure is not included in Annex A to the EIR, the Court assumed that it is excluded from the material scope of the EIR.

The *Employment Court Brussels*¹⁰² decided in the case *Eurodis* that the acquisition of shares by third parties either in the course of reorganisation or

¹⁰¹ *Cour d'Appel de Liège*, 4/28/2011, R.D.C. 2012/2, 165 et seq.

¹⁰² *Arbeidshof Brussel*, 12/18/2009, www.juridat.be.

liquidation, as provided in a CAO (agreement among the employees and their employer), falls within the scope of the EIR.

3.3.1.3 Czech Republic

The Czech national reporter has not referred to relevant national legislation or case law. He emphasized, however, that the Czech reorganisation proceedings fall within the scope of the EIR. In addition, mention is made of the current initiatives to introduce a new pre-insolvency instrument including the judicial approval of a creditors' out-of-court agreement, which – in its present form – does not fulfil the criteria laid down in Article 1 (1) EIR.

3.3.1.4 France

The French national report refers to two pre-insolvency proceedings that are not listed in the Annexes, the *conciliation* and the *mandat ad hoc*.

The *mandat ad hoc* (L 611-3 Code de commerce) constitutes a non-collective procedure aimed at preventing financial difficulties of companies and legal entities, which is rarely used in practice. Subsequent to a request of the debtor (company or legal entity), the competent court appoints a *mandataire ad hoc* in charge of assisting the debtor in the negotiation with the creditors and in the assessment of his situation (exclude the administration of the debtor's estate). The existence of a *mandat ad hoc* is confidential. The agreement with the creditors, if any, is not to be approved by any court.¹⁰³

The purpose of the *conciliation proceedings* (L 611-4 et seq. Code de commerce) is to enhance the debtor's restructuring efforts and to give the creditors and the debtor a further chance to negotiate on a restructuring plan. At the request of a debtor still solvent or having ceased the payment of his debts no longer than 45 days, the competent court opens the proceedings and appoints a *conciliateur* for a period of four months. The commencement of the proceeding does not entail the devastation of the debtor, but rather imposes the debtor to negotiate with his creditors in good faith. The creditors are still allowed to sue the debtor or initiate individual enforcement measures to recover their claims. The *conciliateur* does not administer the debtor's estate, but is empowered to foster negotiations on the conclusion of a

¹⁰³ See *Jeantin/Le Cannu*, *Entreprises en difficulté* (7th ed. 2007), 55 et seq.

restructuring agreement between the debtor and the creditors. If an agreement is reached, it will be acknowledged by a court order without any review of its content and will be declared enforceable. The acknowledged agreement remains confidential unless complicated proceedings over the approval of the agreement are initiated by a formal judgment. If the negotiation efforts fail, the consequences depend on whether the debtor has ceased payments to his creditors.¹⁰⁴ In the first case, a *procédure de redressement* or *procédure de liquidation judiciaire* shall be commenced against the debtor, whereas the opening of a *procédure de sauvegarde* is still possible in the latter.

3.3.1.5 Germany

As stated in the German national report, the proceedings listed in Annex A to the EIR largely correspond to the insolvency proceedings of the German Insolvency Act (InsO)¹⁰⁵; the list also includes the former bankruptcy proceedings of the late 1990s.

The recent amendment of the German Insolvency Act¹⁰⁶ introduced two new proceedings at a pre-insolvency stage:

Sections 270 and 270a of the Insolvency Act enhance the debtor-in-possession proceedings (*Eigenverwaltung*, DIP).¹⁰⁷ An application for DIP proceedings filed by a debtor (company) can only be rejected by the court if there are known concrete circumstances that might lead to the proceedings being disadvantageous to creditors (sec. 270 (2) No. 2 InsO). According to the predominant view in legal literature with regard to the former sec. 270 InsO, DIP proceedings are qualified as insolvency proceedings as they are ordered and supervised by the insolvency court. However, the appointment of a third party to control the debtor (as required by the *ECJ* in its *Eurofood*

¹⁰⁴ See *Jeantin/Le Cannu*, *Entreprises en difficulté* (7th ed. 2007), 59 et seq.

¹⁰⁵ An English version (which does not include the latest amendments) is available at: http://www.gesetze-im-internet.de/englisch_inso/englisch_inso.html#p1010.

¹⁰⁶ Amendments made by virtue of *Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen* (Law for the Further Facilitation of the Restructuring of Enterprises, ESUG), BGBl. I 2011, 2582 applying as of 1 March 2012. See *Göb*, NZG 2012, 371; *Römermann*, NJW 2012, 645.

¹⁰⁷ Those proceedings were introduced in 1999, but had rarely been used; see *Eidenmüller*, ZHR 2011, 11, 24 et seq.: DIP-proceedings are opened in less than 1% of the insolvency cases.

decision) usually does not take place. Nevertheless, Annex A to the EIR includes *Insolvenzverfahren* and, therefore, also DIP proceedings.¹⁰⁸

The protective shield proceedings (*Schutzschirmverfahren*, sec. 270b InsO) are not listed in Annex A of the EIR. The proceedings shall give the debtor an opportunity to develop an insolvency plan, which is implemented in subsequent insolvency proceedings. Protective shield proceedings aim at preparing insolvency proceedings by means of elaborating a restructuring plan. Upon application by the debtor, the court sets a temporal deadline with a maximum of three months for the presentation of the plan. During this period, the debtor is protected from individual enforcement measures. The insolvency proceedings are opened when the debtor presents the restructuring plan to the court. It is discussed whether the protective shield proceedings fall within the scope of the EIR.¹⁰⁹ As those proceedings have only been introduced recently, no consistent view exists in legal literature.

German courts were confronted with the recognition of hybrid proceedings not listed in Annex A to the EIR, such as *schemes of arrangement*.¹¹⁰ Court orders confirming the schemes are usually not recognised under Articles 16 and 25 EIR.

One case concerned a German claimant who filed patent revocation proceedings against a respondent, a company belonging to a US group of companies. While the proceedings were pending, the parent company filed an application under Chapter 11 of the US Bankruptcy Code. The *BGH* found that the proceedings opened under Chapter 11 of the US Bankruptcy Code should be recognized under Section 343 of the German Insolvency Act (InsO).¹¹¹ It qualified the proceeding as insolvency proceedings aimed at the reorganisation of a company by means of a reorganisation plan. Consequently, the patent revocation proceedings were stayed in accordance with sec. 352 of the German Insolvency Act (InsO). In a previous decision, the

¹⁰⁸ It should be mentioned that the recent amendment of the German Insolvency Act enlarged the scope of the DIP-proceedings considerably. However, it did not entail any change of Annex A.

¹⁰⁹ Thereto *Thole*, Festschrift Simotta (2012), 613, 616.

¹¹⁰ An overview of the recognition of English solvent schemes of arrangement affecting German creditors is given by *Schümann-Kleber*, IILR 2011, 447 et seqq.

¹¹¹ *BGH*, 10/13/2009, ZIP 2009, 2217.

OLG Frankfurt also qualified proceedings under Chapter 11 of the US Bankruptcy Code as insolvency proceedings.¹¹²

The *BGH* recently held¹¹³ that an order approving a scheme of arrangement under English law (sec. 899 CA 2006) does not qualify as insolvency proceedings in the sense of Section 1 (1) of the German Insolvency Act (InsO), but can eventually be recognised under Articles 32 et seqq. of the Brussels I Regulation.¹¹⁴

Contrary to the *BGH*, the *LG Rottweil* had held that a *scheme of arrangement* under English law constitutes a foreign insolvency procedure and may be recognized pursuant to sec. 343 of the German InsO.¹¹⁵ The court stated that a scheme of arrangement has comparable effects to proceedings under Chapter 11 of the US Bankruptcy Code, since it aims at restructuring the company and preventing its insolvency. At present, there is considerable uncertainty regarding the qualification and the legal effects of scheme of arrangements in Germany.

3.3.1.6 Greece

Greek law¹¹⁶ provides for the following pre-insolvency proceedings not mentioned in the Annexes: The procedure of reorganization (*diadikasia eksigiansis*, *διαδικασία εξυγίανσης*, Articles 99 et seqq. of the Greek Bankruptcy Code, as amended by Article 12 of the law No. 4013/2011 and Article 234 of the recent law No. 4072/2012) purports to enable restructuring efforts of companies or legal entities facing financial difficulties or having ceased the payment of their debts in a non-constant manner (in the last case, the debtor is obliged to additionally file an insolvency petition). The proceedings are commenced upon the request of the debtor. The decision opening the proceedings designates, *inter alia*, a conciliator (*mesolavitis*, *μεσολαβητής*), who is empowered to assist the distressed company and its

¹¹² *OLG Frankfurt am Main*, 2/20/2007, ZIP 2007, 932.

¹¹³ *BGH*, 2/15/2012, NZI 2012, 425, annotated by *Paulus*, see *supra* 3.2.1.

¹¹⁴ Same opinion *LG Potsdam*, 10/22/2008, BeckRS 2011, 15245; *Petrovic*, ZinsO 2010, 265, 267 et seq.; *Schaloske*, VersR 2009, 23, 27 et seq. However, some scholars do not qualify a scheme of arrangement as a judgment in the sense of Article 32 Brussels I Regulation, see e.g. *Schnepp/Janzen*, VW 2007, 1057, 1058 et seq.

¹¹⁵ *LG Rottweil*, 5/17/2010, ZIP 2010, 1964.

¹¹⁶ *Kotsiris*, Bankruptcy Law (Ptoxeftiko dikeo) (8th ed. 2011), 585 et seq.; *Avgitidis*, Rehabilitating Enterprises: Pre-Bankruptcy Agreements (2011), 237 et seq.

creditors in entering into a restructuring agreement. The court may issue interim measures, i.e. the stay of enforcement measures or the prohibition of filing an insolvency request. The validity of the restructuring agreement depends on the approval of the court which ascertains whether that majority of the creditors, as prescribed by the bankruptcy court, consented to the plan (namely 60% of the present creditors, 40% of the secured creditors and creditors representing 50% of the claims in total). Subsequent to the judicial approval, the agreement binds all creditors, irrespective of whether they have consented to the agreement taken part in the proceedings.

3.3.1.7 Italy

Italian law provides for three types of pre-insolvency proceedings. However, only one of these proceedings, the *concordato preventivo*¹¹⁷, is included in Annex A to the EIR. Further pre-insolvency proceedings are the *accordo di ristrutturazione dei debiti*¹¹⁸ and the *piano di risanamento attestato*.¹¹⁹ The pre-insolvency proceedings do not require the debtor's insolvency, but rather can be implemented if the debtor is in financial distress. It has to be noted that the regulation of workout proceedings has recently been amended in order to increase their efficiency.¹²⁰ Most of the interviewees favoured an extension of the scope of the EIR to pre-insolvency proceedings.

3.3.1.8 Latvia

In Latvia, there are three insolvency laws in force¹²¹. As only the pre-insolvency proceedings under the most recent insolvency law¹²² are listed in

¹¹⁷ Binding workout agreement approved by creditors' (and/or classes of creditors') majority voting, which is under a strict court supervision and must be officially certified by a court, Articles 161 - 182 of the Italian Insolvency Act.

¹¹⁸ Agreement with as many creditors representing at least 60 % of the overall credits and is officially certified by a court, Article 182bis of the Italian Insolvency Act.

¹¹⁹ Workout project certified by an advisor, which does not require the creditors' or court's intervention and is not binding for other creditors, Art. 67 (3) (d) of the Italian Insolvency Act.

¹²⁰ See Act No. 83 of 22 June 2012 as amended by Act No. 136 of 7 August 2012, Gazzetta Ufficiale No. 187 of 11 August 2012.

¹²¹ Those Acts are the "Law on the Insolvency of Undertakings and Companies" of 2 October 1996 (in force from 12 October 1996 through 31 December 2007), which is still applicable to insolvency proceedings which were commenced according to this law, Latvijas Vēstnesis, 2 October 1996, no. 165. English version available at: http://www.vvc.gov.lv/export/sites/default/n_docs/LRTA/Likumi/On_the_Insolvency_of_Undertakings_and_Companies.doc.; the Insolvency Law of 1 November 2007 (in force from 01/01/2008 through 10/31/2010) which is still applicable to insolvency proceedings which were commenced according to this law, Latvijas

Annex A to the EIR, a problem has arisen as to whether the previous version of the Annexes to the EIR were still applicable. Latvian pre-insolvency proceedings previously listed in Annex A¹²³ were deleted from the Annex by virtue of Council Implementing Regulation (EU) No 583/2011¹²⁴, since they had been amended by the new Latvian Insolvency Law of 2010.

Moreover, the new Latvian Insolvency Law provides for out-of court legal protection proceedings not listed in Annex A. However, according to the national report, these proceedings are considered to be within the scope of the EIR as they constitute a type of legal protection procedure.

3.3.1.9 Malta

Maltese law provides for two pre-insolvency proceedings not listed in Annex A of the EIR. Those proceedings are the statutory *scheme of compromise or arrangement* and the so-called *Company Recovery Procedure*, which resembles the administration procedure in the United Kingdom. Upon application of the company, the court appoints a special controller to take over, manage and administer the business of the company. The court shall only issue the order if the following conditions are met: (1) the company is unable to pay its debts and (2) the order would likely achieve the survival of the company in part or in whole or the sanctioning of a compromise or a scheme of arrangement between the company and any of its creditors or members. From the date of application on, there is a moratorium on judicial proceedings, the enforcement of security and voluntary winding up. The appointed special controller has to ascertain whether a recovery plan is viable. In the event of affirmation, he has to submit his report to the court

Vēstnesis, 22 November 2007, no. 188 and the Insolvency Law of 26 July 2010 (in force from 1 November 2010 to present), Latvijas Vēstnesis, 6 August 2010, no. 124. English version available at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Insolvency_Law.doc.

¹²² Insolvency Law of 26 July 2010.

¹²³ Those pre-insolvency proceedings were the recovery in insolvency proceedings of a legal person, the settlement in insolvency proceedings of a legal person and the settlement in insolvency proceedings of a private individual.

¹²⁴ Council Implementing Regulation (EU) No 583/2011 of 9 June 2011 amending the lists of insolvency proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings and codifying Annexes A, B and C to that Regulation, OJ L 160, 6/18/2011, 52.

within two months of his appointment. The time period of the recovery order is roughly 12 months, but may be extended.

3.3.1.10 Netherlands

Dutch law only provides for hybrid proceedings with regard to natural persons¹²⁵ (*Schuldsaneringsregeling*, Article 287a of the Dutch Bankruptcy Act), a cram down procedure not listed in Annex A. The debtor may request that the court order creditors that did not agree on a composition proposed by the debtor prior to filing the petition to consent to the debtor's proposal if the court finds that the dissenting creditor(s) could not reasonably have withheld their consent to the proposed arrangement. If the court orders the dissenting creditors to consent to the proposed arrangement, insolvency proceedings shall not be opened.

There is one decision referred to by the national reporter in which the recognition and enforcement of a Dutch hybrid proceeding (*Schuldsaneringsregeling*, see above) in other Member States has caused problems.

The *Court of Gravenhage*¹²⁶ refrained from issuing an order as referred to in Article 287a of the Dutch Bankruptcy Act (thereby blocking a successful workout) on the basis that the cram down resulting from the court order would be ineffective as it would not be recognised in other Member States under the Insolvency Regulation or the Brussels I Regulation and the (dissenting) creditors concerned were all foreign creditors (mainly German banks). If recognition of a plan in other Member States is not guaranteed, it becomes more difficult to adopt a plan.

3.3.1.11 Poland

Polish law provides a rehabilitation proceeding (*Postępowanie naprawcze*)¹²⁷, the main purpose of which is the debt restructuring through an arrangement between the - still solvent, but in imminent danger of insolvency - debtor and

¹²⁵ At present, Dutch law does not provide for any hybrid proceedings in respect of companies. Accordingly, work outs with creditors require the consent of all creditors affected.

¹²⁶ *Rechtbank's-Gravenhage*, 6/10/2010, LJN: BN9604 (www.rechtspraak.nl).

¹²⁷ Articles 492 – 521 of the Bankruptcy and Rehabilitation Law, see brief description by *Porzycki*, in: *Faber/Vermunt/Kilborn/Richter* (eds.), *Commencement of Insolvency Proceedings* (2012), 484 et seq., para. 14.3.3.

its creditors.¹²⁸ The arrangement must be accepted by the creditors and approved by the court. Rehabilitation proceedings are rarely used in practice. However, in the event of a successful reform of those proceedings, which is currently discussed in Poland, problems may arise with regard to the recognition and enforcement of those proceedings in other Member States. No case law regarding the recognition and enforcement of foreign judgments opening hybrid or pre-insolvency proceedings has been reported.

3.3.1.12 Romania

Romanian legislation provides for two optional pre-insolvency proceedings, similar to the French *mandat ad-hoc* and *concordat préventif* (see Law No. 381/2009). Both proceedings apply to solvent undertakings facing financial difficulties. They permit a restructuring of debts outside a judicial insolvency procedure. These procedures are not explicitly mentioned in Annex A of the Regulation.

The *mandat ad-hoc* is a confidential amicable settlement procedure in which the distressed undertaking requests the court to appoint an ad-hoc professional empowered to negotiate with the creditors measures enabling the reorganisation of the distressed undertaking.

The *concordat préventif* (*preventive agreement*) is an amicable reorganisation proceeding, supervised by a court and conducted by a *provisional conciliator* who elaborates a reorganisation plan. Upon approval of a qualified majority of creditors, the debts can be rescheduled or reduced by up to 50%. During the procedure, the court may grant a provisional stay of individual executorial proceedings against the debtor's assets. However, the debtor is not divested of his assets. The provisional stay of executorial measures, as well as the prohibition of the opening of insolvency proceedings while the creditor-accepted reorganisation plan is in force may cause serious difficulties regarding the opening of territorial proceedings under Article 3 (4) EIR. In particular, the national reporter stressed the disadvantaged position of the local creditors: Whilst creditors in another Member State could still wind up assets located in that jurisdiction, local creditors from Romania have to wait

¹²⁸ Deloitte, Insolvency Group Legal Network (March 2012), available at http://www.taj.fr/portail/liblocal/docs/Actualites/IG%20BOOKLET_MARS2012_FINAL.pdf, 21.

until the reorganisation plan is failed or fulfilled (and, moreover, in that case, they must even accept a cut of their claims).

3.3.1.13 Spain

In 2011, the Spanish legislator¹²⁹ introduced a new pre-insolvency proceeding (the so-called *homologación de los acuerdos de refinanciación*).¹³⁰ This proceeding applies to refinancing agreements (*acuerdos de refinanciación*) and resembles the English *scheme of arrangement*. However, there exist significant differences between both instruments. According to the Fourth Additional Provision of Law No. 38/2011, a refinancing agreement is subject to judicial approval if it meets certain formal requirements laid down in Article 71 (6) of the Spanish Insolvency Act (as amended) and has been supported by financial creditors representing at least 75 % of the debts. Upon application by the debtor¹³¹, the commercial court can, at a first stage, preliminarily approve the agreement after the court clerk has reviewed it *prima facie*. At this stage, the court may grant a stay of individual enforcement actions up to one month until the agreement is finalised.

The agreement is approved by the court if it does not entail a “*disproportionate sacrifice*” for the dissenting creditors. Moreover, the court may order the stay of enforcement actions for a maximum period of three years. Once approved, the agreement is extended to all financial creditors. However, the approval is not binding for creditors holding *in rem* security and - following a doctrinal point of view - its effects are limited to financial creditors (*entidades financieras*). It may be subject to appeal by dissenting financial creditors within 15 days after its publication in the Official Journal.

Spain has not requested the Commission to include the proceeding into Annex A to the EIR. National courts have already dealt with this new

¹²⁹ Ley 38/2011, de 10 de octubre, de reforma de la Ley 22/2003, de 9 de julio, Concursal, BOE No. 245 of 11 October 2011, 106745 et seq. The Act entered into force on 1 January 2012. For a general overview of the recent amendments, see *Moreno Serrano*, *Revista de derecho de sociedades* (2011-2012), 521.

¹³⁰ See Fourth Additional Provision of the Law No. 38/2011.

¹³¹ The debtor shall provide the court with the refinancing agreement and the evaluation report of the restructuring plan by an independent expert appointed by the Mercantile Registry.

instrument and sanctioned the agreement (*acuerdo de refinanciación*).¹³² However, it is assumed that its recognition and enforcement will be as problematic as the English *scheme of arrangement* under the current recognition and enforcement regime at EU-level.¹³³

3.3.1.14 Sweden

The *skuldsanering* [Debt relief proceedings - Paragraph 4 of the *skuldsaneringslagen* (Law on debt relief)] is only available for private individuals¹³⁴ and it is considered as a hybrid proceeding. On one hand, its effects and prerequisites are similar to those of bankruptcy and company reorganization. On the other hand, it does not fulfil the criteria laid down in Article 1 (1) of the EIR, since it doesn't entail the partial or total divestment of the debtor. The institution of *Underhandsackord* (amicable settlement proceeding), a voluntary agreement between creditors and a company that is not insolvent or under a company reorganisation procedure, could also be seen as a pre-insolvency proceeding. For the event that the debtor company is under a company reorganisation procedure, an independent third party appointed by the court, a *rekonstruktör* (administrator), assists with the settlement procedure under the supervision of the court. An agreement/settlement approved by a qualified majority of creditors is binding for the company and all dissenting creditors.¹³⁵

3.3.1.15 United Kingdom (England and Wales)

English insolvency law provides for two pre-insolvency proceedings (*scheme of arrangement* and *company voluntary arrangement*). The scheme of arrangement is a court-sanctioned compromise between the company and its

¹³² E.g. *Juzgado de lo Mercantil No. 6 de Barcelona*, 6/5/2012, BOE No. 186, 8/4/2012, 37141 et seq. commented by *Cervera Martínez*, *Revista de derecho concursal y paraconcursal* 2012, 195 et seqq.

¹³³ The English Scheme of Arrangement is not confined to a creditor restructuring. It is also (and more widely) used to deal with shareholder alterations, insurance mergers and other arrangements which have no insolvency connotations whatsoever. However, as far as the Scheme is used for the restructuring, it should be brought within the scope of the Regulation.

¹³⁴ Cf. "*De schuldsaneringsregeling natuurlijke personen*" in The Netherlands, Annex I of the EIR. For a more detailed description see below (2.4.2.23).

¹³⁵ S. *Deloitte*, *Insolvency Group Legal Network* (March 2012), available at http://www.taj.fr/portail/liblocal/docs/Actualites/IG%20BOOKLET_MARS2012_FINAL.pdf, 27.

shareholders or its creditors concerning the arrangement of the debts.¹³⁶ It can be invoked whether or not the company is insolvent. Financial difficulties are sufficient. The scheme of arrangement has to be approved by the shareholders and creditors. It is then binding for all creditors, even if they have not consented to it or participated in it.¹³⁷ The debtor's assets are administered by a trustee (sec. 895-899 of the Insolvency Act 1986) in accordance with the terms of the scheme.

Schemes of arrangement are not regarded as formal insolvency proceedings. The jurisdiction is determined by autonomous law; sec. 221 of the Insolvency Act generally requires a sufficient connection to the UK. This requirement is met if a reasonable possibility of benefit to those applying for the scheme to be sanctioned and one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise a jurisdiction.¹³⁸ Under these circumstances, courts continue to apply national jurisdictional and PIL rules and approve schemes proposed by foreign companies trying to benefit from the national restructuring legislation.

To date, English courts have granted orders approving schemes of arrangements in a cross-border context for German¹³⁹, Spanish¹⁴⁰ and Italian¹⁴¹ companies.

English law provides for another pre-insolvency proceeding, the *Company Voluntary Arrangement* (sec. 1 – 7 of the Insolvency Act 1986), which is listed in the Annex A of the EIR. The CVA is an out-of-court settlement between the company and its unsecured creditors. The CVA procedure does not presuppose a decision opening the CVA proceedings, nor a later court-sanctioning of the arrangement. The court will only decide if the CVA is challenged.

¹³⁶ Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), paras 12-12 et seqq.

¹³⁷ *Eidenmüller/Frobenius*, WM 2011, 1210, 1212.

¹³⁸ *Stocznia Gdanska SA v Latreefers Inc* [1998] EWHC 1203 (Comm).

¹³⁹ *Trimast Holding Sarl v Tele Columbus GmbH* [2010] EWHC 1944 (Ch); *Rodenstock GmbH* (The "Scheme Company"), Re [2011] EWHC 1104 (Ch): Rodenstock was Europe's fourth largest manufacturer and distributor of spectacle lenses and frames, employing over 4000 people in over 80 countries.

¹⁴⁰ *La Seda de Barcelona SA* [2010] EWHC 1364 (Ch) and *Metrovacesa* [2011] EWHC 1014 (Ch).

¹⁴¹ On 16 August 2012, the *High Court* sanctioned the scheme of arrangement proposed by *Seat Pagine Gialle SpA*, an Italian company with COMI located in Italy and operating business in two other jurisdictions (England and Germany). It has to be noticed that this is the first ever sanction of a scheme of an Italian company.

A CVA procedure does not require the over-indebtedness or the insolvency of the debtor. It comes into force from the date on which the company's creditors approve the CVA proposal. The approval requires a majority of "*three-quarters in value of the creditors present in person or by proxy and voting on the resolution*" (1.19 Insolvency Rules 1986). All unsecured creditors are then bound to the terms of the approved proposal, regardless as to whether or not they voted.

In principle, a company proposing a CVA does not benefit from a statutory moratorium, but a CVA can be combined with an administration-proceeding in order to obtain a moratorium.¹⁴² Small companies¹⁴³, however, may receive a moratorium even under the CVA proceedings,¹⁴⁴ since the opening of an administration proceeding only to benefit from a moratorium is regarded as too cumbersome and costly for small companies. The debtor may manage and dispose of the assets involved in the CVA proceeding under surveillance by a nominee.

The reported case law shows the attraction of the scheme of arrangement and the company voluntary arrangement for the restructuring of companies in financial difficulties. Due to the flexible proceedings and the generous jurisdictional requirement of a sufficient connection to England, foreign companies without physical presence or assets in England can be restructured by the scheme, especially if the contracts on which the claims of the creditors are based provide for the jurisdiction of English courts. Schemes of arrangement have been implemented with regard to German, Italian, Polish and Spanish companies. This practice demonstrates that, in pre-insolvency proceedings, an open competition among the national systems and, correspondingly, *forum shopping* has become a growing phenomenon. The present situation cannot be regarded as satisfactory – although it might be considered (at first glance) beneficial for the legal business at some "judicial marketplaces" within the European Judicial Area.

¹⁴² Cf. Goode, Principles of Corporate Insolvency Law (4th ed. 2011), para. 12-30.

¹⁴³ A company qualifies as small, if it complies with the requirements as specified in sec. 382 (2) Companies Act 2006.

¹⁴⁴ Goode, Principles of Corporate Insolvency Law (4th ed. 2011), para. 12-39. The optional moratorium for small companies was introduced by the Insolvency Act 2000.

3.3.2 Assessment: common features of pre-insolvency and hybrid proceedings

As a consequence of the recent developments, the majority of Member States¹⁴⁵ has introduced pre-insolvency proceedings combining characteristics of out-of-court settlements and judicial insolvency proceedings.¹⁴⁶ The common purpose of these hybrid proceedings is to prevent the debtor's insolvency by means of a (court-approved) agreement between the debtor and his creditors.¹⁴⁷ Since hybrid proceedings apply at a pre-insolvency stage, the debtor's insolvency is not required. Therefore, it is sufficient that the debtor is in a stadium of financial difficulties. Hence, the existence of financial difficulties has to be ascertainable from an *ex ante* perspective. Member States have developed different criteria in order to acknowledge whether those financial difficulties exist. While some of the Member States adopt a very general approach¹⁴⁸, other Member States provide for a more technical description.¹⁴⁹ In this regard, it must be stated that a common understanding of the concept of financial difficulties is lacking which entails legal uncertainty in cross-border situations.¹⁵⁰

Moreover, the procedural instruments in the Member States differ considerably. Comparative analysis has revealed that there is a tendency of

¹⁴⁵ Austria, Belgium, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Romania, Spain, Sweden and United Kingdom.

¹⁴⁶ *Garcimartín*, IILR 2011, 321, 323.

¹⁴⁷ E.g. the conciliation procedure (*procédure de conciliation*) under French law, the *Company Recovery Procedure* under Maltese law; *accordo di ristrutturazione dei debiti, piano di risanamento attestato* and *concordato preventivo* under Italian Law, scheme of arrangement under English law, the conciliation procedure (*concordatul preventiv*) under Romanian law and *homologación de acuerdo de refinanciación* under Spanish Law.

¹⁴⁸ E.g. Italy: *stato di crisi* (Article 160, 182bis Legge Fallimentare); France: "(...) *qui éprouvent une difficulté juridique, économique ou financière, avérée ou prévisible*" (Article L 611-4 Code de commerce); Romania: *aflata în dificultate financiară* (Article 1 Act No. 381/2009); the concept of *dificultate financiară* is defined by Article 3 (b) Act No. 381/2009. Under Greek Law, the debtor has to face "a current or an imminent inability of discharging its due and payable pecuniary obligations in a general manner" (translation taken from *Potamitis/Rokas*, J.B.L. 2012, 235, 238), cf. procedure of reorganization (*diadikasia eksigiansis*, διαδικασία εξυγίανσης; Articles 99 et seqq. of the Greek Bankruptcy Code, as amended by Article 234 of the recent law No. 4072/2012).

¹⁴⁹ Under Austrian Law proceedings under the Business Reorganization Act (URG) can be commenced if the equity ratio is under 8% and the fictitious period of debt redemption is longer than 15 years, cf. Austrian Report answer to question 3, sec. 1 (3) URG; similarly Belgium: According to Article 23 LCE, the continuity of the company has to be threatened in the short or long term, which is presumed in the event of losses having reduced the debtor's assets to less than half of its registered capital.

¹⁵⁰ *Westphal*, ZGR 2010, 385, 412.

appointing an insolvency practitioner in hybrid proceedings.¹⁵¹ However, in comparison to formal insolvency, the appointed person plays a different role: In the majority of the Member States, the powers and duties performed by the practitioner are limited to consultation, assistance, mediation and supervision.¹⁵² Furthermore, the appointment of an insolvency practitioner is directly linked to the issue of whether the opening of pre-insolvency or hybrid proceedings entails the (partial) divestment of the debtor.¹⁵³ In the majority of Member States, there is no divestment of the debtor's assets.¹⁵⁴ However, some Member States provide for specific limits on the debtor's right to control its assets (e.g. subject to (judicial) approval).¹⁵⁵

With regard to the question of whether the commencement of pre-insolvency or hybrid proceedings leads to a stay of enforcement, there is unanimity within the national laws of the Member States. In general, the provisions can be categorized into three groups: The first group of Member States provides for an automatic stay of execution measures after the opening of pre-insolvency or hybrid proceedings¹⁵⁶, whereas in the second group of Member States, the decision of whether to stay enforcement is left to the court's discretion.¹⁵⁷ Only in few Member States is there no moratorium at all.¹⁵⁸ According to some national legal systems, the moratorium may also include the suspension of the right to open main or secondary insolvency

¹⁵¹ The denomination of the third party varies in the Member States, e.g. *Reorganisationsprüfer* (Austria), *mandataire de justice* (Article 14 LCE) or *médiateur d'entreprise* (Article 13 LCE, Belgium), *conciliateur* or *mandataire ad hoc* (France), *commissario giudiziale* and *giudice delegato* (Italy), *special controller* (Malta), *mandatar ad-hoc* (Article 7 Act No. 381/2009) or *conciliatorul provizoriu* (Article 14 (a) Act No. 381/2009, Romania).

¹⁵² One exception is Malta, where "any power conferred on the company [...] shall be suspended unless the consent of the special controller to exercise such power has been obtained", Article 329B (6) (d) Companies Act.

¹⁵³ This is the case in Malta for example (*Company Recovery Procedure*, Article 329B (6) Companies Act).

¹⁵⁴ E.g. in Austria (proceedings under the Business Reorganisation Act), England (*scheme of arrangement*), France (*procédure de conciliation* and *mandat ad hoc*) and Romania (*concordatul preventiv*).

¹⁵⁵ E.g. in the Czech Republic (*reorganization proceedings*) and in Italy (*concordato preventivo*).

¹⁵⁶ E.g. in the framework of the *procédure de sauvegarde* during the *période d'observation* for a maximum of 6 months (France), the *concordato preventivo* and *accordo di ristrutturazione* (Italy) and the *Company Recovery Procedure* (sec. 329B (4) (c) Companies Act (Malta).

¹⁵⁷ E.g. in Greece and Spain (where the stay of execution measures may be ordered for a maximum period of one month, cf. Disposición Adicional Cuarta, subpara 2 of Act No. 38/2011).

¹⁵⁸ E.g. in Austria (proceedings under the Business Reorganisation Act), in England (*scheme of arrangement*) and in France (*procédure de conciliation*), *Westphal*, ZGR 2010, 385, 409.

proceedings. However, it is still possible to apply for the opening of territorial proceedings in another Member State.

A major issue of hybrid proceedings relates to the question of whether the agreement has binding effect on dissenting creditors and, if so, on which creditors.¹⁵⁹ As a general rule, secured debts are excluded from the binding effect. Nevertheless, at least the Italian *concordato preventivo* and the English *scheme of arrangement* are also binding for creditors whose claims are preferential or secured *in rem*. Then again, in some proceedings, the binding effect is determined by the kind of creditors involved, e.g. only financial creditors are affected.¹⁶⁰ In those Member States, where the agreement has (to any extent) binding effect, differences exist concerning the necessary quorum of creditors (or classes of creditors) having to consent to the agreement.¹⁶¹ Finally, the question arises as to whether and to what extent the agreement is subject to an examination by a judicial authority (usually the insolvency court). In this regard, some of the national laws provide for an in-depth examination of the content of the agreement including its fairness.¹⁶² In general, at least the formal requirements of the hybrid proceedings are examined. Some national laws require the court to verify whether the intrusions into the rights of the creditors are necessary, fair and reasonable in order to overcome the current situation.¹⁶³

¹⁵⁹ If sanctioned by the court, the scheme of arrangement under English law has binding effect on all affected creditors (sec. 899 (3) Companies Act 2006). This is also the case under Maltese law regarding the *scheme of compromise and arrangement* (Article 327 (2) Companies Act). The *acuerdo de refinanciación* (Spain), if approved by the court, is binding on financial creditors who have not been party to the agreement or have even opposed it as long as their credits are not guaranteed by an *in rem* guarantee. In contrast, the *piano di risanamento* under Italian law, as well as the *Reorganisationsplan* under Austrian law, are not binding on dissenting creditors.

¹⁶⁰ This is the case in Spain, where the *acuerdo de refinanciación* can only be concluded between *entidades financieras* (financial institutions), cf. *Calbacho Losada*, La homologación judicial de los acuerdos de refinanciación, in: *Actualidad jurídica* Uría Menéndez 2011, 180, 181.

¹⁶¹ The quorum varies considerably, e.g. in Italy (*concordato preventivo*): creditors representing 50 % of the debts; England (*scheme of arrangement*): creditors representing 75 % in value of each class, being also at least a majority in number of each class.

¹⁶² E.g. in England (*scheme of arrangement*), cf. *Goode*, Principles of Corporate Insolvency Law (4th ed. 2011), para.12-23. In Spain, the judge approving the agreement has to decide if the agreement does not demand a “*disproportionate sacrifice*” (*sacrificio desproporcionado*) for the dissenting creditors, cf. 4th Additional Provision of Law No. 38/2011.

¹⁶³ *Bork*, IILR 2012, 477, 482 et seq.

3.3.3 Insolvency Proceedings of Consumers and of Self-Employed Persons

3.3.3.1 Austria

The Austrian Insolvency Code (Insolvenzordnung-IO) provides for three different insolvency proceedings against private individuals. Firstly, the *Regulation of Debts Proceeding (Schuldenregulierungsverfahren*; sec. 181 et seq. IO) is a specific bankruptcy procedure over consumers listed in Annex A to the EIR, in which general insolvency rules apply with certain exceptions and modifications, whereas natural persons can achieve discharge of debts under specific conditions. *Schuldenregulierungsverfahren* are self-administration proceedings, albeit the debtor can be divested of assets under certain conditions.

Secondly, proceedings called *Zahlungsplanverfahren* (sec. 193 et seq. IO) can be opened upon request of insolvent natural persons, even in the course of commenced insolvency proceedings. The debtor has to submit to its creditors a payment scheme over its debts extending to no more than seven years and offering a quota of its presumable income of the next five years. Provided that the majority of the creditors agree on the scheme and the court approves it, the debtor obtains a discharge of its debts. This type of proceedings is not listed in Annex A.

The *Abschöpfungsverfahren* (sec. 199 IO), which is listed in Annex A to the EIR, can be commenced in the course of the insolvency proceeding, upon the debtor's request which declares that it assigns the attachable part of its income to a trustee empowered to transfer the money to the creditors. If, by this means, 50 % of the outstanding debts are paid within three years or at least 10 % within 7 years, the debtor will automatically be discharged of his debts. In addition, the consent of the creditors is not necessary.

3.3.3.2 Belgium

Belgian law provides for collective insolvency proceedings against private individuals and self-employed persons called *Collectieve schuldenregeling/Règlement collectif de dettes* (Procedure for Collective Debt Relief, Article 1675/2 Code Judiciaire). These proceedings are listed in Annex A to the EIR and can be commenced upon the request of a non-merchant

debtor who is continuously unable to meet his current and/or future obligations. They involve the appointment of a mediator, while the debtor can propose a debt repayment scheme to his creditors. In the event all creditors agree to the submitted plan, the court approves the scheme and determines the period of time for the agreement to be implemented. Should the creditors reject the proposed scheme, the court shall impose a debt repayment plan taking into account the interests of the creditors and the debtor. If no consensual or judicial collective debt relief is possible, the mediator can request the court to order the discharge of debts. However, the latter can take effect 5 years after the decision.

3.3.3.3 Bulgaria

In Bulgaria, there are no specific proceedings addressing the over-indebtedness of natural persons or self-employed persons. It is currently discussed among legal experts whether to adopt rules addressing the over-indebtedness of private individuals.

3.3.3.4 Cyprus

In Cyprus, private individuals and self-employed persons are subject to the general provisions of insolvency law (*O peri ptoxefsis nomos, O peri ptwcheuseis nomos*).

3.3.3.5 Czech Republic

Czech insolvency law provides for insolvency proceedings against private individuals (natural persons and legal entities) other than self-employed and merchants named *oddlužení* (discharge). It is incumbent upon the debtor requesting the opening of the proceedings to prove that he/she is able to pay 1/3 of his debts by instalments within a five-year period or through liquidation of his assets. The *oddlužení* is listed in Annex A to the EIR.

Self-employed persons can apply for the commencement of reorganization proceedings (*reorganizace*). Although these proceedings are not common in legal practice, they may be included into Annex A to the EIR. Alternatively, self employed persons can request the opening of bankruptcy, liquidation proceedings (*konkurs*), with the consequence that claims against the debtor

will become time-barred within ten years after the closure of the insolvency proceedings.

3.3.3.6 Estonia

In Estonia, there are two different types of proceedings concerning the over-indebtedness of consumers or self-employed persons: On one hand, the debt restructuring procedure (Estonian Debt Restructuring and Debt Protection Act) purports to prevent the commencement of insolvency proceedings. It is regarded as a pre-insolvency procedure, as the debtor is not divested of its assets. Therefore, it is not listed in Annex A to the EIR. On the other hand, bankruptcy proceedings (Estonian Bankruptcy Act) are included in Annex A. The debtor is divested of its assets and the insolvency estate is liquidated in order to ensure the creditor's satisfaction. The debtor can be discharged of its residual debt under the conditions laid down in Chapter XI of the Bankruptcy Act.

3.3.3.7 Finland

Finnish law provides for two proceedings concerning over-indebted private individuals and small business owners: Firstly, the above-mentioned persons are subject to the general provisions of Finnish bankruptcy law. In this case, no discharge of residual debt is granted. Secondly, the Finnish Debt Adjustment of the Private Individual Act provides for further special proceedings, which can result in the discharge of residual debt. It should be emphasized that no insolvency liquidator is appointed and the debtor is not divested of its assets. These proceedings are not included in Annex A and, therefore, the national reporter refers to problems regarding their recognition in other Member States.

The national reporter mentioned a case in which the *Court of Appeal Helsinki*¹⁶⁴ recognized the effects of a German *Verbraucherinsolvenzverfahren* (insolvency proceedings against over-indebted individuals) and prohibited a pension attachment in Finland.

¹⁶⁴ *HeHO*, 2011:2.

3.3.3.8 France

In France, self-employed individuals are subject to the general provisions of insolvency law (Commercial Code Article L.620-2). The French Consumers Code (*Code de la consommation*, Article L.330-1- *surendettement des personnes physiques*) provides for special proceedings against over-indebted consumers who are unable to pay their non-professional debts. Nevertheless, these proceedings are not included in Annex A to the EIR.

3.3.3.9 Germany

Sections 304 et seq. of the Insolvency Act (InsO) provide for specific consumer bankruptcy proceedings (*Verbraucherinsolvenzverfahren*). In these simplified proceedings, the debtor is discharged of his residual debt after a period of 6 years. Recently, the Federal Government initiated a legislative proposal in order to reduce this time period to 3 years, provided that the debtor regulates 25% of its debts.¹⁶⁵

As *Insolvenzverfahren* (insolvency proceedings) are generally listed in Annex A to the EIR, the consumer bankruptcy proceeding falls within the scope of the EIR.

3.3.3.10 Greece

By virtue of Law No. 3869/2010, recently modified by Law No. 3996 and Law No. 4019/2011, a proceeding concerning the over-indebtedness of private individuals, including small business owners, has been introduced. The procedure consists of three steps: At the first stage, an attempt to reach an out-of-court (amicable) agreement is initiated. If it fails, the procedure continues at the next stage, which is the judicial adoption of a settlement proposed by the individual and – if accepted by the creditors – approved by the court. If the individual's plan of settlement is rejected, the court imposes a judicial arrangement of debts by using the income of the individual and/or by the liquidation of its assets in proportion to its financial capability and its family needs. The execution of this arrangement on behalf of the individual may

¹⁶⁵ Regierungsentwurf für ein Gesetz zur Verkürzung des Restschuldbefreiungsverfahrens und zur Stärkung der Gläubigerrechte of 18 July 2012, thereto *Buchholz*, NZI 2012, 655; *Schmerbach*, NZI 2012, 689.

result in its discharge. These proceedings are not mentioned in Annex A to the EIR.

3.3.3.11 Hungary

Hungarian law does not provide for a regime for natural or self-employed persons. Bankruptcy Act No. XLIX of 1991 only applies to corporations. However, pursuant to its Article 3 (a), it shall also apply to sole traders. Specific provisions on sole traders are provided in Act No. CXV of 2009 on Sole Traders and Sole Trader Companies.¹⁶⁶ According to the definition, a “*private commercial name*” is an entity without legal personality established by a natural person, which has to be listed in the register of private entrepreneurs. It is brought into existence when registered in the register of companies.

3.3.3.12 Ireland

Rules on the insolvency of natural persons were introduced in the Bankruptcy Act by virtue of S.I. No. 334/2002 European Communities (Personal Insolvency) Regulations 2002. A new Personal Insolvency Bill¹⁶⁷ has recently been drafted. It includes numerous non-judicial debt resolution proceedings such as a debt settlement arrangement for the agreed settlement of unsecured debt over five years and a debt relief notice to allow for the write-off of qualifying debt up to 20,000 € subject to a three-year supervision period. The most significant change consists in the reduction of the time period before discharge from twelve to three years. The proceeding is not listed in the Annexes.

3.3.3.13 Italy

Traditionally, Italian insolvency proceedings only apply to commercial firms or commercial individual entrepreneurs exceeding a certain threshold provided for in the Italian Insolvency Act. Recently, a debt relief proceeding (*Procedimento per la composizione delle crisi da sovraindebitamento*) was

¹⁶⁶ Act published in Hungarian Gazette No. 161 of 16 November 2009, 40136.

¹⁶⁷ Personal Insolvency Bill No. 58/2012, available at: <http://www.oireachtas.ie/documents/bills28/bills/2012/5812/b58112d.pdf>. The Amendments by the Select Committee on Justice, Defence and Equality were published on 12 September 2012 and are available at: <http://www.oireachtas.ie/documents/bills28/bills/2012/5812/b58a12d.pdf>.

established by virtue of Law No. 3 of 27 January 2012¹⁶⁸, which applies to all individuals, farm businesses and small businesses in case of over-indebtedness. According to this proceeding, still excluded from the scope of the EIR, the debtor can propose to its creditors a rehabilitation plan. The plan must be approved by a majority of the creditors representing at least 70 % of all debts and approved by the court. Dissenting creditors have to be paid in full. However, if the workout plan is implemented by a special liquidator appointed by the tribunal, the payment of such debts may be postponed by up to one year.¹⁶⁹

3.3.3.14 Latvia

The Insolvency Law (2010) addresses the over-indebtedness of private individuals and provides for a specific procedure consisting of two phases: In the first stage, bankruptcy proceedings are initiated in the course of which the property of the debtor shall be sold within a period of 6 months.¹⁷⁰ The second stage consists of debt relief proceedings in which the debtor is discharged from debts according to the debt relief plan with the exception of maintenance claims, claims regarding unlawful acts and secured claims. Under certain conditions, the court may refuse to apply or may suspend debt relief proceedings, in particular in the event of fraudulent or imprudent behaviour of the debtor. The time limit of the debt relief proceeding depends on the extent to which the whole debt will be settled.

With regard to the over-indebtedness of self-employed persons, it depends on whether the individual is registered in the Register of Enterprises as an individual merchant.¹⁷¹ If an individual is not registered, provisions regarding insolvency proceedings of natural persons apply. Otherwise, provisions regarding insolvency proceedings of legal persons are applicable.¹⁷² The

¹⁶⁸ Legge 1/27/2012 n° 3, “*Disposizioni in materia di usura e di estorsione, nonché di composizione delle crisi da sovraindebitamento*”, Official Journal (Gazzetta Ufficiale) n° 24 of 30 January 2012. The law has entered into force on 29 February 2012.

¹⁶⁹ Cf. Article 8 Act 27/2012.

¹⁷⁰ This time period can be prolonged by sale of unsecured property.

¹⁷¹ The conditions under which an individual may register are provided for by Article 75 (1) Commercial Law (in Latvian: *Komerclikums*), Law of the Latvian Republic, *Latvijas Vēstnesis*, 4 May 2000, No 158/160. English version available at: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/The_Commercial_Law.doc. See also: Annex II to the Report.

¹⁷² Article 56 of the Insolvency Law (2010).

Insolvency Law (2010) provides for the application of (out-of-court) legal protection proceedings and insolvency proceedings to individual merchants. At the request of the debtor, the court initiates legal protection proceedings. Subsequently, the debtor shall submit a legal protection proceeding plan within two months. Similar rules exist with regard to out-of-court legal protection proceedings, which are to be initiated when the debtor has already prepared the legal protection proceedings plan. It is possible to shift from insolvency proceedings to legal protection proceedings with certain exceptions.¹⁷³

3.3.3.15 Lithuania

Specific rules on the over-indebtedness of natural persons and self-employed persons will be introduced by virtue of the Law on Natural Persons Bankruptcy passed by the Parliament on 10 May 2012. This law will be applicable from 1 March 2013 to and will cover natural persons, farmers and self-employed persons whose main property interests are in Lithuania.

3.3.3.16 Luxembourg

Luxembourgian insolvency law only applies to merchants (Article 440 Commercial Code), i.e. persons engaged in commercial activities for the purpose of the Commercial Code. A special regime concerning the over-indebtedness of consumers was adopted in 2000¹⁷⁴. However, the over-indebtedness of self-employed persons not engaged in commercial activities is not addressed.

3.3.3.17 Malta

The over-indebtedness of private individuals and self-employed persons is regulated by the Bankruptcy provisions of Articles 477 et seqq. of the Commercial Code (Chapter 13 of the Laws of Malta). Insolvency proceedings may either be initiated by creditors or by voluntary declaration of bankruptcy to the Civil Court. As a consequence, the trader is dispossessed of the

¹⁷³ Articles 106 and 121 (1) of the Insolvency Law (2010).

¹⁷⁴ Loi du 8 décembre concernant la prévention du surendettement et portant introduction d'une procédure de règlement collectif des dettes en cas de surendettement; portant modification du Livre 1er, Titre 1er, Article 4 du Nouveau Code de procédure civile, Mémorial A N° 136 of 27 December 2000, 2972.

administration of all his property including assets, which, with the exception of charges on the property and maintenance claims devolve on the trader following bankruptcy. Furthermore, any debts not yet due become due upon declaration of bankruptcy. A curator is appointed in order to preserve the debtor's rights.

3.3.3.18 Netherlands

Dutch law provides for three proceedings dealing with the over-indebtedness of natural persons.

Natural persons (consumers as well as sole traders or independent professionals) may be subject to bankruptcy proceedings (*faillissement*). The opening of bankruptcy proceedings requires a petition filed by the debtor or his/her creditors and that the debtor has ceased to pay his/her due and payable debts. The bankruptcy proceeding aims at the distribution of the debtor's equity to all its creditors; there is no fresh start. During the proceeding, the debtor remains divested, a liquidator is appointed by the court and a general stay on enforcement against the debtor's assets is ordered (secured creditors are excluded). However, the debtor may propose an agreement, which, if accepted by the required majority of creditors and sanctioned by the court, becomes binding for all creditors. If an agreement cannot be reached, the debtor's assets are sold and the proceeds are distributed to the creditors in accordance with the statutory waterfall, like any insolvency proceeding.

All natural persons (consumer as well as sole traders or independent professionals) have access to debt reorganisation proceedings (debt relief, *Schuldsaneringsregeling*). These proceedings can only be opened at the debtor's request if it is reasonably foreseeable that he/she will be unable to pay his/her debts as they fall due or if he is in a situation in which he has ceased to pay his debts as they fall due. The opening of these proceedings requires, inter alia, that the debtor's attempt to reach an out of court settlement with his/her creditors was unsuccessful.¹⁷⁵ The debtor is divested, a liquidator is appointed by the court and a general stay on enforcement

¹⁷⁵ Insolvency proceedings are not opened if the court orders the dissenting creditors to consent to the proposed arrangement. This type of composition (which is concluded outside any formal insolvency proceedings) is not listed in the Annexes to the Insolvency Regulation.

against the debtor's assets is ordered (secured creditors are excluded). An agreement proposed by the debtor and approved by the requested majority of creditors and the court binds all dissenting creditors. If this attempt is unsuccessful, the debtor can obtain a fresh start after a period of three years, during which its assets and income (with the exception of a certain amount) are applied towards the satisfaction of its creditors and during which the debtor may not act in breach of his/her obligations under the debt reorganisation proceeding.

With respect to sole traders or independent professionals Dutch law provides for a suspension of payments (*Surseance van betaling*), which can only be ordered by the court upon request of the debtor if the latter foresees that he/she will be unable to pay his/her debts as they fall due. During the proceedings the debtor conducts the administration of his estate in cooperation with an administrator appointed by the court. The suspension of payments proceedings entails a partial stay (e.g. not affecting preferential and secured creditors) and aims at providing for some authority for the debtor to reach an arrangement with its creditors. After being accepted by the required majority and verified by the court, the agreement obtains binding force for all creditors.

All of the above-mentioned proceedings fall within the scope of the EIR. Problems can arise with regard to creditors who could not reasonably have withheld their consent to the proposed out-of-court settlement before the filing of the petition for opening the debt reorganisation proceeding (*Schuldsaneringsregeling*).¹⁷⁶

3.3.3.19 Poland

Polish Law provides for three proceedings regarding private debtors' insolvency.

According to Articles 4911 – 49112 of the BRL natural persons who do not fulfil the criteria of an entrepreneur (i.e. not exercising any business activity) generally have access to a specific sub-set of winding-up bankruptcy proceedings aimed at discharging their debts. However, these proceedings are barely used in practice due to their restrictive access-criteria. From their

¹⁷⁶ See *Rechtbank's-Gravenhage*, 6/10/2010, LJN: BN9604.

introduction on 31 March 2009 until the end of 2011, only 36 consumer bankruptcy proceedings were opened in Poland.

Self-employed persons fulfilling the criteria of entrepreneurs are subject to regular bankruptcy proceedings (*upadłość obejmująca likwidację*/winding-up bankruptcy or *upadłość z możliwością zawarcia układu*/reorganisation bankruptcy). They can benefit from discharge of residual debt (Articles 369 – 370 of the BRL) by a court ruling made at the conclusion of the winding-up bankruptcy proceedings, or, in reorganisation bankruptcy, in the event the arrangement provides for winding-up of the debtor's estate. Such discharges are rare in practice. A reorganisation arrangement can also provide for discharge, which is effective against all creditors included in the arrangement (Article 290 of the BRL). However, successful reorganisation arrangements in bankruptcy are very rare concerning natural persons. These proceedings are included in Annex A to the EIR.

A natural person who does not exercise business activities in his/her own name is treated as an entrepreneur and therefore subject to the regular bankruptcy proceedings if he/she is a member (partner) in a partnership liable for the debts of the partnership without limitation (Articles 5 (2) (2) and (3) of the BRL).

3.3.3.20 Portugal

The Portuguese Insolvency Law (*Código da Insolvência e da Recuperação de Empresas, CIRE, Insolvency and Business Recovery Code*) provides for a discharge of debts for natural persons (Title XII, Specific provisions for the insolvency of individuals, Article 235 et seqq. CIRE).¹⁷⁷ The debtor is discharged of his residual debt after a period of 5 years (Article 235 CIRE). The grounds for refusal are governed by Article 239 CIRE.

If the debtor is a private individual or a small business owner (Article 249 CIRE), Portuguese Insolvency Law contains rules relating to a plan for the settlement of debts in Article 251 et seqq. (*Plano de pagamentos aos credores*).

¹⁷⁷ Cf. *Rathenau*, Einführung in das portugiesische Recht (2013), 234 et seq.

3.3.3.21 Romania

Following the traditional French approach, Romanian law only allows the opening of insolvency proceedings against businessmen. According to the current situation, it does not seem that any natural person (consumer or self-employed person) can enter into insolvency proceedings. In particular:

The Romanian Insolvency Law No. 85/2006 does not allow the opening of bankruptcy proceedings against consumers. Petitions for the opening of insolvency proceedings based on the argument that Romanian insolvency law is applicable and imposes consumers' insolvency have always been rejected by national courts.¹⁷⁸

Insolvency proceedings concerning individuals can only be opened in Romania against "*registered businessmen*", namely natural persons engaged in economic activities, as long as they fulfil the special registration formalities as provided in the Romanian Government Emergency Ordinance no. 44/2008. However, there is an ongoing debate in Romania as to whether these formalities create an obstacle for non-registered businessmen, since some courts¹⁷⁹ have recently opened insolvency proceedings against natural persons acting repeatedly as traders, based on the principle *nemo auditur propriam turpitudinem allegans* (no one can invoke his/her fraudulent behaviour in order to receive a legal benefit or to evade a sanction).

According to Romanian legal tradition and the current legislature, the term "*businessman*" in Article 1 (2a) of the Insolvency Law does not encompass self-employed persons such as lawyers, architects, notaries etc.

However, the situation is not fully clear. The New Civil Code (Law No. 287/2009) has replaced the term "*businessmen*" with the term "*professionals*" and provides for a legal definition according to which "*professionals*" are all persons, legal or natural, who exploit an undertaking with the permission to have an economical or professional activity.¹⁸⁰ The Application Law of the NCC, however, provided that the term "*businessman*" in specific laws shall be understood as referring to "*persons subjected to the registration in the Trade*

¹⁷⁸ See e.g. *Tribunal Bucharest*, 3/9/2010 in the file No. 11479/3/2010 and No. 4512 / 4/10/2012 in the file 11191/3/2012.

¹⁷⁹ *Commercial Tribunal Cluj*, No. 5102 / 12/10/2011 confirmed by the *Court of Appeal Cluj* with the (final) decision No. 4157 / 5/21/2012.

¹⁸⁰ Article 3 and Article 8 of Application Law of the NCC (Law No. 71/2011).

Register".¹⁸¹ On one hand, this does not seem to encompass self-employed persons, since lawyers or notaries are not registered in the Trade Register. On the other hand, it has already been mentioned that recent judgments allow the opening of insolvency proceedings for non-registered traders.

3.3.3.22 Slovakia

Slovakian legislation provides for two proceedings facing both individuals/self-employed and legal persons' bankruptcy (*Konkurzné konanie*) and restructuring (*Reštrukturalizačné konanie*). However, private debtor's bankruptcy is a much more simplified insolvency procedure. Both of the available proceedings fall within the scope of EIR.

3.3.3.23 Slovenia

In 2008, the new National Insolvency Law was adopted in Slovenia. It provides for two new proceedings for over-indebted private persons.

Only natural persons aimed at an economic (commercial) goal (private entrepreneurs) are considered to be debtors eligible to *compulsory composition proceedings*. The purpose of compulsory composition proceedings is the financial restructuring. There are no specific rules regarding compulsory composition proceedings that would only apply for individuals. Compulsory composition is effective for all claims of creditors against the debtor which arose in connection with the performance of his/her activities and regardless of whether the creditor has registered his claim or not.

Consumers, natural persons aiming at an economic (commercial) goal (private entrepreneurs) and natural persons aiming at a private goal (such as doctors, attorneys, farmers, and other natural persons who are not private entrepreneurs and who carry an activity as a profession) are debtors eligible to personal bankruptcy proceedings. The main objectives of personal bankruptcy are the repayment (but without a special repayment plan) and the discharge of debts. In general, the provisions relating to bankruptcy of companies are also used in personal bankruptcy proceedings unless

¹⁸¹ Article 6 (1).

otherwise determined (i.e. probation period for the discharge of the debts between two to five years, lodge of claims).

3.3.3.24 Spain

Current Spanish legislation does not address the issue of insolvency of natural persons in any manner. During the former government's administration, several proposals were made to introduce mechanisms enabling over-indebted private persons to obtain a fresh start (i.e. it was even suggested to grant the competence to deal with the insolvency of natural persons to public notaries). However, all proposals were rejected by the Parliament.

3.3.3.25 Sweden

Swedish law provides for debt relief proceedings (*skuldsanering*) for natural persons. These proceedings are not listed in Annex A to the EIR. Section 4 of the Law on debt relief (*skuldsaneringslagen*, 2006:548) determines the conditions under which natural persons are eligible for complete or partial debt relief. Accordingly, debt relief may be granted to a debtor resident in Sweden¹⁸² if the debtor is insolvent and presumed to be unable to pay the debts within a foreseeable period and it is reasonable, having regard to the debtor's personal and economic situation, that he should be granted debt relief. The proceedings consist of different phases: The debtor applies to a public authority (*Kronofogdemyndighet*, KFM) and has to declare all income and expenditure. The authority determines whether the debtor generally fulfils the requirements set out in Section 4 and initiates the debt relief proceedings. The KFM and the debtor prepare a debt relief plan, which is sent to all known creditors. Subsequently, the KFM makes the final decision on whether to discharge or reduce the debt.

¹⁸² Recently, the *Stockholms Tingsrätt* referred the question to the ECJ for a preliminary ruling on whether the requirement for residence in Sweden in Section 4 of the *skuldsaneringslagen* (2006:548) complies with the freedom of movement for workers within the EU provided for in Article 45 TFEU, see ECJ, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*. According to the Opinion of the Advocate General Sharpston of 13 September 2012, the residence requirement, as a condition for obtaining debt relief, constitutes an unlawful restriction on the freedom of movement of workers, because it is liable to prevent or deter a worker from leaving Sweden to take up employment in another Member State. The ECJ, judgment of 11/8/2012, paras 30 et seq. endorsed the conclusions of the AG, see *supra* at para 3.2.2.

According to the Swedish national reporter, such debt relief proceedings can be regarded as hybrid procedures and do not fall within the scope of the EIR, since it does not entail partial or total divestment of the debtor.

3.3.3.26 United Kingdom (England and Wales)

English law provides for various insolvency proceedings against private debtors. It does not distinguish between entrepreneurs, self-employed persons and other private individuals. Natural persons may enter into any of the available proceedings, which are applicable to their circumstances or for which their asset or income levels make them eligible. These are: IVA, Trust Deeds (Scotland only), Sequestrations (Scotland only) within the scope of the EIR and debt relief orders, debt management plans (both regulated and unregulated) outside the scope of the EIR.

3.3.4 Assessment of the findings of the national reports

The on-going economic crisis has been increasing the number of over-indebted households. As a consequence, many Member States have reformed their insolvency regimes and introduced insolvency proceedings (or enlarged existing pre-insolvency proceedings) against private individuals (consumers and self-employed persons) permitting a relief of debts.¹⁸³ The national reporters demonstrate that many of these proceedings are not listed in Annex A of the EIR.¹⁸⁴ At present, only four Member States (Bulgaria, Hungary, Romania, and Spain) do not address the insolvency of individuals. It seems to be predictable that this situation will change in the near future.

With regard to the legislative technique, two general approaches are available: either national laws provide for traditional bankruptcy proceedings with a liquidation scenario, or they arrange for specific proceedings (debt restructuring proceedings). Most of the Member States enacted specific

¹⁸³ Recent examples of new proceedings introduced for the first time for natural persons can be found in Estonia (since 2011), France (since 2005), Greece (since 2010), Italy (Draft of 27/1/2012, No 3), Latvia (since 2010), Lithuania (in force in March 2013), Poland (since 2009), and Slovenia (since 2008).

¹⁸⁴ See, for instance, the Austrian *Zahlungsplanverfahren*, the French *Traitement des situations de surendettement* (Article L. 330-1 Code de la Consommation), the recently drafted Italian *procedimento per la composizione delle crisi da sovraindebitamento*, the Swedish *skuldsanering* as well as the Estonian (Debt Restructuring and Debt Protection Act, in force since 5 April 2011), Finnish, Greek and Luxembourgian proceedings against natural persons.

proceedings,¹⁸⁵ whereas in some Member States, individuals are subject to the general insolvency law.¹⁸⁶ Furthermore, the personal scope of the proceedings applicable to natural persons varies. 18 Member States (Austria, Belgium, Cyprus, Czech Republic¹⁸⁷, Estonia, Finland, France, Germany, Greece, Italy¹⁸⁸, Latvia¹⁸⁹, Lithuania, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia and UK) provide for proceedings against over-indebted private individuals/consumers and self-employed persons.¹⁹⁰

The debt restructuring proceedings have similar characteristics. They result in the discharge of residual debt on the basis of a debt relief plan, which has to be approved by a court.¹⁹¹ Nonetheless, the conditions regarding the consent of creditors and the binding effect of the restructuring are different; in some Member States, the consent of the creditors to the plan is not a pre-condition for its approval by the court,¹⁹² whereas in other Member States, the judicial rearrangement of debts does not bind dissenting creditors.¹⁹³ Other areas of

¹⁸⁵ See, for example, in France (*Traitement des situations de surendettement*, Article L.330-1 Code de la Consommation). However, for historical reasons this regime is not applicable in three departments of Alsace (Moselle, Bas-Rhin and Haut Rhin).

¹⁸⁶ See, for instance, in Austria (*Schuldenregulierungsverfahren*/Regulation of Debts Proceeding, sec. 181 et seq. IO), with exceptions and modifications from common insolvency law however; Cyprus; France (Commercial Code, Article 620-2 concerning self employed professionals).

¹⁸⁷ In the Czech Republic, self-employed persons are excluded from discharge proceedings.

¹⁸⁸ In Italy, debt relief proceedings (*procedimento per la composizione delle crisi da sovraindebitamento*) have been recently enacted, see Legge 01/27/2012, Official Journal (Gazzetta Ufficiale) n° 24 of 30 January 2012. The law has entered into force on 29 February 2012).

¹⁸⁹ In Latvia, it depends on whether the self-employed person is registered in the Register of Enterprises as an individual merchant. If not, the provisions regarding insolvency proceedings for a private individual are applicable.

¹⁹⁰ In Luxemburg, the over-indebtedness of self-employed persons not engaged in commercial activities is not addressed. Regarding self-employed persons, no answers have been given from Ireland and Sweden.

¹⁹¹ See, for example, in Austria (*Zahlungsplanverfahren* and *Abschöpfungsverfahren*), Belgium (*Collectieve schuldenregeling/Règlement collectif de dettes*), Finland (debt adjustment proceedings in "Adjustment of debts of private individual (Act 1993)", Italy (newly drafted debt relief proceedings in Act 27/1/2012, No 3), Greece.

¹⁹² See, for instance, in Austria (*Abschöpfungsverfahren*). Other examples can be found in Belgium and Greece, where debts relieve proceedings can be ordered by the court if a consensual debt repayment fails on the rejection of the creditors and in Czech Republic (*oddlužení*), where the debt relief has to be ordered if the debtor can prove that it is able to pay 1/3 of his debts by instalments within a five-year period or through liquidation of its assets. In the Netherlands (*faillissement* and *Schuldsaneringsregeling*) if the plan is accepted by the majority of creditors has a binding effect on all of them, even if they have dissented or did not vote at all.

¹⁹³ See, for example, the new drafted proceedings in Italy (Article 8 Act 27/2012).

divergence relate to the participation and the empowerment of a third party¹⁹⁴, as well as to the divestment of the debtor's assets; in some jurisdictions the insolvency proceedings can be categorised as debtor in possession proceedings¹⁹⁵, whereas in others the divestment is optional¹⁹⁶ or partial¹⁹⁷.

However, the most important discrepancy is the duration of the debt relief period which is the major incentive for forum shopping of individual debtors. The time period ranges from one year (England) to six years (Germany), whereas in some jurisdiction it is difficult to draw the line, since it often depends on the extent to which the debts will be settled.¹⁹⁸ Recently, several Member States initiated legislative proposals in order to reduce the time period of the discharge.¹⁹⁹ At present, the most commonly used time periods for relieving the debts of individuals in EU-Member States are three²⁰⁰ or five²⁰¹ years. All in all, the comparative overview shows that the national insolvency laws are based on comparable features permitting a closer coordination of the national laws of the EU-Member States.

¹⁹⁴ See, for instance, in Finland (where no third party is involved), Belgium (Mediator in the *Collectieve schuldenregeling/Règlement collectif de dettes*), Austria and in Czech Republic (Trustee), Italy (special liquidator), The Netherlands (liquidator or administrator).

¹⁹⁵ See Estonia. In the Netherlands (suspension of payments/“*surseance van betaling*”), the third party appointed by the court administers together with the debtor the estate.

¹⁹⁶ For example in Austria (*Schuldenregulierungsverfahren/Regulation of Debts Proceeding*, sec. 181 et seq. IO).

¹⁹⁷ E.g. Finland and Belgium. In Slovenia, activities relating to a disposition of the debtor's assets have to be approved by the official receiver (insolvency practitioner).

¹⁹⁸ See, for instance, in Austria (*Abschöpfungsverfahren* where, 50% of the outstanding debts must be paid within three years or at least 10% within 7 years) and in Latvia.

¹⁹⁹ See, for example, Germany (from six to three years, provided that the debtor regulates 25% of its debts) and Ireland (from 12 to three years).

²⁰⁰ Finland, Germany (recently proposed draft “Regierungsentwurf für ein Gesetz zur Verkürzung des Restschuldbefreiungsverfahrens und zur Stärkung der Gläubigerrechte” of 18 July 2012), Ireland (New Personal Insolvency Bill from June 2012), The Netherlands (*fallissement* and *Schuldsaneringsregeling*).

²⁰¹ Austria (*Zahlungsplanverfahren*), Belgium (*Collectieve schuldenregeling/Règlement collectif de dettes*), Czech Republic (*oddlužení*).

3.3.5 Absence of Provisions for Proceedings opened outside the EU and for the Coordination of Proceedings inside and outside of the European Union²⁰²

3.3.5.1 Austria

The Austrian Insolvency Code contemplates the recognition of insolvency proceedings commenced in third states in sec. 217 et seqq., which were enacted on the model of the EIR and to a lesser extent on the UNCITRAL Model Law on Cross-Border Insolvency. However, the recognition of such decisions does not form an obstacle to the opening of insolvency proceedings according to Austrian Law. This may result in problems with regard to the recognition of Austrian main insolvency proceedings and proceedings commenced in third states.

3.3.5.2 Belgium

The Belgian national reporter did not refer to any problems concerning insolvency proceedings initiated in third states, as the Belgian Private International Law Code (*Code du droit international privé*) contains specific rules on the recognition (121 CDIP) of insolvency proceedings commenced in third states and the cooperation (120 CDIP) among insolvency practitioners designated in Belgium and in third states. Belgian legislation has therefore adhered to the EIR-model.

In December 2009, Belgium initiated proceedings in the International Court of Justice against Switzerland for the violation of the Lugano Convention in the *Sabena*-case.²⁰³ The case arose out of parallel proceedings pursued in Belgium and Switzerland by the main shareholders of the former Belgian airline – Sabena in bankruptcy. After proceedings were brought in the Belgian courts by the Belgian shareholders against the Swiss shareholders, the latter in turn applied for the opening of insolvency proceedings (including a moratorium) in Zurich. At the *ICJ*, Belgium contended that the Swiss courts

²⁰² The Member States not explicitly mentioned (Bulgaria, Cyprus, Czech Republic, Ireland, and Luxembourg) do not provide for rules relating to this issue and did not report any problems or case-law.

²⁰³ *ICJ, Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=e6&case=145&code=besu&p3=12>.

had refused to recognize the future Belgian decisions on the civil liability of the Swiss shareholders or to stay their proceedings pending the outcome of the Belgian proceedings. According to the Belgian government, the Swiss courts had violated Articles 26 and 21 of the Lugano Convention as they had not recognised the pending proceedings in Belgium.²⁰⁴ The Swiss government replied that the debt-scheduling was an insolvency procedure and, therefore, according to Article 1 (2) Lugano Convention excluded from its scope.²⁰⁵ In the substance, the main issue was the applicability of the Lugano Convention to the Swiss debt restructuring proceedings.²⁰⁶ In 2011, the case was settled and removed from the *ICJ's* case list.²⁰⁷ Although the main issue of this case related to the applicability of the Lugano Convention to the Swiss debt restructuring proceedings, it also demonstrates the problems arising from the absence of an international instrument between the European Union and the Lugano States in the area of insolvency.

3.3.5.3 Estonia

The Estonian national reporter states that the fact that the EIR does not contemplate insolvency proceedings opened in third states has caused practical problems, as there are no rules on insolvency proceedings opened in third states. For this reason, he proposed the inclusion of such rules in the EIR.

3.3.5.4 Finland

No particular problems have arisen in Finland. Chapter 7, Section 1 of the Finnish Bankruptcy Act regulates the international jurisdiction of the Finnish Courts in the event the debtor has its COMI in third states, with the exception of Denmark, Norway and Iceland. These rules are based on the EIR-model.

²⁰⁴ Application Instituting Proceedings of 12/21/2009, <http://www.icj-cij.org/docket/files/145/15763.pdf>.

²⁰⁵ Preliminary Objections of Switzerland of 2/17/2010, <http://www.icj-cij.org/docket/files/145/16720.pdf>.

²⁰⁶ *Kohler*, 22 RSDIE 441 (2012).

²⁰⁷ *ICJ, Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland)*, Order of 4/5/2011.

3.3.5.5 France

In France, no problems are reported with regard to third states. The French legal system does not provide for explicit rules on the effects of the French insolvency proceedings and the recognition of proceedings opened in third states. Nevertheless, the French *Cour de Cassation* has established respective rules.

The *Court of Appeal Versailles*²⁰⁸ had to decide on the opening of insolvency proceedings against the *Icelandic Kaupthing Bank HF*, which has an establishment in France and, as a preliminary question, on the recognition of the insolvency proceedings commenced over the Bank in Iceland. The Court set aside the judgment of the Court of the first instance, which recognised the Icelandic Judgment, but opened secondary insolvency proceedings in France. The parties kept on relying on the Regulation to argue that any insolvency to be opened in France ought to be a liquidation and applied Directive 2001/24/EC to the reorganisation and winding up of credit institutions which adheres to the principle of unity of insolvency proceedings and does not permit the opening of secondary proceedings against banking institutions.

3.3.5.6 Germany

The German report points out that the absence of provisions relating to the recognition of decisions from third states has caused difficulties. There have been several cases relating to Non-Member States, particularly Switzerland, Liechtenstein, Israel, China, USA and so-called “tax havens” like the Bahamas. Problems encountered mainly concerned the access to information such as the location of the debtor’s assets. For example, special insolvency proceedings had to be opened in Switzerland in order to get access to the relevant information which entailed high costs.

The German Insolvency Act provides for rules addressing the relationship to third states in Sections 335 – 358 which follow the model of the EIR and did not cause any difficulties. From the German perspective, the extension of the EIR to third states would not entail any change of the present situation. However, an improved cooperation of administrators, courts and other judicial organs has to be adapted to the application to third states.

²⁰⁸ *Cour d’appel de Versailles*, 7/16/2009, n° 09/02917, cited by the French National Reporter.

In the case *Phoenix-Kapitaldienst GmbH* the EIR was not applicable due to Article 1 (2) EIR. Therefore, the enforcement of the *actio pauliana* in Member States and in third states, such as Denmark, was complicated, since the jurisdiction could not be based on Article 3 (1) EIR as decided by the *ECJ* in *Seagon v Deko Marty* case.²⁰⁹

The *Local Court Göttingen*²¹⁰ held that it is sufficient for territorial proceedings to be opened under sec. 354 (2) of the German Insolvency Act against a debtor located in Thailand that the debtor's immovable property in Germany forms a major part of his assets. In addition, the court found that territorial proceedings are to be opened in Germany due to the politically instable position in the country of the debtor's COMI, which put the proper functioning of the legal system in question. According to the court, it might also be sufficient to open territorial proceedings if it cannot be determined whether the possibility to open insolvency proceedings against natural persons exists in the country of the debtor's domicile.

The *LG Frankfurt* had to decide on the effects of Canadian reorganization proceedings (proceedings similar to US Chapter 11 proceedings) on a claim brought before German courts.²¹¹ It held that the recognition of foreign insolvency proceedings in Germany requires that the opening court is competent from a German perspective and that no exclusive jurisdiction of German courts existed. Moreover, the foreign decision must not be contrary to German public policy.

The *BGH* referred the question to the *ECJ* as to whether Article 3 EIR also applies to an *actio pauliana* domiciled in Switzerland.²¹²

3.3.5.7 Greece

According to the Greek national report, it remains unclear whether the EIR applies to companies incorporated in third states which have their COMI in a Member State. It is also pointed out that the EIR is lacking from provisions

²⁰⁹ *ECJ*, case C-339/07, 2/12/2009, *Seagon v Deko Marty Belgium NV*, ECR 2009 I-767.

²¹⁰ *AG Göttingen*, 12/6/2010, NZI 2011, 160.

²¹¹ *LG Frankfurt am Main*, 5/24/2005, TranspR 2006, 461.

²¹² *BGH*, 6/21/2012, BeckRS 2012, 15722.

concerning the effects that the opening of insolvency proceedings would have in other Member States.

Greece adopted the UNCITRAL Model Law on Cross-Border Insolvency through Law 5858/2010. It contains the criteria for recognizing a foreign insolvency procedure in Greece as well as rules on the cooperation between the national courts, foreign courts and insolvency administrators from different jurisdictions and provisions relating to the coordination of concurrent insolvency proceedings in different jurisdictions. There is no case law reported.

3.3.5.8 Hungary

In Hungary, the absence has not created any problems. Hungarian law does not provide for legislation regarding insolvency proceedings in third states, except for a rule on jurisdiction. According to sec. 62/C (g) of the Act No. 13 of 1979 ("PIL-Rules"), Hungarian courts shall not have jurisdiction in connection with the bankruptcy and insolvency of a business entity registered abroad. Concerning the coordination of parallel insolvency proceedings, Hungarian PIL rules provide that if proceedings involving the same cause of action and between the same parties are brought in foreign courts, Hungarian courts may terminate the proceeding provided that the foreign decision can be recognized in Hungary. A foreign decision can be recognized pursuant to sec. 71 of PIL-Rules if it pertains to a matter in which the Hungarian court has no jurisdiction, provided that recognition does not violate the provisions laid down in sec. 72 (2) (a) – (c).²¹³

²¹³ Sec. 72 (2): "An official foreign decision shall not be recognized, if a) doing so would violate public order in Hungary; b) the party against whom the decision was made did not attend the proceeding either in person or by proxy because the subpoena, statement of claim, or other document on the basis of which the proceeding was initiated was not served at his domicile or residence properly or in a timely fashion in order to allow adequate time to prepare his defense; c) it was based on the findings of a procedure that seriously violates the basic principles of Hungarian law; d) the prerequisites for litigation for the same right from the same factual basis between the same parties in front of a Hungarian court or another Hungarian authority have materialized before the foreign proceeding was initiated (suspension of plea); e) a Hungarian court or another Hungarian authority has already resolved a case by definitive decision concerning the same right from the same factual basis between the same parties."

3.3.5.9 Italy

According to the Italian national report, the EIR does not provide for an appropriate solution to Non-EU insolvencies.

Under Italian insolvency law, the court at the debtor's "*principal seat*" (identical to the notion of COMI under the EIR) is competent to open insolvency proceedings. Pursuant to Article 9 (3) of the Italian Insolvency Act, Italian courts can open an insolvency proceeding against debtors having their "*principal seat*" abroad, even if a court of another state has opened an insolvency proceeding. It has to be noted that Article 9 (3) does not apply within the scope of the EIR. Two main problems were reported:

The first problem concerns the criterion to determine international jurisdiction of Italian courts. According to the *Corte di Cassazione*²¹⁴, it is required that the debtor has a "*permanent establishment*" in Italy. The second problem relates to the coordination of insolvency proceedings inside and outside the EU. In the case *Reboani e altri v Varig SA*, the *Tribunale di Milano*²¹⁵ opened insolvency proceedings in Italy, upon the request of Italian employees, against a Brazilian airline company although insolvency proceedings were already opened in Brazil. It held that the debtor operated a subsidiary with sufficient human and financial resources in Italy.

It is emphasized by the national reporter that case law applying Article 9 (3) of the Italian Insolvency Act is rare and judges have demonstrated significant self restraint with regard to this provision.²¹⁶

3.3.5.10 Latvia

According to the Latvian report, there were no problems encountered in relation to proceedings opened outside the EU. Nevertheless, the Latvian report favors the idea of establishing rules relating to the recognition of insolvency proceedings opened outside the EU. Latvian legislation does not provide for any regulation regarding insolvency proceedings in third states,

²¹⁴ *Corte di Cassazione*, 7/4/1985, *Capisec International Holding SA v Banca Privata Italiana SpA*, RDIPP 1986, 886 et seq.

²¹⁵ *Tribunale di Milano*, 1/7/2008 (unreported). The *Corte d'Appello di Milano* in its decision of 19 May 2008 dismissed the appeal on a preliminary point of admissibility (unreported).

²¹⁶ See *De Cesari/Montella*, *Insolvenza Transfrontaliera e giurisdizione italiana* (2009), 8 – 17.

except for provisions on the implementation of the Regulation and general provisions of international civil procedure.

3.3.5.11 Lithuania

There were no problems in this regard reported by Lithuania. However, the national report states that it would be preferable to add such provisions in order to guarantee equal treatment of insolvency proceedings opened outside the EU in all Member States. Under Lithuanian law, no special rules exist. Therefore, general rules on the recognition of foreign judgments apply. Decisions given by courts of third states on the opening of insolvency proceedings or any other court decision during insolvency proceedings can be recognized in Lithuania. Moreover, as the EIR is part of the law system, it is possible to apply the EIR provisions by analogy.

3.3.5.12 Malta

Malta has no practical experience in dealing with insolvency proceedings opened outside the EU. However, the national report emphasizes that the lack of provisions may give rise to the transfer of assets or judicial proceedings from a Member State to a third state seeking to obtain a more favorable legal position. It is pointed out that it is unclear whether the EIR applies if the company is incorporated outside the EU, but has its COMI within the EU.

Maltese law contains provisions concerning insolvency proceedings opened in third states.²¹⁷ Those provisions are modeled on the provisions concerning the dissolution and winding up of Maltese companies.

3.3.5.13 Netherlands

The Dutch Reporter referred to potential problems arising from the exclusion of Denmark from the scope of the EIR and named as an example the enforcement of liability claims against a Danish director of Dutch companies.

The Dutch Bankruptcy Act contains only a few provisions on the cross-border effects of insolvency proceedings opened in the Netherlands (i.e. provisions, which impose a duty on creditors to turn over to the estate the proceeds of

²¹⁷ See The Companies Act (Article 399 et seq., Chapter 386 of the Laws of Malta).

recovery abroad). Regarding the recognition of foreign insolvency proceedings, the national Bankruptcy Act does not provide for any provisions. The Dutch approach in that matter is largely based on relevant case law, according to which a territorial effect of foreign proceedings has been established, since, on one hand, insolvency proceedings opened in the Netherlands claim “universal effect”, and on the other hand foreign insolvency proceedings are generally recognised in the Netherlands, but creditors can continue to enforce their claims against the debtor’s assets in the Netherlands.

In 2007, proposals were submitted to the Dutch government to enact legislation that should abolish this territorial approach, based primarily on a combination of the UNCITRAL Model Law and the Insolvency Regulation. Until now, the Dutch government or parliament has not taken any legislative action in this respect and the territorial effect of foreign insolvency proceedings remains, in practice, a substantial impediment to the proper operation of cross-border insolvency proceedings opened outside the EU.

3.3.5.14 Poland

According to the Polish national reporter, there is no urgent need to include provisions covering third states’ insolvency proceedings in the EIR, since the UNCITRAL Model Law seems to be sufficient as model legislation. However, from the perspective of Non-EU parties dealing with EU partners the introduction of rules for all EU Member States based on UNCITRAL Model Law²¹⁸ could improve legal certainty and reduce complexity.

Polish law provides for legislation regarding insolvency proceedings in third states (Articles 378-417 of the BRL). The rules are loosely based on the 1997 UNCITRAL Model Law and there are some similarities between the Polish provisions of the BRL and the system of the EIR. One main difference is that no automatic recognition of Non-EU insolvency proceedings is granted. Therefore, a decision issued by a Polish bankruptcy court is required in any case to recognise such proceedings in Poland.

²¹⁸ As proposed by INSOL Europe; see *van Galen et al.*, Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012), 109 – 121.

3.3.5.15 Romania

Romanian legislature addresses all issues arising during insolvency proceedings in third states in the Law No. 637/2002. It is drawn upon the UNICITRAL Model Law and contains IPL as well as jurisdictional rules. The Law No. 637/2002 also provides for the conditions and the effects of the recognition of foreign insolvency proceedings at request of the administrator as well as provisional measures.

3.3.5.16 Slovakia

According to the national reporter, there are no particular problems in Slovakia. The Slovak Act on bankruptcy and restructuring contains in its sec. 173, 174 and 175 provisions for the recognition and enforcement of foreign bankruptcy (and not restructuring) proceedings. This set of rules is drawn upon the model of the EIR; however, the Slovak Court can, at its discretion, restrict some of the effects of third states' bankruptcy proceedings or expand some of the effects of Slovak Bankruptcy Law to third states' insolvency proceedings.

3.3.5.17 Slovenia

The new Insolvency Act of 2007 (*Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP)* / The Law on Financial Operations, Procedures concerning Insolvency and Compulsory Liquidation) contains an extensive chapter (Chapter 8) dealing with cross-border insolvency proceedings. It is drawn upon the UNCITRAL Model law and is also strongly influenced by the EIR (except for the automatic recognition of foreign insolvency decision).

3.3.5.18 Spain

No particular problems have been reported by Spain. For cross-border insolvencies in non EU-Member States and Denmark, the Spanish legislator provides for a detailed set of rules (Articles 199 – 230 of the Spanish Insolvency Act), the jurisdictional and applicable law provisions of which are practically identical to the ones contained in the EIR; however, one difference is that in the case of rights *in rem*, the Spanish legislator has departed from

the solution of the EU-Law and has established a conflict rule referring to the (insolvency) rules of the *lex rei sitae*. The recognition and cooperation with foreign insolvency proceedings is based on a mechanism, which allows the Spanish judge to refuse the recognition on different grounds (Article 220). The law contains a negative reciprocity safeguard (Article 199.2).

3.3.5.19 Sweden

According to the current information received from Sweden, no problems were encountered in relation to proceedings opened in Denmark or outside the EU.

The national legislation does not provide for any provisions relating to jurisdiction or recognition of third states' insolvency proceedings or provisions regarding their effects in Sweden. Swedish private international law, which is not based on the model of the EIR, remains applicable. However, a national court²¹⁹ recently tried to apply by analogy the rules of EIR to insolvency proceedings when third states are involved, but the case is still pending.

3.3.5.20 United Kingdom (England and Wales)

According to the national reporter, some respondents in the UK stressed that possible problems could be solved if all Member States adopted the UNCITRAL Model Law.

Under English law, there are at least three different methods for assisting or recognising insolvency proceedings of third states:

(1) sec. 426 of the Insolvency Act 1986 (as amended) provides for international co-operation between courts in specified jurisdictions when dealing with insolvency matters. (2) The Cross-Border Regulations came into force on 4 April 2006 and implemented the UNCITRAL Model Law on Cross-Border Insolvency into English Law. (3) Common law precedent

According to the national reporters, all of the above mechanisms operate reasonably effectively to allow a significant degree of flexibility to address specific situations and entities with activities across the world.

²¹⁹ A case dealing with questions of jurisdiction and applicable law with a Swedish creditor and a Norwegian debtor will be determined by the *Swedish Supreme Court*, (no. Ö 743-11; *Svea Court of Appeal*, case no. 9094-10). This case will probably clarify the role of the Regulation in Sweden in cases where third states are involved.

3.3.6 Assessment: the application of the EIR with regard to third States

As the principle of universality is generally applied in the overwhelming majority of the Member States²²⁰, there is no need to introduce specific rules with regard to third states in the Insolvency Regulation. With regard to main insolvency proceedings opened in third states, in many Member States, the provisions of the EIR serve as the main model either directly by influencing the national legislation²²¹ or indirectly when the EIR rules are applied by analogy.²²² In other Member States, national provisions were basically modelled on the UNCITRAL Model Law on Cross-border Insolvency.²²³ However, it is not necessary to draw a strict line between both solutions, since both instruments share the same underlying principles and both have an impact on national laws.²²⁴ The UNCITRAL Model Law also influenced the legislation in third states. If a third state does not apply the principle of universality (e.g. Switzerland), the position of the main administrator seeking to recover assets located in the respective state is much more difficult.²²⁵ However, any improvement of the current situation would either require a modification of the law of the respective state concerned or the conclusion of a bilateral or multilateral international treaty in the area of insolvency with that third state.

With regard to annex proceedings, the situation is different. Especially in the area of avoidance claims, the proposed head of jurisdiction should be extended to defendants in third states.

3.4 Policy Options

3.4.1 Extention of the Regulation to pre-insolvency proceedings

The main issue regarding the scope of the EIR relates to the definition of insolvency proceedings. As the comparative research demonstrates, the

²²⁰ With the Exception of England, see 3.2.4.

²²¹ In the following Member States, national provisions are drawn upon the basis of the EIR: Austria, Belgium, Finland, Germany, Slovakia and Spain.

²²² This was the case in decisions of Finnish, Lithuanian and Swedish courts, cf. 3.3.5.

²²³ Those Member States are: Greece, Poland, Romania and Slovenia.

²²⁴ E.g. Chapter 8 of the Slovenian Insolvency Act (2007) is drawn upon the UNCITRAL Model Law on Cross Border Insolvency and is also strongly influenced by the EIR.

²²⁵ At the Heidelberg conference, insolvency practitioners reported difficulties with regard to Switzerland.

basic features of pre-insolvency proceedings in the Member States are functionally similar.²²⁶ Politically, it seems advisable to extend the scope of the Regulation to pre-insolvency proceedings. This extension will entail the application of Article 3 EIR to these proceedings, which must be initiated at the debtor's COMI. Consequently, the choice of a national law on pre-insolvency proceedings for the sake of restructuring debts of a corporation registered in another Member State will be impossible. As a result, *forum shopping* in this area will be limited.²²⁷ If the Regulation applies, Articles 4 et seq. EIR determine the applicable law to pre-insolvency proceedings, which will mainly be the *lex fori concursus* (Article 4 EIR).²²⁸ However, third parties' rights *in rem* will be protected by Article 5 EIR and the effect of pre-insolvency proceedings on pending lawsuits shall be governed by the procedural right of the Member State in which the lawsuit is pending (Article 15 EIR). The effects of the pre-insolvency proceedings on enforcement measures against the debtor will depend on Articles 16 and 25 EIR: If the competent court in the Member State, in which the pre-insolvency proceedings are pending, orders a stay of enforcement measures, this decision will be recognized in all other EU-Member States under Article 25 EIR. If the pre-insolvency proceedings are opened by a formal judicial decision (which is usually not the case), this decision will be recognized under Article 16 EIR. It may entail a stay of enforcement if the *lex fori concursus* provides for such. Finally, the case law of the ECJ regarding the protection of (foreign) debtors in insolvency proceedings²²⁹ also applies to cross-border pre-insolvency cases. A judgment confirming a restructuring plan or an arrangement of debts will be recognized under Article 25 EIR. The foregoing considerations demonstrate that the EIR is well-suited for pre-insolvency proceedings.

However, there are also situations in which the application of the EIR to pre-insolvency could entail uncertainty. One issue relates to concurrent proceedings: as the opening of pre-insolvency proceedings is usually not published, these proceedings cannot bar an application for the opening of

²²⁶ See *supra* at para. 3.3.1.

²²⁷ *Forum shopping* under the EIR presupposes a shift of COMI, see *infra* 4.1.3.2.

²²⁸ The application of Article 4 (1) EIR to pre-insolvency proceedings largely corresponds to the present situation in the Member States.

²²⁹ ECJ, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, paras 66 et seq.

main proceedings in another EU-Member State. However, as both proceedings are to be opened at the debtor's COMI, conflicts of jurisdiction usually should not occur.²³⁰ As a matter of principle, the initiation of pre-insolvency proceedings does not bar parallel pre-insolvency proceedings in another Member State as long as there is no formal decision on the opening of such proceedings. Nevertheless, if the debtor and the creditors involved discover that parallel proceedings are imminent, they may apply for a formal opening of pre-insolvency proceedings. These considerations show that parallel proceedings at the pre-stage of insolvency are not excluded. However, this result is due to the structure of pre-insolvency proceedings and not to the regime of the EIR.

If the scope of the Regulation was not extended, most of the pre-insolvency proceedings would fall in the scope of the Brussels I Regulation.²³¹ According to Article 32 JR, judicial decisions approving the restructuring of debts are recognized in the other Member States,²³² the grounds for non-recognition in Articles 34 and 35 JR are applicable.²³³ If the arrangement is not formally approved by the court, it can be recognized as a settlement under Article 57 JR. Its substantive effects on the regulated debts will, however, depend on the applicable conflict of law rules (which are partly found in the Rome I Regulation). In addition, the jurisdiction for the intervention of a court approving the restructuring of debts is equally determined by Articles 2 – 24 of the Brussels I Regulation. In this respect, the application of mandatory heads of jurisdiction (i.e. Article 22 no 2 JR to debt-to equity swaps) seems to be an open question. The application of Article 23 JR in order to prorogate the

²³⁰ But are not excluded as the case law of the ECJ demonstrates: ECJ, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR I-2006 3813; ECJ, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*; ECJ, case C-527/10, 7/5/2012, *ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt.*, 2012/C 287/06.

²³¹ From the perspective of Article 1 JR, the application of national law seems to be excluded: The renegotiation of private and commercial debts qualifies as a civil and commercial matter and decisions of the courts of Member States in these areas of law are judgments in the sense of Article 32 EIR; cf. *Rogerson*, in: Magnus/Mankowski (eds.), *Brussels I Regulation* (2012), Article 1 para 32; *Jenard Report*, OJ C 59, 3/5/1979, 12.

²³² In case C-456/11, 11/15/2012, *Gothaer Allgemeine Versicherung et al.*, at paras 29 – 32 and 40, 42, the ECJ enlarged the autonomous concept of the “judgment” under Article 32 of the Brussels I Regulation – even transgressing the concept of *res judicata* in the procedural laws of the Member States implied. Against this backdrop, it seems to be predictable that orders approving pre-insolvency settlements will be qualified as judgments in the sense of Article 32 JR.

²³³ *BGH*, 2/15/2012, NZI 2012, 425 (*Equitable Life*).

jurisdiction of the court where the restructuring is negotiated presupposes the formal and individual consent of all debtors under Article 23 JR – a majority vote will not be sufficient. In addition, the law applicable to restructuring proceedings also seems to be an unsettled issue.

These reflections show that the EIR is much more appropriate for coordinating cross-border pre-insolvencies than the Regulations Brussels I and Rome I. Although pre-insolvency proceedings are designed to avoid the (imminent) insolvency of the debtor, they are largely based on tools of insolvency law. The coordination of these proceedings in cross-border situations is a matter for European insolvency law. The application of the general instrument (the Brussels I and the Rome I Regulation) does not entail appropriate and balanced solutions. All in all, it seems to be advisable to include pre-insolvency proceedings into the scope of the EIR.

3.4.2 Improving the interfaces between the definitions in Articles 1 and 2 and the Annexes to the EIR

The second area where legislative improvement is necessary relates to the interplay between the definitions provided for by Article 1 (1) and 2 EIR and the Annexes to the Regulation. At present, several proceedings listed in the Annexes do not correspond to the definition of Article 1 EIR; in many Member States, there are insolvency proceedings (especially those concerning individuals) which are not mentioned in the Annexes.²³⁴ However, according to Article 2 (a) EIR, all proceedings listed in Annex A are insolvency proceedings in the sense of Article 1 (1) EIR. Article 2 and Annex A of the EIR shall provide for guidance and legal certainty for legal practice. Historically, it seems that the drafters of the original text of the international insolvency convention had not foreseen any discrepancy between Annex A and Article 1 (1) EIR. However, this situation has become a widespread phenomenon. Almost all national reports revealed national proceedings which are not

²³⁴ In this respect, two situations must be distinguished: On one hand, Member States do not communicate new insolvency procedures under Article 45 EIR; on the other hand, broad definitions of national insolvency procedures contained in the Annex A may cover changes of the insolvency laws of the Member States which had not been envisaged at the time when the respective procedures had been communicated under Article 45 EIR. Both situations seem to be problematic as changes of national law are not visible in the framework of the Regulation.

correctly listed in Annex A, especially with regard to the insolvency of individuals.²³⁵

It must be noted that considerable legal uncertainty exists, since the current text of the EIR does not explicitly define the relation between the Regulation and the Annexes.²³⁶ According to the pertinent provisions of the Regulation, different options of interpretation seem to be possible. A first option is to consider Annex A to be an informative, non-binding list visualising the Regulation's scope of application without influencing its content. This would mean that the Annexes are not formal parts of the Regulation.²³⁷ A second possibility is to interpret Annex A as integral part of the Regulation with the same status as the operative text. A third option is to see Annex A as implementing provisions in the sense of Article 291 TFEU. This would entail that the Member States provide the information on the national laws in order to ensure the implementation of the Regulation. A fourth option is to qualify the Annex as specifying provisions which can be adopted by the EU-Commission by delegated acts in accordance with Article 290 TFEU.

According to the predominant opinion in the legal literature²³⁸ shared by the AG of the ECJ²³⁹, the Annexes are regarded as an integral part of the Regulation. Consequently, the application of the EIR requires that a national insolvency procedure has been listed in the Annex.²⁴⁰ This interpretation is based on the wording of Article 2 (a) EIR, which explicitly refers to Annex A thus fully including it into the legal framework of the Regulation. However, the

²³⁵ See *supra* 3.3.1 and 3.3.3.

²³⁶ At the Heidelberg conference, the general reporters asked whether a renouncement of the Annexes would be beneficial. In this case, the scope (and the application) of the EIR would be entirely determined by the definitions of Articles 1 and 2 EIR. However, there was a quasi-unanimous reaction from practitioners that the existence of the annexes is indeed very helpful. Therefore, deleting the annexes does not seem to be a valuable option.

²³⁷ This interpretation does not correspond to the wording of Article 2 (a) EIR which explicitly refers to Annex A.

²³⁸ *Pannen*, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 1, para. 8; *Paulus*, *Europäische Insolvenzverordnung* (3rd ed. 2010), Article 1 EIR, para. 6; *Mäsch*, in: Rauscher (ed.), *EuZPR/EuIPR* (2010), Article 1 EIR, para. 2; *Moss/Fletcher/Isaacs*, *The EC regulation on insolvency proceedings* (2nd ed. 2009), para. 36.

²³⁹ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, Opinion of AG Jacobs, 11/27/2005, para. 84; *ECJ*, case C-116/11, 11/22/2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.*, para. 33; *ECJ*, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, Opinion AG Sharpston, 9/13/2012, paras 42, 69, 70. The *ECJ*, judgment of 11/8/2012, paras 30 et seq., endorsed the arguments of the conclusions.

²⁴⁰ *Wessels*, *International Insolvency Law* (3rd ed. 2012), para. 10518.

main substantial problem of the present Annex is the lack of scrutiny regarding the information given by the Member States. At present, there is no control over whether the proceedings listed in the Annex correspond to the definition of insolvency proceedings in Article 1 (1) EIR. As a result, the Member States decide at their discretion on the scope of the Regulation when they propose changes of the Annex A.²⁴¹ In addition, the procedure of Article 45 EIR for the amendment of the Annexes does not correspond to the legislative process of the Lisbon Treaty, as it does not include the European Parliament.²⁴² On the other hand, the ordinary legislative process seems too cumbersome for a flexible adaptation of the Annexes.²⁴³

Under the Lisbon Treaty, however, it seems to be possible to regard the Annexes not as secondary legislation, but rather as delegated acts (Article 290 TFEU) or as implementing provisions (Article 291 TFEU). In both options, Annex A would be qualified as an exemplifying list which binds the courts when one of the enumerated proceedings is concerned, but does not exclude further proceedings from the scope of the Regulation. This would considerably improve the situation of private litigants as they can rely on the EIR even if national proceedings have not yet been listed in the Annex. With regard to the application of Article 290 or 291 TFEU, the better solution seems to be to apply Article 291 TFEU and to qualify the Annexes as delegated acts. This would imply that the Commission is empowered to verify whether national legislation corresponds to the (new) definition of Article 1 (1) EIR. If the Annexes are considered as implementing legislation, any control of the EU-Commission would be excluded. With regard to legal certainty, it seems advisable to provide for a residual control of the Annexes by the EU-Commission.²⁴⁴

²⁴¹ In case C-325/11, 12/19/2012, *Alder v Orlowski*, the ECJ held that Member States are not free to determine the scope of the Service Regulation. In this case, the Polish government asserted that the Regulation was inapplicable as the Polish Code of Civil Procedure did not require service abroad as the foreign party had not appointed a representative for the service in the forum state. According to the ECJ, the Regulation applies to any cross-border service when a party is domiciled abroad. Leaving the national legislation with the task of determining in which case service abroad is necessary would prevent any uniform application of the Regulation, ECJ, case C-325/11, 12/19/2012, paras 27 et seq.

²⁴² Cf. Article 294 TFEU.

²⁴³ Wessels, International Insolvency Law (3rd ed. 2012), para. 10951.

²⁴⁴ The Commission may be supported by an expert committee, see Wessels, International Insolvency Law (3rd ed. 2012), para. 10931d.

3.5 Recommendations

Stakeholders agree that, in 2001, the main objective of the Regulation was to implement the principle of universality of (national) insolvency proceedings in the European Judicial Area. However, ten years later, the perspective has changed: Modern insolvency law is marked by the objective to restructure businesses and to discharge private debtors from unbearable debts, to avoid formal insolvency and give a new chance to struggling businesses and insolvent individuals. In the last decade, most of the Member States adapted their national laws and introduced restructuring proceedings and proceedings for the discharge of private debtors. Accordingly, there is a need to enlarge the scope of the EIR to pre-insolvency proceedings and to include hybrid proceedings.

- **Proposal:** Article 1 (1) EIR should be amended in the sense that the definition of “collective insolvency proceedings” includes pre-insolvency proceedings aimed at rescuing or reorganising the debtor’s estates. The new definition should be based on the following criteria: The procedures covered must concern a debtor in substantial financial difficulties; the procedures must be collective and be conducted under the supervision of a court.²⁴⁵ This amendment shall adapt the Regulation to recent legal developments and ensure that (new) proceedings of the Member States aimed at the restructuring of debtors in financial difficulties are coordinated by the EIR. However, it must be mentioned that the exceptions for financial institutions (Article 1 (2) EIR) considerably reduces the practical impact of the Regulation.
- A second issue is the discrepancies between the procedures listed in the Annexes and the definition of insolvency in Article 1 (1) EIR. Two pending cases at the *ECJ* clearly demonstrate the underlying problems: (1) Does the Regulation apply to a national insolvency procedure which is not listed in the Annexes, but corresponds to the definition of Article 1 (1) EIR? (2) Does the Regulation apply to national procedures which are listed in the Annex, but do not correspond to the definition of Article 1 (1) EIR? A third issue relates to

²⁴⁵ Supervision may also be exercised when the court approves the arrangement between the debtor and the creditors at the end of insolvency proceedings. In this case, negotiations between the debtor and the creditors on a reorganization of debts cannot trigger a bar to concurrent insolvency proceedings in another Member State, since these proceedings are not formally opened at their beginning.

situations in which national procedures in the Annexes are changed by the Member States without any communication of the amendment to the EU-Commission. In these situations, it is unclear whether the amended or new procedures of the Member States correspond to the definition of Article 1 (1) EIR.

Proposal: It seems advisable to improve the coordination between the Annexes and Article 1 (1) EIR. One option is to provide for a clear hierarchy between the Annex and the definition in the sense that the definition of Article 1 (1) EIR prevails over the information in the Annexes. Furthermore, the Commission should be empowered to control whether the information on the national laws meets the requirements of Article 1 (1) EIR. This solution corresponds to the general empowerment of the Commission with regard to delegated acts under Article 291 TFEU. However, the final word on the compatibility of national proceedings with Article 1 (1) EIR lies with *ECJ*.

- With regard to the relationship to third states, the present situation appears to be unsatisfactory. However, the national reporters have not referred to considerable problems and have not proposed substantial changes. This result might be explained by two factors: On one hand, many Member States extended the scope of the EIR to third states; other Member States followed the pattern of the UNCITRAL model law. In addition, the model law has also been adopted by many third states (including Australia, Canada and the United States).²⁴⁶ As a result, the universality has become a guiding principle of international insolvency law. At the moment, it seems advisable not to enlarge the scope of the Regulation to third states, but rather to encourage the latter to implement universality as the guiding principle of their national system. Nevertheless, with regard to annex proceedings, the inclusion of third state cases seems to be advisable.²⁴⁷

²⁴⁶ http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

²⁴⁷ See *infra* 3.3.6.

4 Jurisdiction

4.1 Article 3 EIR: Definition and Determination of the Centre of Main Interests²⁴⁸

4.1.1 Underlying Policies

The central provision of the EIR is found in Article 3. By allocating the jurisdiction among the EU Member States, this provision coordinates cross-border insolvency proceedings in the European Judicial Area and implements the objectives of the Regulation (see recital 3 EIR). According to its wording, Article 3 (1) EIR only regulates the international jurisdiction for the opening of insolvency proceedings. However, the function of this provision goes further, since it implements the underlying concept of the Regulation: Only the judicial authorities of the EU Member State in which the main interests of the debtor are located are competent for the commencement of insolvency proceedings²⁴⁹ and these (main) proceedings are automatically and immediately recognised in all other Member States in alignment with the principles of mutual trust (Article 16 EIR).²⁵⁰ The Regulation is therefore based on the principle of the unity of the insolvency, according to which a multitude of (parallel) main proceedings over the same debtor is excluded,²⁵¹ and the principle of universality, as all assets of the debtor are encompassed.²⁵²

However, the scope of Article 3 EIR transcends the mere stage of the opening of insolvency proceedings: This rule equally provides for the jurisdiction over all decisions which might be given in course of insolvency

²⁴⁸ I am grateful to *Lars Bierschenk*, *Adriani Dori (LL.M.)*, *Stefanie Spancken* and *Carl Zimmer* who assisted me in the preparation of this part.

²⁴⁹ Article 3 (1) EIR provides for exclusive jurisdiction.

²⁵⁰ See EIR recital 22; *Wessels*, *International Insolvency Law* (3rd ed. 2012), para. 10731.

²⁵¹ *Goode*, *Principles of Corporate Insolvency Law* (4th ed. 2011), para. 15-05 et seq.; in fact, the EIR provides for qualified unity of the insolvency proceeding, as the opening of secondary proceedings is only allowed under certain conditions.

²⁵² See recitals 11 – 12; further *Béguin/Menjuq*, *Droit du commerce international* (2005), 2314, *Goode*, *Principles of Corporate Insolvency Law* (4th ed. 2011), para. 15-05 et seq.; actually, the EIR introduced a model of mitigated universality due to the fact that the commencement of secondary proceedings limits the effects of the main proceedings.

proceedings such as the conduct of the insolvency proceedings, the closure, the approval of a restructuring plan, etc. According to the case law of the ECJ, Article 3 (1) EIR also applies to all proceedings, which are closely connected to the insolvency, such as avoidance actions of the insolvency administrator.²⁵³ The competent judicial authority under Article 3 EIR may order all necessary provisional measures – these are recognised under Article 25 EIR.²⁵⁴ Furthermore, the insolvency administrator of the main proceedings may exercise his powers in all other EU Member States (Articles 17 – 19 EIR).

As far as private international law is concerned, Article 3 EIR entails additional legal consequences which are laid down in Article 4 EIR: According to this provision, the law applicable to insolvency proceedings is determined by the Member State in which such proceedings are opened. Although Article 5 EIR provides for several exceptions, the basic structure of the EIR is clear: This instrument is based on a synchronization of *forum* and *ius* (*Gleichlauf*). This parallelism is crucial for the practical operation/efficiency of insolvency proceedings (but sometimes detrimental to foreign creditors who are subject to a foreign insolvency law which entails additional burden, costs and often delays). However, the exceptions of Articles 5 – 12 EIR shall protect secured creditors against unexpected consequences of foreign insolvency proceedings.²⁵⁵ In addition, foreign creditors have full access to the main insolvency proceedings abroad.

The third issue addressed by Article 3 EIR relates to so-called territorial proceedings: In this respect, Article 3 strikes a balance between universal and territorial approaches to cross-border insolvency as the unlimited universality might be considered to be too far reaching with respect to local creditors.²⁵⁶ Accordingly, local creditors may seek the opening of territorial proceedings in order to delineate and to restrict the cross-border effects of the main

²⁵³ ECJ, case C-339/07, 2/12/2009, *Christopher Seagon v Deko Marty Belgium NV*, ECR 2009 I-767; ECJ, case C-213/10, 4/19/2012, *F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"*. The delineation of the different situations where litigation is closely related to insolvency proceedings, however, is much more complicated.

²⁵⁴ See i.a. *Riedemann*, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 25, paras 29-30.

²⁵⁵ See *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), paras 21-22.

²⁵⁶ *Virgós/Garcimartín*, *The European Insolvency Regulation: Law and practice* (2004), 15-16; *Béguin/Menjuq*, *Droit du commerce international* (2005), 2316.

proceedings. When territorial proceedings are initiated in Member State B, this Member State (B) is shielded against the universal effect of the main proceedings opened in Member State A due to the fact that the insolvency law of Member State B applies to the secondary proceedings.²⁵⁷

Most of the territorial proceedings are secondary proceedings. Pursuant to Article 3 (2) EIR, secondary proceedings may be opened in another Member State when the debtor possesses an establishment in this Member State. Accordingly, jurisdiction for secondary proceedings is based on an establishment of the debtor which presupposes an economic activity with human means or goods (cf. Article 2 (h) EIR). Secondary proceedings are restricted to the assets located in the Member State in which they are opened (Article 3 (2) EIR). As they exclude the recognition of the main proceedings, they are aimed at protecting local creditors.²⁵⁸ However, Article 3 (2) and (3) provide for the following safeguards: Secondary proceedings are limited to the liquidation of the debtor's assets and the administrator of the main proceedings is entitled to apply for the opening of secondary proceedings (Article 29 (a) EIR). According to the underlying concept of the EIR, secondary proceedings have an auxiliary function with respect to the main proceedings and, therefore, the Regulation provides for close cooperation between the administrators of the main and the secondary proceedings (see especially Article 33 EIR).

An additional type of secondary proceedings are territorial proceedings as found in Article 3 (4) EIR. However, their practical impact seems to be limited. These proceedings may be opened prior to the opening of main proceedings if the main proceedings in the Member State in which the COMI is located cannot be opened or if a creditor in a EU Member State in which an establishment of the debtor is situated, requests the opening of insolvency proceedings. These provisions have been rarely used in the practice of the EU Member States.

²⁵⁷ ECJ, case C-116/11, *Bank Handlowy and Adamiak*, 5/24/2012, Opinion of AG Kokott, paras 30 et seq.; *Fletcher*, *The Law of insolvency* (4th ed. 2009), para. 31-052 et seq.; *Pannen/Riedemann*, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 16, paras 22-23.

²⁵⁸ Pursuant to Article 29 (b) EIR, these creditors may apply for the opening of secondary proceedings.

According to its function, Article 3 EIR is mainly aimed at coordinating the autonomous insolvency laws of the Member States in cross-border situations. The provision therefore fully corresponds to the present state of affairs of the European law of cross-border insolvency, which is characterized by coordination, not by harmonization of the national systems. However, the EIR goes beyond the scope of the national systems, which - by providing for far reaching cross-border effects - are mainly conceived for domestic settings. Although this situation is not unusual in the European law of civil procedure, insolvency proceedings are different in that the empowerment of the administrator and the divestment of the debtor transcends the usual realm of cross-border implications: As a matter of principle, universality affects all EU Member States at the same moment. Accordingly, the coordination of the national systems requires closer cooperation than the one – insufficiently – provided for in Articles 27 et seqq. EIR. In addition, the coordination of the national systems necessitates a high degree of transparency over their functioning in order to grant efficient access to justice to foreign creditors.

4.1.2 Main Issues

It is apparent that the concept of COMI is of paramount importance for the application of the Insolvency Regulation. However, the Regulation does not provide for a clear definition. Article 3 (1) EIR simply states that *“the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. 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.”* Pursuant to recital 13 EIR, *“the centre of main interest shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.”* The Regulation does not provide much guidance with regard to the concept of COMI, which appears as an undetermined legal term open for interpretation in the light of the specific circumstances. However, it goes without saying that the term has an autonomous meaning, and therefore must be interpreted in a uniform

manner, independently of national legislation.²⁵⁹ *Virgós* and *Schmit* pointed out that the term aims to reflect the focal point of economic life of the debtor which presupposes an institutional presence in the *forum*.²⁶⁰ After 2001, the courts in the Member States developed two different concepts: According to the so-called “Mind of Management Theory”, the COMI was considered to be located in the Member State in which the most important decisions of the insolvent company had been made.²⁶¹ In the *Eurofood*-case, however, the *ECJ* referred to recital 13 and developed an objective approach according to which the centre of 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.²⁶² This concept has been described as the “Business Activity Approach”.²⁶³

Although COMI applies equally to both companies and private individuals, the two situations must be distinguished. With regard to corporations, Article 3 (1), 2nd sentence provides for a (rebuttable) presumption that the COMI corresponds to the place of the registered office. There is no similar presumption with regard to individuals – neither to consumers, nor to self-employed persons. Therefore, the question arises as to whether this overlooked issue should be addressed explicitly in the Regulation, especially with regard to the phenomenon of “insolvency tourism”.²⁶⁴

Article 3 (1) EIR only addresses international jurisdiction; territorial jurisdiction is regulated by the Member States (see recital 15). In practice, this reference to national law does not entail difficulties, since many national laws equally designate the local jurisdiction in which the debtor is domiciled or carries out his or her main business. However, the concept and the criteria of COMI (as described below) would also permit the designation of the local competent court in the Member State and, as a consequence, simplify the verification of

²⁵⁹ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 30; *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, para. 43.

²⁶⁰ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 75.

²⁶¹ *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9, para. 19.

²⁶² *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 30; *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, para. 49.

²⁶³ *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9, paras 19 and 20.

²⁶⁴ See *infra* 4.1.3.6.3.

the admissibility of the application for opening insolvency proceedings by the requested court.²⁶⁵

4.1.2.1 COMI of corporations

The COMI of corporations has proved to be one of the most controversial issues within the Regulation. However, the case-law of the *ECJ* has clarified the underlying concept and the (mostly) factual elements of the COMI. Nevertheless, there remain several deviations in the practice of the Member States, as the test elaborated by the *ECJ* depends to a large extent on the factual circumstances of the individual case.

Article 3 (1) 2nd sentence EIR provides for a presumption that the COMI is located at the place where the company is registered. Although this presumption corresponds to the factual situation in many cases, its (possible) rebuttal has triggered much case-law in the EU-Member States and also of the *ECJ* itself.²⁶⁶ According to the structure of Article 3 (1) EIR, the determination of the COMI of a corporation is subject to a two-stage examination: First, COMI is presumed to be located in the Member State in which the corporation is registered. However, a creditor (or any other interested person) may assert and prove to the court that the main activities of the debtor are carried out in a different Member State. Therefore, the main function of the presumption is to shift the burden of proof onto the party challenging the opening of the insolvency proceedings.²⁶⁷ According to the case-law of the *ECJ*, Article 3 (1) EIR provides for a strong presumption which can only be rebutted in exceptional circumstances, especially in the case of sham or letter-box companies.²⁶⁸ However, in *Interedil*, the *ECJ* adopted a more relaxed standard and clarified that the presumption of the statutory seat can also be rebutted in cases in which the statutory seat and the administration of the business activities are located in different Member

²⁶⁵ Wessels, *International Insolvency Law* (3rd ed. 2012), para. 10543; Hess, *Europäisches Zivilprozessrecht* (2010), § 9, para. 21; different opinion *Duursma-Kepplinger*, in: Duursma-Kepplinger/Duursma/Chalupsky (eds.), *Europäische Insolvenzverordnung* (2002), Article 3 EIR, para. 60.

²⁶⁶ Most of the national reporters refer to case-law where the presumption has been successfully challenged and rebutted, see *infra* at 2.4.1.

²⁶⁷ Wessels, *International Insolvency Law* (3rd ed. 2012), para. 10570, *Virgós/Garcimartín*, *The European Insolvency Regulation: Law and Practice* (2004), 44.

²⁶⁸ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 35.

States. The Court described the task of a national judge assessing the COMI as follows:

*“The main centre of interests of a corporation must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company 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 that provision cannot be rebutted. Where a company’s central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other Member State.”*²⁶⁹

Accordingly, the party challenging the opening of the insolvency must assert and prove objective factors ascertainable by third parties. Therefore, the party must allege facts and circumstances which clearly demonstrate that the main administration of the insolvent company, as well as its business activities and the relevant assets, are not located in the Member State in which the proceedings had been opened.²⁷⁰ The pertinent factors depend on the type of the debtor’s business: A manufacturer usually has its COMI in the Member State in which the factory is located²⁷¹, whereas a retailer usually performs business activities with its main clients out of the place of its main administration, making the location of the storage irrelevant.²⁷² As the *BenQ*-case demonstrates, the situation may be more complicated if the holding

²⁶⁹ ECJ, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, para. 59.

²⁷⁰ Wessels, *International Insolvency Law* (3rd ed. 2012), para. 10570c.

²⁷¹ Examples: *Hans Brochier Holding Ltd. v Exner* [2006] EWHC 2594 (Ch), NZI 2007, 187 and *High Court of Justice London*, Order of 8 December 2006, 6211/06, NZI 2007, 187 et seq.; *AG Nürnberg*, 8/15/2006, NZI 2007, 185 and *AG Nürnberg*, 10/1/2006, NZI 2007, 186.

²⁷² Example: *Court of Stockholm*, 1/27/2005, K 17664-04.

company and the factories are located in different Member States: In BenQ, the European branch of an IT-company was organised in a way that the holding was registered in the Netherlands (where two directors and nine employees worked at the office), whereas the production site (with several thousand employees) was located in Munich. The District Court Amsterdam opened main insolvency proceedings on the grounds that the holding operated its business activities (including staff, managing directors and permanent office) in the Netherlands and these activities were ascertainable for the creditors as third parties.²⁷³ As a consequence, parallel proceedings in Germany were only opened as secondary proceedings.²⁷⁴ The decision of the *Amsterdam Court* was in line with the case law of the *ECJ*, in accordance with which the presumption can only be rebutted under exceptional circumstances, especially when the insolvent company does not carry out any business in the forum state. However, as the national reports demonstrate, in most of the Member States, the presumption was sometimes more easily rebutted.²⁷⁵ This practice may be explained by the open standards and the factual approach to COMI elaborated by the *ECJ*. Most of the cases in which the presumption was rebutted concerned (small) holding companies or a transfer of the seat of the insolvent company.²⁷⁶

A second feature of the COMI relates to the legal personality of the insolvent company. As the *ECJ* clearly held in *Eurofood*, the COMI of each legal entity has to be determined separately; each debtor constituting a separate legal entity is subject to its own jurisdiction.²⁷⁷ Therefore, the opening of one unitary insolvency procedure over a group of companies is excluded; the EIR presupposes that each entity of the group is subject to a separate insolvency

²⁷³ *Amsterdam District Court*, 2/28/2007, NIPR 2007, 139.

²⁷⁴ *AG Munich*, 2/5/2007, ZIP 2007, 495.

²⁷⁵ Example: *Commercial Court Brussels*, 3/29/2003, DAOR 2004, 94; *First instance Court Budapest*, 10/14/2008, 9.Fpk. 01-08-003390/6, INSOL EIR-case register, Abstract No. 154; *Tribunale di Roma*, 8/14/2003, *Cirio del Monte NV*, Riv.dir.int.priv.proc. 2004, 685 et seq.; *Collins & Aikman Europe SA* [2005] EWHC 1754 (Ch).

²⁷⁶ Examples: *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, paras 54 et seq.; *BGH*, 12/1/2011, NJW 2012, 936; *BGH*, 6/21/2012, NZI 2012, 725.

²⁷⁷ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 30; *ECJ*, case C-191/10, 12/15/2011, *Rastelli Davide e C. Snc v Jean-Charles Hidoux*, para. 25; see further *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 74, *Pannen*, in: Pannen (ed.), Europäische Insolvenzverordnung (2007) Article 3, para. 46, *Virgós/Garcimartín*, The European Insolvency Regulation: Law and practice (2004), 46.

procedure if it is constituted as a legal person. In *Rastelli*, the *ECJ* held that the intermixture of the property of two companies (having legal personality) does not result in a single centre of interests.²⁷⁸ However, if a company runs several establishments in different Member States without distinct legal personalities, the jurisdiction for insolvency proceedings lies in the Member State in which the main activities of the company take place.²⁷⁹

4.1.2.2 COMI of individual persons

With regard to natural persons, Article 3 (1) EIR neither provides for any definition of the centre of main interests nor for any presumption. However, if an individual runs a business, he/she may be registered as a businessman and the presumption of Article 3 (1) 2nd sentence EIR may apply by analogy. In other circumstances, the centre of main interests of professionals will be the place of their professional domicile and for other individuals, especially consumers, the place of their habitual residence.²⁸⁰ If a person lives in Metz and works four or five days a week in Luxembourg, the situation must be determined according to the circumstances of the individual case and with reference to objective factors ascertainable by third parties.²⁸¹ The *BGH* had to determine the COMI of a debtor who was domiciled in Luxembourg, but imprisoned in Germany.²⁸² The Court referred to sec. 7 of the German Civil Code, which defines the domicile (*Wohnsitz*) using objective and subjective criteria. The *BGH* came to the conclusion that the domicile of the debtor was still in Luxembourg as the debtor was not voluntarily imprisoned in Germany. However, this decision seems to be misleading for the following reasons: On one hand, it refers to the subjective intention of the debtor and, on the other hand, the autonomous concept of COMI was interpreted with reference to national law. This example illustrates the uncertainties with regard to the ascertainment of the COMI of individual persons.

²⁷⁸ *ECJ*, case C-191/10, 12/15/2011, *Rastelli Davide e C. Snc v Jean-Charles Hidoux*, paras 35-38, The *ECJ* explained that the intermixing of property is not an objective factor which can be easily ascertained by third parties.

²⁷⁹ See i.e. the German-Austrian case *Zenith, LG Klagenfurt*, 7/2/2004, NZI 2004, 677 and a Spanish-Hungarian case referred to by the Spanish national reporter.

²⁸⁰ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 75.

²⁸¹ *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10559.

²⁸² *BGH*, 11/8/2007, NZI 2008, 121.

4.1.2.3 Relocation Cases

The national reports clearly demonstrate that the determination of the COMI is most difficult in cases in which the debtor relocated its registered seat or its domicile prior to its application for insolvency. These situations equally arise with regard to natural persons and corporations. According to the case law of the ECJ, the decisive moment for determining the existence of the COMI is the filing of the application for opening main proceedings.²⁸³ If the debtor moves its COMI to another Member State after the application to open insolvency proceedings, the requested court retains jurisdiction. This case law is largely respected by the courts of the EU Member States.²⁸⁴

Major problems arise when the statutory seat or the domicile of the debtor is transferred to another Member State prior to the application for insolvency proceedings. In legal literature, such cases are sometimes described as “insolvency tourism” – where debtors try to benefit from national rules providing for shorter periods of time for a discharge of residual debts or for more sophisticated restructuring mechanisms. Over the last decade, forum shopping in insolvency law has become a common phenomenon in the European Judicial Area. However, *forum shopping* cannot be regarded as abusive or illegitimate *per se*.²⁸⁵ As long as the national insolvency laws are not harmonized in the European Judicial Area, stakeholders may select the most favorable law for the restructuring of their debts. Furthermore, any relocation of the statutory seat of corporations or of the habitual residence of individuals is protected by the fundamental freedoms of establishment (Article 49 TFEU) and of movement (Article 45 TFEU). Against this background, any introduction of restrictions requires a legitimate justification (which will often,

²⁸³ ECJ, case C-1/04, 1/17/2006, *Susanne Staubitz-Schreiber*, ECR 2006 I-701, para. 29; ECJ, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, para. 55; see i.a. Hess, *Europäisches Zivilprozessrecht* (2010), § 9 para. 17, *Kindler*, in: MünchKomm-BGB (5th ed. 2010), Article 3 EIR, paras 32 et seq.

²⁸⁴ See, in Germany, AG Celle, 4/18/2005, EuZW 2005, 415 and in England *Trillium (Nelson) Properties Ltd. v Office Metro Ltd.* [2012] EWHC 1191 (Ch); contra *Malcolm Brian Shierson (as trustee in bankruptcy of Martin Vlieland-Boddy) v Clive Vlieland-Boddy* [2005] EWCA Civ 974 and *Shierson v Vlieland-Boddy* [2004] EWHC 2752 (Ch) which adhered to the time of the opening of the proceedings; prior to the ECJ ruling in *Staubitz-Schreiber*, see AG Wuppertal, 4/10/2002, BeckRS 2010, 12174.

²⁸⁵ Schack, *Internationales Zivilverfahrensrecht* (5th ed. 2010), para. 252; further *Eidenmüller*, KTS 2009, 137 et seqq. and *McCormack*, C.L.J. 2009, 68(1), 169, 179 et seq., *Moss/Fletcher/Isaacs*, *The EC Regulation on Insolvency Proceedings* (2nd ed. 2009), para. 8.101.

but not always be the protection of the creditors²⁸⁶) and must correspond to the principle of proportionality.²⁸⁷ Furthermore, a general court practice denying foreign creditors any discharge based on the presumption that these applications are abusive seems to be problematic.²⁸⁸

However, the national reports have revealed cases of evident abusive (temporary) relocation of COMI only for the purpose of obtaining discharge of residual debts: especially German debtors tried to take advantage of the discharge opportunities of English law which provides for a debt release within one year.²⁸⁹ According to the information obtained by a German lawyer practicing in England, German self-employed debtors relocated their domicile to England where up to six persons lived (for months) in one small apartment of two bedrooms and applied for a discharge. In these circumstances, a careful examination by the requested court is crucial for the determination of COMI. If the court only relies on the declaration of the debtor, it will be impossible to reveal any abusive behavior. However, the Regulation does not address the examination of the COMI by the court where the application was filed; this issue is considered to be a matter for the national procedural laws.

4.1.2.4 Territorial Proceedings

Territorial proceedings are addressed by Article 3 (2) - (4) EIR. These proceedings are opened if the COMI of the debtor is located in another Member State; their effects are limited to the territory of the particular Member State in which these proceedings are opened. The opening of territorial proceedings requires an establishment of the debtor: Such a requisite presupposes more than the mere existence of assets (e.g. a bank account) in the Member State in which the territorial proceedings are initiated, and is

²⁸⁶ It should be noted that “*the legitimate expectation*” of a creditor that the debtor would not move his COMI to another Member State is flawed by the fundamental freedoms of the TFEU which expressly permit the relocation of citizens and of businesses, cf. *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.102; *Nerlich*, in: *Nerlich/Römermann* (eds.), *Insolvenzordnung* (2012), Article 3 EIR, para. 44; *Reinhart*, NZI 2012, 304, 306.

²⁸⁷ ECJ, case C-378/10, 7/12/2012, *VALE Építési kft*; ECJ, case C-461/11, 11/8/2012, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, paras 30 et seq., further *Eidenmüller*, KTS 2009, 137 et seqq.

²⁸⁸ See French National Report, answer to Q 9; further *Reinhart*, NZI 2012, 304, 306.

²⁸⁹ Pursuant to sec. 287 (2) of the German Insolvency Act the period for discharge amounts to six years; see further *Hergenröder/Alsmann*, ZVI 2007, 337 et seqq.; see about bankruptcy tourism in France *Hölzle*, ZVI 2007, 1 et seqq.

satisfied instead by a business unit with human means and goods carrying on substantial activities.²⁹⁰

The Regulation provides for two types of territorial proceedings: on one hand, the so-called secondary proceedings, which require an establishment of the debtor (see Article 2 (h) EIR) in the respective Member State. On the other hand, Article 3 (4) EIR provides for so-called independent territorial proceedings which are initiated when main proceedings have not been opened. Article 3 (4) regulates two types of these proceedings: Subsection a) addresses situations in which the opening of main proceedings has proved to be impossible under the applicable insolvency law of the EU-Member State in which the COMI is located. Subsection b) requires a connection of either the creditor or the asserted claim to an establishment of the debtor in the Member State where the opening of the proceedings is requested.²⁹¹ In *Zaza Retail*, the *ECJ* held that a public authority acting in the public interest does not qualify as a creditor in the sense of Article 3 (4) (b) EIR.²⁹²

The objective of the territorial proceedings is clear: These proceedings shall shield local creditors against the universal reach of the main proceedings.²⁹³ Governed by their own *lex fori* (Article 28 EIR), secondary proceedings restrict the legal effects of the main proceedings. However, the secondary proceedings shall have a supplementary and auxiliary function²⁹⁴ to the main proceedings; Article 31 EIR provides for a duty of cooperation between the insolvency administrators of the main and secondary proceedings. Further, the main insolvency administrator may influence the secondary proceedings considerably: He/she is empowered to apply for the opening of these proceedings, lodge claims, represent creditors of the main proceedings and

²⁹⁰ *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, para. 62; further *Fletcher*, *The Law of Insolvency* (4th ed. 2009), para. 31035; *Verougstraete*, *Manuel de la continuité des entreprises et de la faillite* (2010), 928, *Pannen*, in: *Pannen* (ed.), *Europäische Insolvenzverordnung* (2007), Article 3, para. 119.

²⁹¹ See i.a. *Verougstraete*, *Manuel de la continuité des entreprises et de la faillite* (2010), 929-930, *Moss/Fletcher/Isaacs*, *The EC Regulation on Insolvency Proceedings* (2nd ed. 2009), para. 8.154.

²⁹² *ECJ*, case C-112/10, 11/17/2011, *Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV*, para. 27 et seq.

²⁹³ *ECJ*, case C-444/07, 1/21/2010, *McProbud Gdynia sp.z.o.o*, ECR 2010 I-417, para. 24; *Hess*, *Europäisches Zivilprozessrecht* (2010), § 9 para. 25; *Verougstraete*, *Manuel de la continuité des entreprises et de la faillite* (2010), 928.

²⁹⁴ *Herchen*, in: *Pannen* (ed.), *Europäische Insolvenzverordnung* (2007), Article 27, paras 12 et seq.

apply for a stay and the closure of the secondary proceedings. The remaining assets in the secondary proceedings are transferred to the main liquidator (Article 35 EIR).²⁹⁵

When the EIR entered into force, there was a discussion as to whether secondary proceedings could be commenced against subsidiaries of groups of companies. The issue depends on the interpretation of the term establishment (Article 2 (h) EIR). In the context of the Brussels I Convention/Regulation, the *ECJ* had held that an independent foreign subsidiary fully controlled by the parent company qualified as an establishment in the sense of Article 5 no 5 JR.²⁹⁶ In *Eurofood*, the *ECJ* did not transfer this case-law to the EIR and held that in the jurisdictional system of the Regulation each debtor constituting a distinct legal entity is subject to its own court jurisdiction.²⁹⁷ Therefore, the COMI must be ascertained separately for each legal subject in the group of companies. However, the practice in the Member States indicates a need for a better coordination of the insolvency of a group of companies.²⁹⁸

A second limitation of secondary proceedings is laid down in Article 3 (3), 2nd sentence. According to this provision, secondary proceedings are limited to the winding up of the debtor.²⁹⁹ Although reorganisation in secondary proceedings is excluded, this limitation is mitigated by Article 34 (1) EIR, which allows the rescue of the establishment by rescue plan.³⁰⁰ This limitation seems to be unnecessary, especially in cases in which the main proceedings

²⁹⁵ See i.a. Hess, *Europäisches Zivilprozessrecht* (2010), § 9 para. 25.

²⁹⁶ *ECJ*, case C-218/86, 12/9/1987, *SAR Schotte GmbH v Parfums Rothschild SARL*, ECR 1987, 4905, para. 17.

²⁹⁷ *ECJ*, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 30; further Pannen, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 3, para. 121; Deyda, *Der Konzern im europäischen internationalen Insolvenzrecht* (2008), 65; Wautelet, in: Affaki, *Faillite Internationale et conflit de juridictions - Regards croisés transatlantiques* (2007), 73, 91; Wessels, *ECL*, 3/2006, 183, 186.

²⁹⁸ See, for example, the insolvency of the PIN group, *AG Cologne*, 2/1/2008, NZI 2008, 254 and *AG Cologne*, 2/19/2008, NZI 2008, 257.

²⁹⁹ Those insolvency proceedings, which are winding up proceedings for the purpose of the EIR, are listed in Annex B of the Regulation; see also the definition provided for by Article 2 (c) EIR. The restriction of secondary insolvency proceedings to liquidation proceedings could adversely affect restructuring efforts, for this see McCormack, *C.L.J.* 2009, 68(1), 169, 195 and Moss/Fletcher/Isaacs, *The EC Regulation on Insolvency Proceedings* (2nd ed. 2009), para. 8.147.

³⁰⁰ See also Kindler, in: *MünchKomm-BGB* (5th ed. 2010), Article 34 EIR, para. 1; Herchen, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Article 34, para. 1 et seq.

are conducted with the aim of rescuing the company.³⁰¹ However, it seems to be advisable to amend Article 34 EIR in the sense that only the main administrator may apply for secondary restructuring proceedings.

4.1.3 The application of the Regulation in the Member States³⁰²

4.1.3.1 The COMI of corporations

The judgments of the *ECJ* in *Eurofood* and in *Interedil* on the determination of the COMI using objective criteria provide much guidance to the national courts. However, the national reports demonstrate that there are inconsistencies often connected with the presumption of Article 3 (1), 2nd sentence EIR. Most of the national reports refer to cases in which the presumption had been rebutted.³⁰³ Only in six Member States was no such case-law found.³⁰⁴ Most of the cases where the presumption of the statutory seat was rebutted concern groups of companies (holdings) or private limited companies. Another group of cases relates to the relocation of the COMI in the eve of the opening of insolvency proceedings.³⁰⁵

4.1.3.1.1 Austria

In accordance with the *ECJ*'s decision in *Eurofood*, Austrian courts focus on objective criteria in order to establish COMI and to rebut the presumption of Article 3 (1) EIR.³⁰⁶

In one case, the *Commercial Court Vienna* held that the debtor, the Elba Maria Bauträger Ltd., who has its central administration in Austria and just a

³⁰¹ See, for example, the insolvency of the PIN group, *AG Cologne*, 2/1/2008, NZI 2008, 254 and *AG Cologne*, 2/19/2008, NZI 2008, 257.

³⁰² Member States not cited did not report any specific case law.

³⁰³ Those Member States are inter alia: Austria, Belgium, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Poland, Romania, Spain, Sweden and the United Kingdom.

³⁰⁴ Bulgaria, Estonia, Latvia, Lithuania, Malta and Slovenia.

³⁰⁵ See *infra* 4.1.3.4.

³⁰⁶ *Commercial Court Wien*, publication of the appointment of a German temporary liquidator over a company in Parndorf/Neusiedl [Austria] as main insolvency proceedings under Article 3 (1) EIR, 3/19/2010, *FOC Neusiedl Fashion GmbH* [vorm. *firmierend Rosner Fashion GmbH*].

“letterbox-address” at the place of its registered office, has its COMI in Austria.³⁰⁷

In several cases, Austrian courts also deviated from the presumption laid down in Article 3 (1) EIR by refusing to open main insolvency proceedings over companies having their registered office in Austria.³⁰⁸

In one case³⁰⁹, the *District Court of Salzburg* decided that the COMI of two limited liability companies having their registered office in Austria was in Germany at the company’s place of effective management. The court argues that the company did not carry out economic activities in Austria as it had a German address and a German tax number.

In another case³¹⁰ concerning a limited liability company registered in Austria, most of the company’s assets and creditors were located in Germany. The court held that COMI required minimum organizational structures such as human resources, offices and IT-facilities. It therefore rebutted the presumption of Article 3 (1) EIR and did not open main insolvency proceedings.

With regard to groups of companies, the Austrian national reporters do not consider it to be too difficult to rebut the presumption of Article 3 (1) EIR. In their view, opening main insolvency proceedings regarding subsidiaries under the head-office-function doctrine might be a useful tool for a coordinated administration of the group. From this perspective, the *ECJ* judgment in *Interedil* leaves room to continue applying the head-office doctrine.³¹¹

4.1.3.1.2 Belgium

Before the *ECJ*’s decision in *Eurofood*, Belgian courts occasionally tended to rebut the presumption of Article 3 (1) EIR without providing suitable justification for the rebuttal:

³⁰⁷ *Commercial Court Wien*, 3/25/2009, *Elba Mari Baurträger Ltd.* In the vast majority of cases, however, applications to open insolvency proceedings regarding a Ltd. in Austria were dismissed due to the fact that the cost of the insolvency could be not covered by the estate.

³⁰⁸ E.g. *District Court Salzburg*, 8/25/2009, *non ferrum Metallpulver GesmbH, St. Georgen (Salzburg)*; See on this case also: *Der Standard*, 11/17/2009: *non ferrum metallpulver in Konkurs*, <http://derstandard.at/1256745046685/non-ferrum-Metallpulver-in-Konkurs>.

³⁰⁹ *LG Salzburg*, 8/5/2004, ZIK 2004, 177.

³¹⁰ *OLG Linz*, 2/9/2006, ZIK 2006/88b, 73.

³¹¹ Cf. *Geroldinger*, ZIK 2011, 208, 210.

In 2003, the *Commercial Court Brussels*³¹² opened insolvency proceedings against CGC Communications Ltd., a company whose registered office was in the United Kingdom, without alleging grounds for rebutting the presumption. In the *Belgium v s.p.r.l. Eurogyp* case³¹³, the same court held that a company, which moved its registered office from Belgium to France, still had its COMI in Belgium, since the company could not be located at the French address and still held its tax number and company registration number in Belgium. Another decision concerned a company with registered office in Greece. The *Commercial Court Brussels*³¹⁴ opened main insolvency proceedings over Electra Airlines stating that the management resided in and operated from Brussels as invoices were sent from Brussels and the company had a Belgian bank account.

After *Eurofood*, Belgian courts adopted the objective approach, which eventually lead to the inverse situation that Belgian courts interpreted the presumption strictly and were reluctant to rebut the presumption laid down in Article 3 (1) EIR. Consequently, there were several cases in which there was not sufficient evidence to rebut the presumption.³¹⁵ Belgian courts held that the presumption could only be rebutted if it was proven that the place of the registered office was fictitious. Moreover, Belgian courts found that the location of property or the establishment of a bank account are not sufficient criteria to rebut the presumption laid down in Article 3 (1) EIR.³¹⁶ In two recent decisions³¹⁷ Belgian courts extensively dealt with criteria which may justify the rebuttal of the presumption and found that the criteria used to identify the COMI in a State different from the place of the registered office have to be transparent and objectively ascertainable by third parties. Such criteria could

³¹² *Commercial Court Brussels*, 3/29/2003, DAOR 2004, 94.

³¹³ *Commercial Court Brussels*, 12/8/2003, DAOR 2004, 96.

³¹⁴ *Commercial Court Brussels*, 12/18/2003, *Electra Airlines* (unreported).

³¹⁵ *Commercial Court Charleroi*, 7/16/2002, TBH 2004, 811; *Commercial Court Dendermonde*, 8/18/2005, TBH 2006, 145; *Court of Appeal Mons*, 4/24/2006 (unreported) - In contrast, the first instance court rebutted the presumption stating that the company had no valuable assets in Belgium and that it mainly exercised its activities in Italy and partly in France, see *Tribunal de Commerce de Tournai*, 5/24/2005, INSOL Europe Database No. 132; *Court of Appeal Liège*, 1/25/2007, JLMB 2007, 1231; *Commercial Court Charleroi*, 4/8/2011, *SARL Harmonie Textile*, Case nr. B/2011/00109 (unreported).

³¹⁶ *Court of Appeal Liège*, 1/25/2007, JLMB 2007, 1231.

³¹⁷ *Court of Appeal Liège*, 4/28/2011, TBH 2012, 165; *Court of Appeal Mons*, 10/21/2011, *Groupe Calortee SAS* (unreported).

be the place of the debtor's bank account, the address mentioned in its correspondence and the use of a courier service. In contrast, the court stated that the location in which the group's middle management worked, the contract for domiciliation and the extent of the debtor's economic activity in a particular country cannot justify the location of COMI in a Member State different from the Member State of registration. In case of a group of companies, the fact that the administration of the debtor is controlled by a parent company located in another Member State is not sufficient for rebutting the presumption.³¹⁸

4.1.3.1.3 Czech Republic

The national report refers to two decisions in which the presumption of Article 3 (1) EIR was rebutted. The first case relates to a manufacturing group referred to as KORD. The Czech court found that three Slovak manufacturing subsidiaries of the Czech parent had their COMI in the Czech Republic. The second case is referred to as ECM and the situation there was quite the opposite: the Czech court found that the Luxembourg holding company's COMI was in the Czech Republic, where most of the group's business activities and assets (real estate development projects housed in separate companies) were located.

4.1.3.1.4 Estonia

The national reporter referred to one case in which the presumption was rebutted, since the Estonian court held that the actual COMI was located in Estonia. The case concerns a company incorporated in Gibraltar. No further information has been provided on this case.

4.1.3.1.5 France

The national report quoted several decisions in which the legal presumption of COMI was rebutted, especially with regard to companies incorporated in Luxembourg while conducting their main business activities in France.

³¹⁸ *Court of Appeal Mons*, 10/21/2011, *Groupe Calortee SAS* (unreported).

1. In the *Heart of La Défense* case, the *Court of Appeal of Versailles*³¹⁹ opened main proceedings over a Luxembourgian holding company. The court based its judgment on the following objective criteria: the Luxembourg holding company had no employees, no activity and no turnover in Luxembourg; 100% of its shares were held by a French company, the sole asset of which was a building in Paris; all important transactions of the company at issue have been concluded in Paris; the Luxembourg holding had been represented by the manager of the French company. The sole activity performed in Luxembourg was aimed at complying with the company law of Luxembourg.
2. In the so-called *Mansford* case³²⁰, 12 companies incorporated in Luxembourg filed an application for the opening of insolvency proceedings in France and in two other cases. Rebutting the presumption of Article 3 (2) EIR and locating the companies' COMI in France, French courts held that the companies had not performed any business activities in Luxembourg. In fact, all meetings of the boards of the companies had taken place in Paris and the sole asset of each respective company was a building in France. The contractual relationships of the companies were limited to other French companies and the contracts were subject to French law. Furthermore, the holding companies of the applicants had not performed any business activities in Luxembourg either.
3. The *Court of Appeal of Douai*³²¹ decided in the case *Trading Logistics Mediations Ltd.* that the COMI of the debtor was located in France and it consequently had jurisdiction to open insolvency proceedings over the insolvent debtor's estate, despite the fact that the company was incorporated in the UK. The rebuttal of the presumption of Article 3 (1) was based on the fact that the company mainly operated business activities in France, including all important transactions, pending lawsuits, and the company operated under a French address, E-mail account, and French telephone number. The correspondence letters, legal documents and

³¹⁹ *Court of Appeal of Versailles*, 1/19/2012, *SA Eurotitrisation v SAS Heart of La Defense*, BeckRS 2012, 15298, annotated by Dammann/Müller, NZI 2012, 643 et seqq.

³²⁰ *Cour d'appel Paris*, 11/26/2009, Case no 09/17248.

³²¹ *Cour d'appel Douai*, 5/2/2006, N°ct0039.

correspondence was conducted in French and the company paid taxes to the French authorities.

4. The *Tribunal de commerce de Paris*³²² rebutted the presumption laid down in Article 3 (1) EIR with regard to one of the two holdings companies of the Eurotunnel group incorporated in England. The French Court found that it has international jurisdiction to decide on the request to commence a “*procédure de sauvegarde*” over the holding on the grounds that the strategic decisions are made in France, the assets and the employees of the holding are located in France and the restructuring efforts are taking place in France.
5. In the *EMTEC* case, the *Tribunal de Commerce de Nanterre*³²³ commenced restructuring proceedings (“*redressement judiciaire*”) over all the companies of the group EMTEC, the registered office of which was in other Member States, although the Holding company of the group was incorporated in the Netherlands. The court based the rebuttal of the presumption of Article 3 (1) upon the fact that the subsidiaries with registered office in France made all strategic decisions concerning the group.

As a result, it can be stated that French courts are inclined to open insolvency proceedings in cases in which the domestic corporations are formally held by foreign holding companies, which do not carry out substantial business activities at the place of registration.

4.1.3.1.6 Germany

Prior to the *ECJ*’s decision in *Eurofood*, problems have arisen in the context of groups of companies. In order to concentrate jurisdiction,³²⁴ German courts tended to locate foreign companies’ COMI in Germany if the key management decisions were taken at the seat of the parent company and if the latter was also situated in Germany.³²⁵ However, in *Eurofood*, the *ECJ*

³²² *Tribunal de Commerce de Paris*, 8/2/2006, *Eurotunnel*, Dalloz 2006, 2329 et seq.

³²³ *Tribunal de Commerce de Nanterre*, 2/15/2006, PCL 2006J00174.

³²⁴ See *Haß/Herweg*, in: *Haß/Huber/Gruber/Heiderhoff* (eds.), *EU-Insolvenzverordnung* (2005), Article 3, para. 57; *Pannen/Riedemann*, *NZI* 2004, 646.

³²⁵ In three cases, German courts found that subsidiaries registered in Austria had their actual COMI at the place of the parent company’s registered office in Germany: *AG Munich*, 5/4/2004,

clearly declined to endorse the mind of management doctrine as a doctrinal basis for the determination of COMI.

In a second category of cases, the presumption of Article 3 (1) EIR has been rebutted on the basis of criteria ascertainable by third parties.³²⁶ In this regard, German courts held that COMI has to be determined on the basis of the company's activities, such as the place of the business premises, the place where contractual relations with third parties (in particular suppliers) were concluded as well as the place where operative activities, such as financial and personnel administration, were performed.³²⁷

Following the *Eurofood* case, there have been various cases in which German courts have rebutted the presumption.

1. The *Local Court of Nuremberg*³²⁸ held in the *Hans Brochier* case that the actual COMI of an English Limited was in Germany because the company's administration, including financial and personnel administration, was performed in Nuremberg and legal relations with clients and suppliers were carried out and coordinated from Nuremberg. Moreover, the company's website indicated Nuremberg as the centre of administration and most of the business premises were located in Germany. The law applicable to the majority of contracts was German law and the contracts were mainly concluded in Germany.
2. The *Local Court of Cologne*³²⁹ ordered in the *PIN II* case preservation measures in respect of a holding registered in Luxembourg stating that subordinate activities continuing at the place of the registered office do not exclude the rebuttal of the presumption. Due to the following criteria, it has been ascertainable for third parties that the COMI has been transferred to

ZIP 2004, 962 (Re *Hettlage*); AG *Siegen*, 7/1/2004, NZG 2005, 92 (Re *Zenith*); AG *Offenburg*, 8/2/2004, NZI 2004, 673 (Re *Hulka*).

³²⁶ AG *Weilheim i.OB*, 6/22/2005, ZIP 2005, 1611; AG *Hamburg*, 12/1/2005, NZI 2006, 120.

³²⁷ See AG *Mönchengladbach*, 4/27/2004, NZI 2004, 383 (Re *EMBI/C*): The Court opened main insolvency proceedings in Germany despite the fact that the insolvent company had filed in England a petition for the opening of insolvency proceedings and had filed in Germany for secondary proceedings, as the debtor conducted its business in an ascertainable manner for third parties and the winding up petition had not been heard at the time of the opening of the proceedings. With regard to German companies having transferred their COMI to England, see, for example, AG *Saarbrücken*, 2/25/2005, ZInsO 2005, 727.

³²⁸ AG *Nuremberg*, 10/1/2006, NZI 2007, 186 (Re *Hans Brochier Holding Ltd.*), see also *Andres/Grund*, NZI 2007, 137.

³²⁹ AG *Cologne*, 2/19/2008, NZI 2008, 257 (Re *PIN II*).

Germany: (a) the important decisions were made in Cologne. (b) All administrative activities (press services, marketing, communication, controlling etc.) were performed in Germany. (c) Negotiations with third parties took place in Germany. (d) Two German lawyers represented the holding as managers.

3. One judgment³³⁰ concerned an Austrian holding company whose parent company was located in Austria. Deviating from the presumption, the local court held that the COMI of the holding company was in Germany, because it hardly conducted any activities in Austria. It exclusively held shares in the German subsidiary and all business communication of the holding company was conducted using the postal address of the subsidiary in Germany. Business records were stored in the premises of the subsidiary and the director of the holding had his office at the seat of the subsidiary.
4. In two recent rulings, the *German Federal Supreme Court*³³¹ set aside first instance decisions based on the presumption of Article 3 (1) EIR and rebutted the presumption of the registered seat. The first case concerned a company registered in the Netherlands being the legal successor of a German company. The court located the actual COMI in Germany arguing that the (formal) debtor corporation had been founded in 2007 to take over the shares of the German company and transform them into a limited partnership (KG). The sole partner left the company, which caused its dissolution without liquidation and the transfer of the registered office to the Netherlands. After the takeover, the debtor did not perform any discernible activities in Germany or in the Netherlands. A German national domiciled in Germany was the sole shareholder and director of the debtor. Eventually, the Supreme Court held that the COMI was not located in the Netherlands, but rather in Germany.

The second judgment³³² concerns a company registered in Spain. The court deviated from the presumption on the ground that the company's sole asset was immovable property located in Germany. The company had leased the

³³⁰ AG *Mönchengladbach*, 8/11/2011, ZIP 2012, 383.

³³¹ BGH, 12/1/2011, NZI 2012, 151, see *Tashiro*, LMK 2012, 329552; BGH, 6/21/2012, BeckRS 2012, 16835.

³³² BGH, 6/21/2012, BeckRS 2012, 16835.

building to third parties and a German credit institution had financed the transactions.

There were also decisions in which German insolvency courts held that the evidence was insufficient for rebutting the presumption of Article 3 (1) EIR. Applying the guidelines set out in the *ECJ Eurofood* decision, German courts³³³ considered that winding-up activities carried out in another Member State after economic activities had been ceased at the place of registration are sufficient to rebut the presumption only if they are ascertainable by third parties. Change of jurisdiction is only justified if the winding-up activities require the termination of pending transactions and, as the case may be, entering into new transactions, as well as the administration and preservation of the debtor's assets.

4.1.3.1.7 Greece

The Greek national report refers to a decision of the *Court of Appeal Piraeus*³³⁴ which considered that the COMI was located in Greece despite the presumption of Article 3 (1), 2nd sentence EIR. The case concerned a Greek branch office of a foreign offshore company with registered seat in the Marshall Islands. The court stated that the company carried out “*limited activity*” in Greece, because there were few employees working at the branch office and merely controlling financial issues of the company's administration. The main business (shipping) activities as well as the administration of the company's interests, including all business correspondence, were performed in the Ukraine. Most of the employees were located in the Ukraine and contracts were concluded from the branch office in the Ukraine. Moreover, Lloyd's List web site mentioned Ukraine as the seat of the company. As a result, the court held that these circumstances were not sufficient to rebut the presumption and did not commence insolvency proceedings in Greece.

³³³ *AG Hamburg*, 8/16/2006, NZI 2006, 652.

³³⁴ *Court of Appeal Piraeus*, 670/2009, DEE (ΔΕΕ) 2010, 64.

4.1.3.1.8 Hungary

According to the Hungarian national report, the interpretation of the term COMI has not caused any particular problems. Local Courts have principally adhered to the criteria laid down by the *ECJ* in Eurofood case.

Moreover, several judgments relating to Article 3 (1) 2nd sentence EIR have also been reported:

In the first case³³⁵, the Hungarian tax authorities filed an application to open insolvency proceedings against a company registered in the USA. The court considered that the decisive factor is the actual COMI rather than the place of the registered office. In the end, the court declined to open insolvency proceedings as the company had ceased to exist. It would, however, have opened proceedings if the company still existed. In the second judgment³³⁶, Hungarian courts rebutted the presumption laid down in Article 3 (1) EIR with regard to a Slovakian subsidiary of a Hungarian company which was itself a subsidiary of the *Parmalat group*. It argued that the main strategic and financial decisions of the company were made by the board of directors operating in Hungary. The court referred to the criteria ascertainable by third parties. Another case concerned a company registered in Slovakia. The Hungarian court³³⁷ opened insolvency proceedings arguing that documents such as taxation documents and the director's address proved that the company's actual COMI was in Hungary. In an additional case³³⁸, the court opened insolvency proceedings against a company registered in the UK by stating that the company did not conduct any business in the UK and that all assets were located in Hungary.

4.1.3.1.9 Italy

The Italian reporters stated that problems have arisen relating to the interpretation of the term COMI. A survey has revealed that 54% of the Italian judges held that the COMI is located in the Member State of the administrative seat, whereas 47% of them adhere to Member State where

³³⁵ *First instance Court of Budapest*, 9/24/2007, INSOL Europe Database, Abstract No. 153.

³³⁶ *Municipality Court of Fejer/Szekesfehervar*, 6/14/2004, ZInsO 2004, 861.

³³⁷ *First instance Court Budapest*, 10/14/2008, INSOL Europe Database, Abstract No. 154.

³³⁸ *First instance Court Budapest*, 1/14/2009, INSOL Europe Database, Abstract No. 55.

business activities are conducted. In particular, the criterion of the ascertainability by third parties, as set out by the *ECJ* in *Eurofood* case, is fully disregarded in several cases relating to the rebuttal of the presumption of Article 3 (1) 2nd sentence.

In this context, four Italian judgments relating to the Parmalat and Cirio groups are reported where the presumption was rebutted according to the “mind of management” doctrine.

In the first case, the *Tribunale di Parma*³³⁹ opened insolvency proceedings over the *Eurofood IFSC Ltd.* incorporated in Ireland. Deviating from the presumption of Article 3 (1), the court held that the actual COMI was at the parent company’s registered office in Italy as the company had no business premises in Ireland and was only founded in order to carry out the group’s financial transactions. The Italian parent company had issued financial guarantees for the Irish subsidiary. Furthermore, the executive directors of the subsidiary were Italian employees. In the second case, the *Tribunale di Parma*³⁴⁰ opened insolvency proceedings against the Parmalat GmbH, a subsidiary incorporated in Germany. The court rebutted the presumption on the following grounds: all of the subsidiary’s decisions required the approval of the Italian parent company; the strategic decisions of the company were made in Italy.

In two other cases relating to the insolvency of the Cirio Group, the *Tribunale di Roma*³⁴¹ opened insolvency proceedings against two affiliates of the group (*Cirio del Monte NV* and *Cirio Holding Luxembourg*) incorporated in the Netherlands and Luxembourg. The Court rebutted the presumption of the registered seat on the grounds that the strategic decisions were made in Italy, as the insolvent affiliates of the Cirio Group were controlled by an Italian company.

Another case concerns the insolvency of the Burani Group. One of the companies belonging to this group, Burani Designer Holding N.V., had its registered office in the Netherlands. Deviating from the presumption laid down

³³⁹ *Tribunale di Parma*, 2/19/2004, ZIP 2004, 1220.

³⁴⁰ *Tribunale di Parma*, 6/15/2004, ZIP 2004, 2295.

³⁴¹ *Tribunale di Roma*, 8/14/2003, *Cirio del Monte NV*, Riv.dir.int.priv.proc. 2004, 685 et seq., *Tribunale di Roma*, 11/26/2003, *Cirio Holding Luxembourg*, Riv.dir.int.priv.proc. 2004, 691 et seq.

in Article 3 (1), the *Corte Suprema di Cassazione*³⁴² held that the company's COMI was in Italy. It argued that the parent company as well as other companies of the group were incorporated in Italy and all the important decisions were made in Italy.

In several judgments³⁴³ Italian courts have rebutted the presumption by assuming that the transfer of the registered office to a different state had fictitious character.

In *D.G.F. Holding v Equitalia Gerit SpA and others* case³⁴⁴, the *Supreme Court of Cassation* opened insolvency proceedings concerning a company which has transferred its registered office to the USA, because the the purpose of the transfer was deemed to be *forum shopping*.

Another case³⁴⁵ relates to a company (*s.p.a. Link Due*) which has transferred its registered office from Italy to Luxembourg. The court rebutted the presumption following the evidence given by the creditor that the company still had interests in Italy (several debts and pending lawsuits). According to the court, the debtor has to prove that the COMI was at the place of the registered office if the creditor proved certain interests to be in a state different from the state of the registered office.

In two other cases, Italian courts refused to rebut the presumption laid down in Article 3 (1) EIR.

In the case *Gabriel Tricot s.p.r.l.* regarding the insolvency of a company with registered office in Belgium, the *Tribunale di Milano*³⁴⁶ adhered to the “mind of management” theory, but was reluctant to rebut the presumption as the meetings of the managers took place in Belgium and all strategic decisions were made in the same country. The Court further emphasized that the company had a Belgian address and held a bank account in Belgium.

³⁴² *Corte Suprema di Cassazione*, judgment No. 26518/2011 of 12/12/2011. The *Corte Suprema di Cassazione* upheld the judgments of the *Tribunale di Milano* of 2/11/2010 (unreported) and the *Corte d'Appello di Milano* of 6/4/2010 (unreported).

³⁴³ *Corte di Cassazione*, 10/3/2011, *D.G.F. Holding v Equitalia Gerit SpA and others*; *Cassazione* 1244/2004; *Cassazione* 25038/2008; *Cassazione* 11398/2009; *ECJ*, case C-378/10, 7/12/2012, *VALE Építési kft.*

³⁴⁴ *Corte di Cassazione*, 10/3/2011, *D.G.F. Holding v Equitalia Gerit SpA and others*.

³⁴⁵ *Corte di Appello di Milano*, 5/14/2008, *Fallimento s.p.a. Link Due in liquidazione v Immobilink Corporation S.A.*, *Riv.dir.int.priv.proc.* 2008, 1098.

³⁴⁶ *Tribunale di Milano*, 7/6/2005, *Gabriel Tricot s.p.r.l.*, *Riv.dir.int.priv.proc.* 2006, 450 et seq.

The Corte di Cassazione³⁴⁷ held in case *Santa Maura v Immobiltrading Srl* concerning the international jurisdiction of Italian courts to commence insolvency proceedings over a creditor (Santa Maura) with registered office in Luxembourg that the mere fact that a company owns a building in Italy is not sufficient for the rebuttal of the presumption of Article 3 (1) EIR.

4.1.3.1.10 Luxembourg

In Luxembourg, courts are faced with circumstances where holdings of foreign companies are registered in Luxembourg (for reasons of taxation) although the main business activities are carried out in other EU-Member States. The national report refers to three cases in which the presumption of Article 3 (1) EIR has been set aside; all cases are related to France.

1. In the first case, the *First Instance Court of Luxembourg*³⁴⁸ found that the main establishment was in France, because all workers and stocks were located in France. The company had only concluded a domiciliation contract with a Luxembourg fiduciary.
2. In the *Linea Design SA* case, the *Court of Appeal of Luxembourg*³⁴⁹ held that the insolvent debtor, a company incorporated in Luxembourg, performed its commercial activities mainly in France. The court based its decision on the fact that only a letterbox of the company existed in Luxembourg and only a few meetings of the board of directors had taken place there. Accordingly, these administrative activities were not ascertainable for third parties, especially not for the creditors of the company. The Court therefore did not apply the presumption of Article 3 (1) EIR and dismissed the insolvency petition filed in Luxembourg for want of jurisdiction.

³⁴⁷ Corte di Cassazione, 1/28/2005, *Santa Maura v Immobiltrading Srl*, Riv.dir.int.priv.proc. 2005, 450 et seq.

³⁴⁸ Tribunal d'arrondissement de et à Luxembourg, deuxième chambre, 4/7/2006, Conférence du Jeune Barreau de Luxembourg - Bulletin d'information sur la jurisprudence 2006, 130.

³⁴⁹ Cour d'appel siégeant en matière commerciale (Luxembourg), 11/12/2008, *Linea Design SA v Luxembourg State and the bankruptcy trustee*, Numéro 32256 du rôle, Journal des Tribunaux Luxembourg 2009 N°1, 32.

In the *Silvalux Srl* case, the Court of first instance³⁵⁰ was requested to open insolvency proceedings over a company incorporated in France which had a branch in Luxembourg. The Court held that the company had its COMI in Luxembourg where its real business was conducted. To rebut the presumption of Article 3 (1) EIR, the court took into account the fact that the debtor did not receive a letter, which the court had sent to the French address of Silvalux and that all employees of the debtor were members of the Luxembourg social security scheme.

4.1.3.1.11 Netherlands

Dutch courts generally apply the criteria for determining the COMI as developed in the case law of the *ECJ*.

In this regard, Dutch courts have rebutted the presumption of Article 3 (1) EIR in several cases:

1. The *Hoge Raad*³⁵¹ has seized jurisdiction over the opening of insolvency proceedings against a private partnership whose partners had moved to Poland and the partnership had ceased to pursue economic activities in the Netherlands. The Court stated that, at the time when the opening of insolvency proceedings was requested, the COMI of the partnership was located in the Netherlands and the COMI of the individuals in Poland. Further, it held that by virtue of Article 4 EIR, the effects of insolvency proceedings are governed by the *lex fori* (i.e. the laws of Netherlands) and therefore according to the Dutch insolvency law the insolvency of the partnership results in the insolvency of its individual partners, even though the latter did not have their COMI or an establishment in the Netherlands.

2. In *Henzo International Group BV*, the *Rechtbank Roermond*³⁵² rebutted the presumption of Article 3 (1) EIR with respect to two subsidiaries of the Henzo group Inc. in Belgium and Germany. On the basis of the following facts, the court held that the companies' COMIs were located in the Netherlands: the subsidiaries at issue were run from the Netherlands; they were sales companies with no more than eight employees who received orders in their

³⁵⁰ *Tribunal d'arrondissement de et à Luxembourg*, deuxième chambre, 4/15/2005, INSOL Europe Database, Abstract No. 87.

³⁵¹ *The Dutch Hoge Raad*, 12/22/2009, www.rechtspraak.nl.

³⁵² *Rechtbank Roermond*, 11/17/2008, JOR 2009/55.

country and immediately reported them to their sales manager in the Netherlands; the production was run from the Netherlands and took place in the Netherlands and China; in Belgium, the company's registered office address was only a mailing address and, in Germany, the offices that were leased by the company and used until 6 months before were empty in anticipation of the termination of the lease.

3. The Dutch *Rechtbank Arnhem*³⁵³ decided in the *Food Express Netherlands Ltd.* case that the presumption in favour of the registered office was to be rebutted. The debtor, who was situated in the United Kingdom, only conducted activities in the Netherlands – as his trade name indicated.

In the case *BenQ Mobile Holding B.V.*, the *Dutch Arrondissementsgericht Amsterdam*³⁵⁴ justified its international jurisdiction on the basis of Article 3 (1) EIR. The court rejected the allegations of the liquidator who had been appointed in the parallel German insolvency proceeding and who claimed that the COMI was located in Germany where the strategic decisions of the company were made and where all legal and tax issues were dealt. The court considered that the presumption of Article 3 (1) EIR could only be rebutted if the company does not conduct any business activities in the country of the registered office. In the given case, the company continued business in the Netherlands in an ascertainable way for third parties, while the activities in Germany were not ascertainable for third parties.

4.1.3.1.12 Poland

The legal practice in Poland is marked by several cases in which courts of other EU-Member States opened insolvency proceedings over Polish holdings' subsidiaries. These decisions were not fully in line with the objective approach of Eurofood, and were based on the mind of management approach instead.³⁵⁵ The foreign decisions on the opening of main proceedings were

³⁵³ *Dutch Rechtbank Arnhem*, 4/4/2006, JOR 2006/143.

³⁵⁴ *Arrondissementsgericht Amsterdam*, 1/31/2007, ZIP 10/2007, 492.

³⁵⁵ See *supra* 4.1.2.

recognised in Poland under Article 16 EIR; the Polish courts opened secondary proceedings in several cases.³⁵⁶

With regard to the approach suggested by the ECJ in *Eurofood*, the national reporters criticised the possibility of “*jurisdiction grabs*” by courts of other Member States. First of all, the possibility to open secondary proceedings (limited to winding-up proceedings) in Poland in cases in which most or all assets of the debtor are located in the secondary jurisdiction (Poland) is a major obstacle for the restructuring in main proceedings. Furthermore, the appeal against the decision opening main proceedings does not always provide for effectively protection of the creditors, especially when taking into account the time needed for the court to decide on the appeal (i.e. in case of *Maflow*³⁵⁷, it was considered more practical to reach an out-of-court settlement than to challenge the opening of main proceedings in Italian courts).

Despite all of the above concerns, the principle of automatic recognition and mutual trust within the EU should definitely be maintained; any examination of the decision on the opening of main proceedings by courts of other Member States should continue to be excluded. However, the introduction of a simple standardized procedure for appeals against the decision on COMI to the second instance court of the Member State of the opening of proceedings can be considered in this regard in order to facilitate challenging such decisions by parties from other Member States and streamline the appeal proceedings.

The national report refers to a decision in which a Polish court set aside the presumption of COMI laid down in Article 3 (1) EIR.

³⁵⁶ See Polish National Report, answers to Q 30 and Q 34 (*Belvedere group, Christianapol and Maflow*); Conclusions AG Kokott, 5/24/2012, case C-116/11, *Bank Handlowy and Adamiak*: Main insolvency proceedings (procédure de sauvegarde) in France, the holding was registered in France, the productions site and the main assets were located in Poland. AG Kokott criticized that the opening of main proceedings in France was not compatible with the case law of the ECJ in *Eurofood* and *Interedil*, see Opinion of AG Kokott, para. 43. In its judgment of 11/22/2012 the ECJ endorsed the view of the AG and held that the Polish court was bound by the decision of the French court on the opening of insolvency proceedings, ECJ, case C-116/11, *Bank Handlowy w Warszawie SA und PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o.*, paras 41 – 43.

³⁵⁷ For main proceedings in Italy, judgments no. 260/09 and no. 261/09 of 5/11/2009 by the Court of Milan; for secondary proceedings in Poland, decision of 6/30/2009 by the District Court Katowice - *Wschód*; see information on <http://www.insol-europe.org/events/>, under INSOL Europe Eastern European Countries' Committee Conference, 24 – 26 May 2012.

The *District Court of Warsaw*³⁵⁸ opened insolvency proceedings over *Betterware Poland Limited*, a company registered in the UK, which held an establishment in Poland without separate legal personality. The Court based the rebuttal of the presumption on the findings that the business activities were exclusively conducted in Poland; the strategic decisions were made in Poland; the employees were located in Poland and the products were sold to Polish customers. This decision is in line with the criteria of the *ECJ*'s decisions in *Eurofood* and in *Interedil*.

4.1.3.1.13 Romania

Romanian courts only once had the opportunity to interpret the term COMI of companies within the meaning of Article 3 of the EIR.

The *Tribunal of Bucharest*³⁵⁹ held that it had international jurisdiction for insolvency proceedings against a company with its registered seat in Northern Ireland. As the debtor conducted its businesses mainly in Romania and all creditors were domiciled in the same country, the court held that the debtor's company's COMI was located in Romania and not at the place of the registered office.

4.1.3.1.14 Spain

The Spanish approach can be explained in the light of the national provisions (Spanish Insolvency Act), which regulate the international jurisdiction for insolvency proceedings through a presumption similar to Article 3 (1) of the EIR. Nevertheless, the Spanish Act includes a safeguard aimed at preventing strategic movements of the registered office in Spain: Changes of the registered office performed within six months before the petition for insolvency shall be ineffective for these purposes.³⁶⁰

³⁵⁸ *District Court in Warsaw*, case GUp 46/12. Case summary provided by one of the interviewees, a legal practitioner.

³⁵⁹ *Tribunal of Bucharest*, 11/30/2010, file No. 56658/3/2010 (unreported).

³⁶⁰ Furthermore, with regard to transfers abroad of registered office, the Act on Structural Changes of Trading Companies envisages a shareholders' exit right ("*Shareholders not voting in favour of the agreement to relocate the registered office abroad may exit the company under the terms and conditions laid down in the legislation on limited liability companies*") and creditors' right of objection ("*Creditors whose credit dates from prior to the date of publication of the proposal to relocate the registered office abroad may object to relocation under the terms established for objection to mergers*").

Following the *Eurofood* doctrine, Spanish judges adhere to the presumption of the registered office and emphasize the fact that the location of COMI should be based on objective factors ascertainable for third parties.

According to some respondents in Spain, small and unsophisticated creditors involved in cross border insolvencies normally have to face high transactional costs. The COMI concept of the EIR should primarily function as a safeguard for them. It should allow them to rely on the true (as opposed to the formal) location of the debtor and it should not privilege debtors by leading them to an insolvency regime more suitable for their interests. As a result, the ascertainability by third parties should be the key factor in any interpretation of the term COMI.

In the case *Promociones Habitat SA*, the *Juzgado de lo Mercantil*³⁶¹ held that the COMI of the company was located in the Member State in which the company has its registered office, i.e. in Spain. The mere fact that the company had an establishment in Lisbon, Portugal, was in the court's opinion not sufficient for rebutting the presumption of Article 3 (1) EIR.

In another case brought before the *Audiencia Provincial of Las Palmas de Gran Canaria*³⁶², the Court dismissed the request to open insolvency proceedings against a company with its registered office in Spain, arguing that the Court lacks jurisdiction. Thus, the Court found that the presumption was to be rebutted due to the fact that the debtor did not conduct his administration in an ascertainable way.

4.1.3.1.15 Sweden

Swedish courts have often dealt with the interpretation of the COMI within the meaning of Article 3 (1) EIR.³⁶³ In general, national courts seem to be rather reluctant to rebut the presumption. However, it is difficult to identify the criteria used by national courts, since similar factors are not always treated uniformly in Swedish case law. The following cases have been reported:

³⁶¹ *Juzgado de lo Mercantil*, Núm. 3, 12/4/2008, 943/2008, *Promociones Habitat, S.A.*, INSOL Europe Database, Abstract No. 77.

³⁶² *Audiencia Provincial of Las Palmas de Gran Canaria*, 4/4/2006 and 6/16/2008.

³⁶³ See *Morgell*, IILR 2012, 55 et seqq.

1. In *Re Electronic Personel Ltd.*, the Swedish *Attunda District Court*³⁶⁴ dismissed the insolvency petition filed by a former employee of the limited, emphasizing that the company had its registered office in England. In contrast, the mere fact that the debtor's company had never conducted business activities outside of Sweden has not been deemed sufficient in order to uphold the rebuttal of the presumption of Article 3 (1) EIR.
2. The *Swedish Court of Appeal for Northern Norrland*³⁶⁵ decided upon the request to open insolvency proceedings against *Batteriservice & Transport Ltd.*, a company incorporated in the UK. It made clear that the debtor's COMI should be foreseeable and ascertainable by third parties and pointed out that, in the case at issue, the mere fact that the debtor had an establishment in Sweden prior to the insolvency petition is not sufficient for the rebuttal of the presumption of Article 3 (1) EIR, even if the applicant's claim arises out of the activity of this establishment.
3. In *Re Scania and Blekinge*, the *Court of Appeal*³⁶⁶ determined that Swedish courts have international jurisdiction to commence insolvency proceedings over the company Kosingen Ltd., which was registered in England, had a postal address in Spain, but was partner of a the Swedish limited partnership Top Emblem. The Court based its judgment on the finding that the company only conducted business activities in Sweden and that the partnership Top Emblem generated most of the company's turnover.
4. In *Re Bluegrid Ltd.* case, the *District Court of Stockholm*³⁶⁷ rebutted the presumption of Article 3 (1) EIR and found that the debtor company, registered in England, had its COMI in Sweden on the following grounds: The codes to the computer programs of the debtor were stored in Sweden; the debtor had its premises in Sweden; the landlord was a Swedish company; the employees were Swedish citizens working in Sweden; the employee in charge was a Swedish citizen living in Sweden; all administration took place in Sweden; most of the creditors were Swedish.

³⁶⁴ 12/21/2009, K 3286-09, extract from *Morgell*, IILR 2012, 61.

³⁶⁵ *Court of Appeal for Northern Norrland*, 2/14/2006, *The State v Batteriservice & Transport Limited*, Sweden, INSOL EIR-case register No. 159.

³⁶⁶ *Scania and Blekinge Court of Appeal*, 2/3/2005, extract from *Morgell*, IILR 2012, 58.

³⁶⁷ *District Court of Stockholm* 1/21/2005, BeckRS 2011, 23974; see also *Morgell*, IILR 2012, 55.

In the *Radaflex* case, the *Svea Court of Appeal*³⁶⁸ seized jurisdiction over the commencement of insolvency proceedings with regard to a company with registered office in Finland, as it had no business activities, assets or debts in Finland, but was engaged in business activities in Sweden and owed debts there, including unpaid salaries to former employees.

4.1.3.1.16 United Kingdom (England and Wales)

Respondents generally considered there to be few issues regarding corporate COMI, where the established case law is felt to be flexible and practical. The concept that there should be a “residence” period for corporates has not found favour and there have been comments that this concept contravenes the principles of free movement.

English courts rebutted the presumption of COMI stipulated in Article 3 (1) EIR in several cases.

Prior to the ECJ judgment in *Eurofood*, English courts endorsed the “mind of management theory”. In *Re Enron Directo SA*³⁶⁹, *Automold GmbH*³⁷⁰, *Ci4net*³⁷¹, *Collins & Aikman*³⁷² and *Crisscross Telecommunications*³⁷³, the *High Court of Justice* rebutted the presumption of Article 3 (1) EIR with regard

³⁶⁸ *Radaflex OY*; *Svea Court of Appeal*, 5/30/2003, extract from *Morgell*, IILR 2012, 58.

³⁶⁹ *Enron Directo SA* (Ch Div, Lightman J, 4 June 2002, unreported). In *Re Enron Directo SA*, which concerned a Spanish subsidiary of the American Enron-group, the *High Court of Justice in London* rebutted the presumption of Article 3 (1) in favour of the Spanish courts and located the debtor’s COMI in the UK on the grounds that all important decisions on management and accountancy were made in the UK.

³⁷⁰ *High Court of Justice in Birmingham*, 12/19/2003 (unreported), see *Pannen*, in: Pannen (ed.), *Europäische Insolvenzverordnung* (2007), Annex A to Article 3, para. 2. In this case concerning the insolvent company *Automold GmbH* incorporated in Germany whose shares were exclusively held by a UK company, the *High Court of Justice in Birmingham* set aside the presumption of Article 3 (1) in favour of the German courts. It argued that, despite the fact that production and employees are located in Germany, the debtor’s COMI is located in England due to the fact that strategic decisions are made in the UK.

³⁷¹ *Ci4net .com Inc and another* [2004] EWHC 1941 (Ch), ZIP 2004, 1769. The *High Court of Justice in Leeds* opened insolvency proceeding against the company *Ci4net* which was incorporated in the USA on the grounds that the business activity was mainly conducted in England.

³⁷² *Collins & Aikman Europe SA* [2005] EWHC 1754 (Ch). In *Re Collins & Aikman* the *High Court of Justice in London* based on the mind of management doctrine made an administration order over all European subsidiaries of the insolvent US parent company despite the fact that they were incorporated in ten different European countries.

³⁷³ In *Re Crisscross Telecommunications* the *High Court of Justice* (5/20/2003, unreported) held that the COMI of the subsidiaries of the group was located in the UK, although the companies had their registered seat in other Member States. It justified the rebuttal of the presumption by arguing that the strategic decisions of the group were made in England. In the light of the criteria of *Interdil*, the correctness of this decision seems to be doubtful.

to subsidiaries on the grounds that strategic decisions of the company were made in England. In addition, in *Re Parkside Flexibles SA* the *High Court of Justice*³⁷⁴ decided on its international jurisdiction to make an administration order over Parkside Flexibles SA, a company incorporated in Poland. The insolvent debtor conducted its manufacturing activity exclusively in Poland, all employees were located in Poland and its banking and borrowing activities were carried out exclusively with Polish institutions. Nevertheless, the supervisory board of the company was located in the United Kingdom where the strategic decisions were made. Although matters appeared to be evenly balanced, the Court attached importance to the fact that the creditors were looking to the group in England for reassurance and English companies had given securities to Polish credit institutions having granted credit to the insolvent debtor. Nonetheless, in *Re Sendo Ltd*³⁷⁵, English courts issued administration orders over a company registered in the Cayman Islands based on the fact that the main operations of the company were carried out in the UK. In *Re El-Ajou v Dollar Land Ltd*³⁷⁶, the English Court refused to rebut the presumption of Article 3 (1) in favour of the English courts; despite the fact that its directors were not domiciled in the UK, the company's board meeting took place abroad and most of the employees and company's assets were located abroad.

However, as the following decisions indicate, even after the *Eurofood* ruling of the *ECJ*, a modified version of the "mind of management" theory seems to still prevail, although decisions rebutting the presumption on the basis of this theory have become less frequent.

1. The *High Court*³⁷⁷ rebutted the presumption of Article 3(1) EIR in *European Directories DH6 BV* case, as the company against which the opening of the insolvency proceedings was requested was the intermediate holding of a group of companies incorporated in the Netherlands, but its ultimate parent company was European Directories SA, which held a registered office in Luxembourg. The Court pointed out that the company had no employees, did not trade with third parties and its assets mainly consisted of intangible

³⁷⁴ *Parkside Flexibles SA* [2006] BCC (Ch) 589.

³⁷⁵ *Sendo Limited v Sendo International Limited* [2005] EWHC 1604 (Ch).

³⁷⁶ *El-Ajou v Dollar Land (Manhattan) Ltd.* [2005] EWHC 2551 (Ch).

³⁷⁷ *European Directories DH6 BV* [2010] EWHC 3472 (Ch).

assets. Further, it argued that the company had no operating office in the Netherlands and the vast majority of its creditors were located in England, its principal financing agreements were governed by English law, it had an English address and bank account ascertainable for its creditors and since the onset of its financial difficulties, all restructuring and reorganization efforts have taken place in London.

2. The directors of *Hellas Telecommunications II* filed for an administration order in England subsequent to the relocation of its business to London as part of a restructuring strategy including, inter alia, the sale of the company's shares to WIND Hellas. The High Court³⁷⁸ assumed jurisdiction despite the fact that the company's registered office was located in Luxembourg. The Court highlighted that the relocation of the COMI to England and the change of address was ascertainable for third parties by way of a press release. Furthermore, the debtor had opened a bank account in London into and from which all payments were made and had registered its English office in accordance with the Companies Act. Therefore, the fact that its registered office remained in Luxembourg has been deemed irrelevant.

3. In *Lennox Holdings PLC v European Supplies Logistics Ltd., European Supplies SL, Milenio Foods* the English Court³⁷⁹ opened insolvency proceedings against the holding company of a group with its registered office in UK and three subsidiaries, two of which had their registered office in Spain and one of which in UK. The Court applied a "modified" head function doctrine with referral to the opinion of the advocate general in the Eurofood case. The Court emphasized, namely, that the presumption laid down in Article 3 (1) EIR was to be rebutted *in casu*, as strategic decisions of the whole group were made in England in a way ascertainable by third parties.

In the *Hans Brochier Holding Ltd.* case, an English court issued an administration order against the holding company Hans Brochier Holding Ltd, which was incorporated in England and became the legal successor of the German company Hans Brochier GmbH 10 months prior to the opening of the proceedings. 45 minutes after the designation of the English administrators, a

³⁷⁸ *Re Hellas Telecommunications (Luxemburg) II* SCA [2009] EWHC 3199 (Ch), ZIP 2010, 1816.

³⁷⁹ *Lennox Holdings Plc, Re* [2008] EWHC B11 (Ch), BeckRS 2009, 27240.

German court (*AG Nuremberg*) appointed a provisional insolvency liquidator. The English administrators appealed against the decision of the English court before the *High Court of Justice*³⁸⁰ in London. On the basis of objective and ascertainable facts, the court rebutted the presumption of Article 3 (1) EIR and found that the COMI of the company was located in Germany. It regarded the fact that the vast majority of the employees were located in Germany as decisive and, therefore, subject to German employment and social security laws, as well as that business operations were exclusively run out of its headquarters in Nuremberg, where all of the relevant information and documents were also located.

4.1.3.2 The COMI of natural persons

With respect to the COMI of natural persons, the Regulation lacks a distinct definition of COMI. As with corporations, the COMI must be determined using objective criteria which are ascertainable by third parties. A distinction has to be made between professionals and non-professionals. As a general rule, the COMI of natural persons not carrying out business activities (in particular consumers) will be their place of habitual residence.³⁸¹ In contrast, when an individual carries out professional activities (i.e. self-employed persons or freelancers) the centre of main interests is in general the place where the business activities are carried out.³⁸² The determination of the COMI has to be based on the circumstances at the time when the application was filed.³⁸³ The court of the Member State where the application for insolvency proceedings has been filed retains jurisdiction to open those proceedings, even if the debtor moves his COMI to the territory of another Member State after lodging the request but prior to the opening of the proceedings.³⁸⁴

³⁸⁰ *Hans Brochier Holding Ltd. v Exner* [2006] EWHC 2594 (Ch), NZI 2007, 187; see also *Smid*, DZWIR 2007, 485, 515; *Ballmann*, BB 2007, 1121 et seqq.

³⁸¹ *Mankowski*, NZI 2005, 368, 370; *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 75.

³⁸² See Article 19 Rome I Regulation and Article 23 Rome II Regulation. *Pannen*, in: Pannen (ed.), Europäische Insolvenzverordnung (2007), Article 3, para. 28.

³⁸³ *Mankowski*, NZI 2005, 368, 369.

³⁸⁴ *ECJ*, case C-1/04, 1/17/2006, *Susanne Staubitz-Schreiber*, ECR 2006 I-701, para. 29.

4.1.3.2.1 Austria

In Austria, the COMI of debtors who carry out professional activities can be localised in the Member State of their business. Otherwise, the habitual residence of the debtor is presumed as the centre of main interest.³⁸⁵ Nevertheless, there are always circumstances under which it could be useful to have main insolvency proceedings in a jurisdiction other than at the COMI at the date of application for opening main insolvency proceedings.

An example from recent case law: An Austrian citizen who had lived in Spain since 1999 filed an application to open main insolvency proceedings in Austria, because nearly all of his creditors were in Austria where he had carried out professional activities before 1999. In 2008, the *Austrian Supreme Court* decided that Austrian courts had no jurisdiction to open main insolvency proceedings as the COMI had been in Spain since 1999.³⁸⁶

In this particular case, even the time limits that are usually discussed (e.g. several months or one year prior to the date of the application for opening main insolvency proceedings) would still not have generated jurisdiction in Austria where the debtor had lived long before the commencement of the proceedings.

In another case, main insolvency proceedings were opened in Austria, while the debtor still had his domicile in Germany. Half a year after the proceedings were opened in Austria, the debtor's address was changed to an Austrian address.³⁸⁷ However, it could not be established with certainty whether the debtor had carried out some sort of professional activity in Austria at the date of application for opening main insolvency proceedings.

4.1.3.2.2 Belgium

In Belgium, no problems have arisen in interpreting Art. 3 (1) EIR in cases regarding the over-indebtedness of private individuals.

³⁸⁵ Cf. *Austrian Supreme Court*, 11/30/2006, ZIK 2007/111, 67.

³⁸⁶ *Austrian Supreme Court*, 1/16/2008, ZIK 2008/114, 70.

³⁸⁷ *Local Court Neumarkt*, 12/7/2009, 3 S 9/09t; please consult: [http://www.edikte.justiz.gv.at/edikte/id/idedi8.nsf/suchedi?SearchView&subf=e&SearchOrder=4&Schuldner=Dauser&BMAZ=NUL&ftquery=&query=%28\[Schuldner\]%3D%28Dauser%29%29#1349077936636](http://www.edikte.justiz.gv.at/edikte/id/idedi8.nsf/suchedi?SearchView&subf=e&SearchOrder=4&Schuldner=Dauser&BMAZ=NUL&ftquery=&query=%28[Schuldner]%3D%28Dauser%29%29#1349077936636).

In a recent case, the COMI has been considered to be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.³⁸⁸ The court based its decision on the following criteria: The debtor's habitual residence has been in Belgium since 2003 and this was known by her creditors; she conducted the research element of her occupation as a professor in Belgium, despite travelling on set days to France, where she teaches at a university; French creditors knew of her residence in Belgium and also pursue their claims there; her car was registered in Belgium; she paid taxes in France as a non-resident.

4.1.3.2.3 France

French courts established certain criteria to define natural person's COMI exclusively within the context of abusive relocation.³⁸⁹

4.1.3.2.4 Germany

German judges (especially those practising in the border regions) and insolvency practitioners often reported problems with regard to private individuals abusively relocating their COMI to another Member State in order to benefit from a more favorable insolvency regime.³⁹⁰ According to the German national reporter, the question on the efficiency of the concept of COMI should always be raised in relation to forum shopping. Judges often emphasized the lack of a presumption with respect to the COMI of natural persons. Many interviewees therefore suggested including a legal definition of the concept of COMI in the text of the EIR. Such a definition should stipulate essential criteria ascertainable by third parties, e.g. the place of residence or of the activities of natural persons. Judges also proposed the introduction of a minimum duration as a prerequisite for the new habitual residence to be qualified as COMI. However, the German national reporter also pointed out that no binding definition could prevent the abusive relocation of the COMI. Practitioners would appreciate a legal definition or presumption of COMI with regard to natural persons combined with rules for a better cooperation and

³⁸⁸ *Employment Court of Appeal Brussels*, 5/17/2011, 2011/AB/00255 (unreported).

³⁸⁹ For further information, please consult French Report, Q 9.

³⁹⁰ Cf. also the relevant case-law: *BGH*, 11/13/2008, ZInsO 2008, 1382; *AG Mannheim*, 11/5/2008, IPRspr. 2009, Nr. 302 a, 774; *BGH*, 4/22/2010, NZI 2010, 680.

communication between courts in order to ascertain a coherent interpretation and to contribute to legal clarity and foreseeability.

Relating to natural persons who do not perform economic activities, the *District Court of Mannheim* stated that the “centre of the debtor’s life”, as the place of integration in a social environment, is decisive.³⁹¹ In particular, linguistic knowledge, the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family, professional and social relationships of the debtor in that State have to be taken into consideration. In a similar context, the *Local Court of Cologne*³⁹² held that the debtor itself had the burden of proof for having shifted its COMI to another Member State. In 2008, the *Local Court of Göttingen* stated that a flat in a foreign country could only indicate the debtor’s COMI if it was the “main domicile”.³⁹³ Since, in the case at issue, the debtor’s flat in France was only one room amounting to 15 square meters, the German court denied the situation of the debtor’s COMI in France. The *German Federal Supreme Court* had to determine the COMI of a debtor who was domiciled in Luxembourg, but imprisoned in Germany.³⁹⁴ The *BGH* concluded that imprisonment in another Member State does not shift the debtor’s COMI.

Relating to businessmen or self-employed persons, the *BGH* stated that the COMI is located at the place where the debtor carries out his economic or business activities.³⁹⁵

4.1.3.2.5 Ireland

The Irish national reporter emphasized that there has been an increasing trend over the last few years for Irish based debtors to seek to move their COMI to the United Kingdom in order to benefit from a more favourable bankruptcy law. It was pointed out that it appears to be too easy for personal

³⁹¹ *LG Mannheim*, 1/13/2009, BeckRS 2009, 26625, see also the *BGH*, 9/17/2009, BeckRS 2009, 26500 on appeal. Please also consult *AG Mannheim*, 11/5/2008, BeckRS 2009, 26626; *AG Göttingen*, 5/7/2008, IPRspr. 2008, No. 228, 715 and *LG Hannover*, 4/10/2008, NZI 2008, 631; *LG Göttingen*, 12/4/2007, ZInsO 2007, 1358; *AG Celle*, 4/18/2005, NZI 2005, 410.

³⁹² Cf. *AG Cologne*, 1/19/2012, NZI 2012, 379.

³⁹³ *AG Göttingen*, 5/7/2008, BeckRS 2008, 13262.

³⁹⁴ *BGH*, 11/8/2007, NZI 2008, 121.

³⁹⁵ *BGH*, 6/13/2006, BeckRS 2006, 08542, para. 8, confirmed by *BGH*, 9/17/2009, BeckRS 2009, 26500.

debtors to move their COMI to another jurisdiction. The national report suggests strengthening the provisions on judicial co-operation.

4.1.3.2.6 Latvia

The Latvian national reporter points out that private individuals try to change their COMI in order to benefit from a more favourable insolvency law. Therefore, there are several cases in which Latvian individuals have relocated their COMI to England.³⁹⁶

4.1.3.2.7 Lithuania

There are few cases in which Lithuanian citizens have relocated their COMI to Latvia or England in order to benefit from a more favourable insolvency regime.³⁹⁷

4.1.3.2.8 Netherlands

The national report points out that the Dutch courts have adapted and apply the criteria established by the *ECJ*. In 2004, the *Dutch Hoge Raad*³⁹⁸ stated that the EIR does not contain a rebuttable presumption for the COMI of natural persons, although in principle a natural person's COMI will be the place of his habitual residence. However, this is not presumed by the EIR as it is with regard to companies in Article 3 (1) EIR. In the latter case, the court held that the debtor's COMI (natural person) was located in the Netherlands, since the debtor had substantial interests in a large number of companies established in the Netherlands, although he was living Belgium.

4.1.3.2.9 Slovakia

The Slovakian report mentions a decision of a Slovakian court dealing with the COMI of a German citizen. The German debtor had a permanent residence in Slovakia, owned a Slovakian company and held a bank account in Slovakia. However, since she could not be reached at the given address and the majority of her property and the majority of her creditors were in Germany, the court held that her COMI was located in Germany.

³⁹⁶ Please also consult Latvian Report, Q 9.

³⁹⁷ Please also consult Lithuanian Report, Q 9.

³⁹⁸ *Dutch Hoge Raad*, 1/9/2004, JOR 2004/87.

4.1.3.2.10 Spain

According to the Spanish report, the current interpretation of the COMI by the ECJ is still too vague, especially with regard to recital 13 (“ascertainable by third parties”). The Spanish report suggests taking into consideration a temporal factor when determining the COMI to avoid an abusive relocation. In that sense, the *Juzgado de lo Mercantil* núm. 1,³⁹⁹ in a case of a German couple moving to Spain, denied its jurisdiction under Article 3 (1) EIR. The COMI was held to (still) be located in Germany, since – amongst other things – the debtors moved to Spain only three months prior to their request without having a connection to Spain prior to that date.

4.1.3.2.11 Sweden

The Swedish national report states that the lack of criteria, especially when determining a natural person’s COMI, may lead to conflicting judgments, since the courts in the different Member States rely on different criteria for the location of the COMI. However, the *Swedish Supreme Court* decided that there is a rebuttable presumption that a national registration in Sweden corresponds to the person’s COMI, unless otherwise proven.⁴⁰⁰ In this respect the courts focus in particular on the economic interest of a natural person.⁴⁰¹

4.1.3.2.12 United Kingdom (England and Wales)

The national report emphasizes that there is a need for clear criteria in order to locate the COMI of a natural person, especially because of the uncertainty arising from the phenomenon of “bankruptcy tourism”. In the case *Stojevic*⁴⁰², the *High Court* decided that the COMI of natural persons is generally the place of their habitual residence. English courts highlight the freedom of movement. The mere fact that the creditors are in another Member State does not prohibit the debtor from switching its COMI, even for a self-serving purpose.⁴⁰³ English judges tentatively suggested that a definition could be

³⁹⁹ *Juzgado de lo Mercantil* núm. 1, 9/30/2009.

⁴⁰⁰ *Supreme Court*, 6/11/2009, Ö 1545/08, NJA 2009, 383.

⁴⁰¹ *Hovrätten for Nedre Norrland*, 11/1/2010, Ö 656/10; *Svea Court of Appeal*, 2/26/2007, Ö 995/07; *Svea Court of Appeal*, 1/20/2004, Ö 9174/03.

⁴⁰² *Stojevic v Komerčni Banka AS* [2006] EWHC 3447 (Ch), NZI 2007, 361.

⁴⁰³ *Malcolm Brian Shierson (as trustee in bankruptcy of Martin Vlieland-Boddy) v Clive Vlieland-Boddy* [2005] EWCA Civ 974, para. 49.

reached by reference to the debtor carrying on business or residing in a Member State for a certain time before the commencement of the proceedings.

4.1.3.3 Investigation *ex officio*

The Austrian and German national reports raised the question as to whether and to what extent the court opening insolvency proceedings should investigate the COMI *ex officio* and specify its decision assuming international jurisdiction under Article 3 EIR. Several legal writers tried to directly infer such a duty from the Regulation itself.⁴⁰⁴

In both Member States, there are several judgments addressing this issue:

In two decisions, the *OLG Wien*⁴⁰⁵ held that the court has to verify the basis for its jurisdiction under the EIR *ex officio*. Accordingly, the court cannot merely rely on the presumption stipulated in Article 3 (1) EIR or on the parties' submissions. Sec. 254 (5) Austrian Insolvency Code stipulates the court's duty to investigate all relevant facts *ex officio* which are necessary for its decision on jurisdiction. Hence, Austrian courts in any case assess their jurisdiction *ex officio* prior to opening of insolvency proceedings under the EIR.⁴⁰⁶

Similarly, the *German Federal Supreme Court*⁴⁰⁷ decided that the court has to establish the debtor's COMI *ex officio* without being bound by submissions of the parties. In a recent judgment⁴⁰⁸, the *BGH* addressed the relationship between the duty to investigate the circumstances *ex officio* according to national procedural law and the presumption laid down in Article 3 (1) of the EIR. It held that the court's duty to the *ex officio* investigation is not limited due to the presumption of Article 3 (1) EIR. The presumption is applied if the investigation *ex officio* has not led to a different COMI. As Article 3 (1) exclusively covers the determination of international jurisdiction, the question

⁴⁰⁴ Vogler, Die internationale Zuständigkeit für Insolvenzverfahren (2004), 185 et seq.; Duursma-Kepplinger, EWIR 2007, 81, 82; Geroldinger, in: Gedächtnisschrift Konuralp (2009), 303, 310.

⁴⁰⁵ OLG Vienna, 9/30/2004, ZIK 2005/27, 37; OLG Wien, 5/6/2011, ZIK 2011/273, 191.

⁴⁰⁶ E.g. District Court Salzburg, 8/5/2004, ZIK 2004, 177; OLG Innsbruck, 9/12/2005, ZIK 2006, 205; Higher Regional Court Wien, 6/24/2008, ZIK 2009, 62; OLG Wien, 5/6/2011, ZIK 2011, 191.

⁴⁰⁷ BGH, 6/21/2007, NZI 2008, 121; BGH, 12/1/2011, NZI 2012, 151, cf. Tashiro, LMK 2012, 329552; BGH, 6/21/2012, BeckRS 2012, 16835.

⁴⁰⁸ BGH, 12/1/2011, NZI 2012, 151, annotated by Tschentscher, FD-InsR 2012, 328078.

as to whether the court has the duty to investigate *ex officio* is left to the procedural law of the Member State concerned. As sec. 5 (1) of the German Insolvency Act (Insolvenzordnung) provides the court's duty to investigate *ex officio* all circumstances relevant to insolvency proceedings, German courts investigate the relevant circumstances prior to the opening of insolvency proceedings under the EIR.

4.1.3.4 Relocation cases

The relocation of the COMI in the eve of the opening of insolvency proceedings has become a major issue, although the practice varies considerably throughout the Member States: With regard to companies, the problem is obvious in Belgium, Finland, Germany, Italy, Spain and the United Kingdom. As far as natural persons are concerned, the issue arises in France, Germany, Sweden and the United Kingdom as well as in Latvia, Lithuania, Slovakia and Slovenia.⁴⁰⁹ The common motivation for natural persons to relocate their COMI to another Member State is to benefit from an easier discharge of debts.⁴¹⁰ It must be noted that the time periods for the discharge of debts vary considerably in the Member States. Companies mostly try to benefit from specific proceedings for the restructuring of their obligations, such as the English scheme of arrangement, or they tend to avoid personal responsibilities.⁴¹¹ However, several reporters emphasized that COMI shifts are not to be considered abusive if they are genuine and not merely virtual.⁴¹² As the relocation of COMI has been considered to be a controversial issue of the Regulation, the general report addresses this topic in a broad manner. We explicitly asked the national reporters to provide empirical and statistical information.

⁴⁰⁹ France and the United Kingdom can be seen as typical "countries of immigration".

⁴¹⁰ In this context, France and the United Kingdom seem to be preferred "immigration countries"; cf. the National Reports from the Czech Republic, Estonia, Germany and Slovenia.

⁴¹¹ Please also consult the Bulgarian report referring to legal taxes.

⁴¹² Cf. the National Reports from Austria, the Czech Republic, the Netherlands, Poland and the United Kingdom.

4.1.3.4.1 Relocation cases concerning corporations

4.1.3.4.1.1 Belgium

The Belgian national reporter mentioned several cases of companies having tried to relocate their COMI to France in preparation of the opening of insolvency proceedings. However, Belgian courts do not consider the relocation of the debtor's COMI to be abusive if the relocation is objectively ascertainable for third parties.⁴¹³ In this regard, Belgian courts notably examine the physical location of the company's central administration.⁴¹⁴

4.1.3.4.1.2 Finland

The Finnish reporter mentioned several cases of companies having relocated their registered seat from Finland to Estonia with the aim of avoiding the responsibilities under Finnish law.

4.1.3.4.1.3 Germany

In Germany, courts accept relocations of the debtor's COMI if economic activities have been ceased completely and the winding-up activities are objectively ascertainable for third parties.⁴¹⁵ COMI shifts are considered manipulative if the debtor remains involved in any economic activity.⁴¹⁶ According to the Regional Court of Leipzig, the abusive character of COMI shifts may be indicated by the short time period between the resolution to relocate COMI and the filing for insolvency.⁴¹⁷ As the *AG of Nuremberg* exemplified in the case *Brochier Ltd.*, German courts regularly establish COMI regarding the place where the company's personal and financial administration is situated; the place of registration is generally of secondary importance.⁴¹⁸ Although German courts critically examine whether COMI shifts are real and effective, COMI shifts remain possible for holding

⁴¹³ *Court of Appeal Liège*, 4/28/2011, TBH 2012, 165.

⁴¹⁴ *Commercial Court Brussels*, 12/8/2003, DAOR 2004, 96.

⁴¹⁵ *Local Court Hamburg*, 8/16/ 2006, NZI 2006, 652. The decision has recently be confirmed, *inter alia*, by the *Regional Court Bonn*, see *LG Bonn*, 1/13/2012, 6 T 83/11 (juris).

⁴¹⁶ *BGH*, 12/13/2007, BeckRS 2008, 00720.

⁴¹⁷ *LG Leipzig*, 2/27/2006, ZInsO 2006, 378.

⁴¹⁸ *AG Nuremberg*, 8/15/2006, NZI 2007, 185 and *AG Nuremberg* 1/10/2006, NZI 2007, 186. Please also consult the adversarial decision *Hans Brochier Holding Ltd. v Exner* [2006] EWHC 2594 (Ch), NZI 2007, 187.

companies with subsidiaries in various jurisdictions: To enable a debt to equity swap in accordance with the law of another Member State, assets may be transferred to a subsidiary, which is effectively situated in the respective State.⁴¹⁹

4.1.3.4.1.4 Italy

The Italian national reporters mentioned that there are several cases concerning Italian companies which have abusively transferred their COMI abroad; the ECJ's decision in the *Interedil* case⁴²⁰ could serve as an example. In addition, there are several Italian rulings in which emigration was determined to be abusive⁴²¹ by assuming that the new registered office was nothing more than an ordinary "*place of business*".

4.1.3.4.1.5 Spain

Following the model of the Regulation, the Spanish Insolvency Act generally provides that the jurisdiction to declare and deal with the insolvency proceedings is based on the place of the COMI and provides for a presumption of the registered seat of companies. Nevertheless, the Act includes a safeguard aimed at preventing strategic movements of the registered office within Spain: Changes of registered office performed in the six months preceding the petition for insolvency shall be ineffective for these purposes.

Furthermore, with regard to transfers of registered office abroad, the Act on Structural Changes of Trading Companies provides for a shareholders' exit right ("*Shareholders not voting in favour of the agreement to relocate the registered office abroad may exit the company under the terms and conditions laid down in the legislation on limited liability companies*") as well as for a creditors' right of objection ("*Creditors whose credit dates from prior to the date of publication of the proposal to relocate the registered office*").

⁴¹⁹ Vallender, NZI 2007, 129 – cases *Deutsche Nickel AG* and *Schefenacker*.

⁴²⁰ ECJ, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA*.

⁴²¹ E.g. Cassazione 1244/2004; Cassazione 25038/2008; Cassazione 11398/2009. Further, see ECJ case C-378/10, 07/12/2012, *VALE Építési kft.*

abroad may object to relocation under the terms established for objection to mergers”).

No cases of companies COMI-relocation have been reported from or to Spain.

4.1.3.4.1.6 *United Kingdom (England and Wales)*

With the exception of the *Brochier Ltd.* case, no evidence has been provided of abusive corporate relocation.⁴²² Corporate relocations are initiated in order to select more efficient restructuring procedures rather than to put the debtor in a better position. German courts considered this strategy to be acceptable.

There are two reported cases in which German companies opened English cram-down proceedings (*Deutsche Nickel* in 2004 and *Schefenacker* in 2007)⁴²³ after they successfully moved their COMI from Germany to England by transferring the assets and liabilities of a German holding company to an English holding company by way of an accrual. The English courts approved the proposed schemes.

4.1.3.4.2 *Relocation cases of individuals*

4.1.3.4.2.1 *Austria*

In Austria, there has only been one case in which the relocation of the debtor’s COMI to another Member State (viz. the United Kingdom) turned out to be fictitious. The debtor, who owned several apartments in Austria and in Germany and received rental income from these assets, transferred his residence to London after officially unregistering in Austria. However, he was not registered in the voters’ register in London and still occasionally stayed in Austria while managing his assets there. It was not until the proceeding before the *Supreme Court* that the COMI shift was declared abusive.⁴²⁴

⁴²² See UK Report, Q 9.

⁴²³ Both unreported.

⁴²⁴ *Austrian Supreme Court*, 11/30/2006, ZIK 2007/111, 67.

4.1.3.4.2.2 Czech Republic

The Czech national reporter mentioned one case of 2004 in which a Czech-German citizen relocated his COMI from the Czech Republic to Germany.⁴²⁵

The reporter stated that the situation was still similar today, as Czech insolvency law does not allow discharge of residual debt.

4.1.3.4.2.3 Estonia

The Estonian reporter mentioned cases of Estonian citizens having successfully relocated their COMI to the United Kingdom or to Latvia in order to benefit from a more comfortable insolvency regime.⁴²⁶ The reporter also mentioned cases concerning citizens from Sweden and Finland having relocated their COMI to Estonia

4.1.3.4.2.4 France

Courts in eastern France (Moselle, Bas-Rhin, Haut Rhin) are regularly faced with the issue of German natural persons attempting to relocate their COMI to France to benefit from French insolvency law.⁴²⁷ Between 2009 and 2011, the *Court of Appeal Colmar* gave judgments in 24 relocation cases. In all of these cases, the court denied a successful relocation of the debtor's COMI to France.⁴²⁸ This demonstrates that French courts critically examine whether COMI shifts are genuine or virtual.⁴²⁹ Even if the debtor manages to get an employment contract in France, this would still not be sufficient to convince the court of his actual willingness to relocate his COMI to France.⁴³⁰ There has only been one case in which the court found that a German national had shifted his COMI successfully. In that case, the debtor had moved to France five years before his financial difficulties, had built a house there, and his

⁴²⁵ *Czech Supreme Court*, case no 29 Odo 164/2006 (Re *Fischer*).

⁴²⁶ For an example, please consult case no 2-10-56649, 3/23/2011.

⁴²⁷ French insolvency proceedings immediately extinguish the debts of the debtor.

⁴²⁸ *Cour d'appel Colmar*, 6/8/2010, case no 10/01282; *Cour d'appel Colmar* 3/30/2010 case no 09/03843; *Cour d'appel Colmar*, 2/2/2010, case no 09/04592; *Cour d'appel Colmar*, 12/13/2012, ZInsO 2012, 441.

⁴²⁹ *Cour de Cassation*, 10/28/2008, n° de pourvoi 06-16108 concerning a German debtor being a subtenant of a 15 square meter room in France and not performing regular activities there. Sometimes, private investigators are hired and can report that the debtor is never to be seen at his alleged new domicile (cf. *Cour d'appel Colmar*, 11/27/2011, case no 1 A 10/05332).

⁴³⁰ *Cour d'appel Colmar*, 3/30/2010, case no 09/03843; *Cour d'appel Colmar*, 6/8/2010, case no 10/01282.

daughter had been entirely educated in France.⁴³¹ As a result of this jurisprudence, the relocation of German debtors to Alsace has come to an end.

4.1.3.4.2.5 Germany

In Germany, the problem of natural persons abusively relocating their COMI to another Member State – notably to England or to France – is evident. Since the EIR came into force, the *Local Court of Leipzig* has issued 25 cases of relocation of COMI. In 19 cases, the *Local Court of Leipzig* declared the relocation of COMI as being abusive. Concerning natural persons, the *Local Court Cologne* recently held that the debtor must prove the shift of his COMI.⁴³² In 2009, the *Regional Court Mannheim* confirmed that the COMI of individuals is located at their “centre of life”. In order to determine said “*centre of life*”, (e.g. actual residence, duration of stay, reasons for being in a certain place, work place) the court based its findings on statements of former neighbours of the debtor who were not aware of any relocation.⁴³³

4.1.3.4.2.6 Netherlands

In the Netherlands, national courts have dealt with several cases of fictional or abusive relocation of the COMI. The Dutch courts affirmed jurisdiction to open main insolvency proceedings and concluded that the COMI was still located in the Netherlands, although the debtors asserted a relocation to another Member State. The courts held in principle that the mere fact that the debtor had moved to another Member State did not justify the conclusion that the COMI was no longer in the Netherlands. These findings were based on evidence submitted by creditors indicating that the debtors had still strong connections to the Netherlands. The criteria used by the courts to determine a debtor’s connection to a jurisdiction were, for example, the address the debtor used for official documents, the place where the debtor carried out economic

⁴³¹ *Cour d’appel Colmar*, 5/19/2009, case no 1 A 08/05948.

⁴³² *AG Cologne*, 1/19/2012, NZI 2012, 379; please also consult the preceding decision of the *BGH*, 11/13/2008, ZInsO 2008, 1382.

⁴³³ *LG Mannheim*, 1/13/2009, IPRspr. 2009, No 302b, 774; please also consult *AG Mannheim*, 11/5/2008, IPRspr. 2009, No 302a, 774 and *AG Göttingen*, 5/7/2008, IPRspr. 2008, No 228, 715.

activity,⁴³⁴ the fact that the debtor's wife still lived in the Netherlands or that the debtor regularly returned there, inter alia for medical treatment.⁴³⁵

4.1.3.4.2.7 Slovakia

The Slovakian national reporter mentioned one case of abusive relocation: a German debtor had moved to Slovakia in order to escape from his German creditors and/or to decrease the number of them. The court decided that the COMI was not located in Slovakia although the debtor owned a 100% ownership interest in a Slovak company, had permanent residence in Slovakia, where he also held a bank account. However, the debtor could not be reached at his Slovakian postal address, most of his assets were located in Germany and the majority of his creditors were German.

4.1.3.4.2.8 Slovenia

In Slovenia, no cases of abusive relocation of COMI have been reported. However, it seems that before the introduction of a bankruptcy regime for non-professional individuals, certain debtors have relocated their residence/COMI to other Member States (i.e. Austria, Germany) in order to avail themselves of a possibility of personal bankruptcy abroad. This operation was indeed encouraged by legal practitioners.⁴³⁶ To prevent the fraudulent temporary COMI-migrations, the national reporter suggested the introduction of a detailed legal definition.

4.1.3.4.2.9 Spain

In Spanish case law, there are two reported cases of German debtors having relocated their COMI to Spain.

1. In the first case,⁴³⁷ the court denied its jurisdiction to open insolvency proceedings under Article 3 EIR. The Court held that the COMI-shift was fictitious, since the debtor transferred his domicile to Spain for the sole purpose of opening insolvency proceedings. The court also argued that the

⁴³⁴ Appellate court - *Gerechtshof Amsterdam*, 11/13/2009, www.rechtpraak.nl.

⁴³⁵ Court of Assen, 6/5/2002, *Schuldsanering* 2002/6, no. 164, *schuldsaneringsregeling*.

⁴³⁶ See *Skubic*, *Pravna praksa*, 2007, No. 6, 6-7.

⁴³⁷ First instance court - *Juzgado de lo Mercantil núm. 1*, 9/30/2009, INSOL EIR-case register Nr. 75.

debtor moved to Spain only three months prior to his request without having any connection to Spain prior to that date.

2. In the second case,⁴³⁸ a German creditor of a German debtor living in Spain applied for the opening of insolvency proceedings in Spain. The debtor challenged the jurisdiction. The court held that individuals without any professional activity have their COMI at the place of their habitual residence. As the debtor had several bank accounts in Spain and concluded contracts with attorneys and landline phone companies, the court held that the debtor and his wife had established habitual residence in Spain.

4.1.3.4.2.10 Sweden

Although Swedish courts dealt with COMI-shifts, no particular problems have arisen in that context.⁴³⁹ In these cases, the debtors appealed the opening of insolvency proceedings in Sweden requested by creditors. The Supreme Court dismissed the appeals and held that the debtors' COMI were still located in Sweden. The COMI of natural persons was determined in those cases on the basis of the place of their habitual residence. The latter is usually assessed by reference to the national register of the domicile.⁴⁴⁰ However, the court relied on additional factors, such as

- the non-existence of economic interests in the Member State in which the debtor was registered and maintained a postal address. In this case, the debtor (still) owned real estate in Sweden, operated several companies and maintained numerous bank accounts.⁴⁴¹
- In another case⁴⁴² the court held that a civil registration in Belgium was not decisive, as long as the debtor had been living with his wife in Sweden.

In two other cases, Swedish courts denied jurisdiction and stated that the debtors had genuinely relocated their COMI to other Member States. In the

⁴³⁸ *Juzgado de lo Mercantil núm. 1*, 6/16/2008 – Auto num. 149/2008, INSOL EIR-case register Nr. 76.

⁴³⁹ See *Morgell*, IILR 2012, 55 et seqq.

⁴⁴⁰ *Supreme Court of Sweden*, 6/11/2009, INSOL EIR-case register Nr. 47.

⁴⁴¹ *Court of Appeal Southern Norrland (Hovrätten för Nedre Norrland)*, 11/1/2010, BeckRS 2011, 23965, extract from *Morgell*, IILR 2012, 63.

⁴⁴² *Court of Appeal for Western Sweden*, 5/9/2003, extract from *Morgell*, IILR 2012, 61.

first case,⁴⁴³ the debtor was declared bankrupt by a District court. The *Court of Appeal* held that the debtor had been living in Italy for many years, maintained a postal address and was employed in Italy. As a result, the *Court of Appeal* reversed the decision on the bankruptcy and dismissed the application.

4.1.3.4.2.11 *United Kingdom (England and Wales)*

Recently, England has attracted many debtors from other EU-Member States, since sec. 279 (1) Insolvency Act 1986 (IA) permits the discharge of debts within a period of one year. The application for discharge is usually filled out on a form; the debtor must make a comprehensive statement indicating his or her financial situation and the names and addresses of the creditors.⁴⁴⁴ The request for bankruptcy is sworn as an affidavit before a solicitor, and the debtor must indicate his residence and the date of relocation to England. Usually, the court opens insolvency proceedings and appoints an Official Receiver for the assessment of the financial situation of the debtor. The debtor may even apply for an early discharge which may be obtained within a couple of months. If the debtor does not correctly indicate his personal and financial situation, the creditors and the Official Receiver may seek an annulment of the bankruptcy order under sec. 282 (1) (a) IA 1986. On appeal, the applicant must establish that the bankruptcy order was based on misleading or false statements of the debtor.⁴⁴⁵ In cross-border situations, most of these appeals are based on the allegation that the debtor had not genuinely established its COMI in England.

As the “insolvency tourism” to England has become widespread practice,⁴⁴⁶ this problem has received growing awareness.⁴⁴⁷ The Official Receiver (a governmental body) may challenge the opening of bankruptcy at public expense. Also, the creditors may appeal the opening at their own expenses

⁴⁴³ *Court of Appeal for Western Sweden*, 12/5/2003, extract from *Morgell*, IILR 2012, 62.

⁴⁴⁴ The form is available at: http://www.detini.gov.uk/6_31_debtors.pdf

⁴⁴⁵ See i.e. *Sparkasse Hilden Ratingen Velbert v Benk & Anor* [2012] EWHC 2432 (Ch); *Sparkasse Hannover v The Official Receiver and Peter Johann Joseph Körffler* [2011] BPIR 775; *Official Receiver v Eichler* [2007] BPIR 1636 and *Steinhardt v Eichler* [2011] BPIR 1293, para. 197.

⁴⁴⁶ According to estimations obtained from practitioners, there are 60 – 80 cases per year.

⁴⁴⁷ The issue was discussed in the expert group in which *Gabriel Moss*, QC, provided additional information.

which amount, according to information obtained, up to 50,000 – 70,000 € if the debtor defends his/her case in court.⁴⁴⁸ According to information obtained from practitioners, the main problem for the creditors is the reversal of the burden of proof: Usually, the registrar opens insolvency proceedings on the basis of the information obtained from the debtor (without much scrutiny). If the creditor challenges the decision of the opening, he/she must prove that the allegations of the debtor on the COMI were false. However, recent case law demonstrates that the *High Court* carefully assesses the existence of the COMI in England.⁴⁴⁹ However, the high costs of the proceedings still deter creditors from challenging the opening of insolvency proceedings. It remains to be seen whether the phenomenon of insolvency tourism will continue to exist – it will certainly end if the European Union provides for a minimum harmonisation of the time periods for the discharge of the debtors.⁴⁵⁰

4.1.3.5 Territorial Proceedings

The commencement of secondary insolvency proceedings presupposes the existence of an establishment in the respective Member State. Most of the national reports (12) state that national courts have not experienced any difficulties with regard to the “establishment” as defined in Article 2 (h) EIR. The judgment of *ECJ* in *Interedil*⁴⁵¹ provides for additional guidance. Some reports mention problems concerning the determination of the establishment of self-employed persons or private individuals as well as the distinction between establishment and mere assets. Furthermore, it is debated whether real estate companies have an establishment in the Member State in which the property is located and whether preparations conducted for the purpose of pursuing activities could constitute an establishment.

⁴⁴⁸ Lawyers involved in the English proceedings were interviewed by the Heidelberg team.

⁴⁴⁹ See e.g. *Sparkasse Hilden Ratingen Velbert v Benk & Anor* [2012] EWHC 2432 (Ch); *Eck v Zapf* [2012] BPIR 499; *Official Receiver v Eichler* [2007] BPIR 1636 and *Steinhardt v Eichler* [2011] BPIR 1293; *Official Receiver v Hiwa Huck* [2011] BPIR 709; *Volksbank Paderborn-Höxter-Detmold eG v Hagemeister* [2010] BPIR 1093; *Official Receiver v Mitterfellner* [2009] BPIR 1075; *Sparkasse Hannover v The Official Receiver and Peter Johann Joseph Körffer* [2011] BPIR 775.

⁴⁵⁰ A description of the most prominent cases is found in the Annex III to the General Report.

⁴⁵¹ *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*.

4.1.3.5.1 Austria

According to the findings of the Austrian courts, the wording “*establishment*” requires an organisational unit composed of assets and employees. Economic activities on an individual basis or activities of short duration only are not considered to be sufficient.⁴⁵²

4.1.3.5.2 Belgium

According to Belgian courts, the term “*establishment*” presupposes the existence of assets and a structure of economic activity. However, Belgian courts generally do not require a registration in a Trade Registry.⁴⁵³

In a relevant case, the debtor was a merchant, which had its COMI in France where it entered *liquidation judiciaire*, but which also maintained an establishment in Belgium. The establishment was registered with Belgian VAT tax authorities and with the Database on Commercial Enterprises. The debtor also conducted the administration of its business in France from Belgium and rented a warehouse and office in Belgium. Furthermore, it received bills in Belgium where judgments were also rendered against it. Consequently, it had an establishment in Belgium and the Belgian courts had jurisdiction to open a secondary insolvency proceedings pursuant to Article 3 (2) EIR.⁴⁵⁴

Further examples in which territorial or secondary proceedings were opened on the basis of there being an establishment in Belgium:

Commercial Court Tongeren, 9 September 2002: No need for registration in the Trade Registry (Handelsregister) in order to be considered an establishment in the sense of Article 2 (h) EIR.

Commercial Court Brussels, 18 November 2002, National Social Security Office v Soc. Dr. Lux. RP International: Belgian court has the jurisdiction to open territorial insolvency proceedings on the basis of Article 3 (4) (b) EIR, since claim of National Social Security Office arose out of the operation of the

⁴⁵² *Higher Regional Court of Wien*, 11/9/2004, NZI 2005, 56, annotated by *Paulus*; *Austrian Supreme Court*, 11/30/2006 – 8 Ob 12/06g.

⁴⁵³ *Commercial Court Tongeren*, 9/9/2002 (unreported).

⁴⁵⁴ *Belgian Cour de Cassation*, 6/27/2008 confirmed by *Court of Appeal Brussels*, 11/17/2009 (www.juridat.be).

Belgian establishment of a Luxembourg company. No further elaboration on Belgian establishment.

Commercial Court Brussels, 25 November 2002, Promedia v Werlin Corporation Ltd.: Belgian court has jurisdiction to open territorial insolvency proceedings on the basis of Article 3 (4) (b) EIR, since the claim of the creditor (Promedia) arose out of the operation of the Belgian establishment of an English company. No further elaboration on Belgian establishment.

Commercial Court Brussels, 16 December 2002, National Social Security Office v Pittagold Ltd.: Belgian court has jurisdiction to open territorial insolvency proceedings on the basis of Article 3 (4) (b) EIR, since the claim of creditor (National Social Security Office) arose out of the operation of the Belgian establishment of an English company. No further elaboration on Belgian establishment.

Commercial Court Tongeren, 20 February 2003: Belgian court has jurisdiction to open secondary insolvency proceedings pursuant to Article 3 (2) EIR, since the establishment in Belgium took place after the company was already declared insolvent in Luxembourg. No further elaboration on Belgian establishment.

Commercial Court Tongeren, 31 March 2003, BPPS v BVHE: Belgian court has jurisdiction to open territorial insolvency proceedings on the basis of Article 3 (4) (b) EIR, since the claim of the creditor (VAT office) arose out of the operation of the Belgian establishment of a Dutch subsidiary to a Dutch parent company. No further elaboration on Belgian establishment.

Commercial Court Brussels, 19 May 2003, Conception Enterprises: Belgian court has jurisdiction to open territorial insolvency proceedings on the basis of Article 3 (4) (b) EIR, since the claim of the creditor arose out of the operation of the Belgian establishment of an English company. No further elaboration on Belgian establishment.

Commercial Court Gent, 21 February 2006 confirmed by Court of Appeal Gent, 19 January 2009, NV Interstore v BV Megapool: No secondary insolvency procedure in Belgium, since no assets were left to liquidate. There was therefore also no establishment in Belgium following the liquidation by

the Dutch main insolvency practitioner of the assets located in Belgium. No further elaboration on what constitutes an establishment in Belgium.

4.1.3.5.3 Estonia

According to Estonian courts, the sole existence of property, bank accounts, etc. does not constitute an “*establishment*” in the context of main or secondary proceedings. In a decision of 2006 (*Rapla Invest AB*),⁴⁵⁵ the *Tallinn Court of Appeal* held that secondary proceedings can also be opened in cases where branches complied with the criteria of an “*establishment*” in the past, if assets were still left.⁴⁵⁶

4.1.3.5.4 France

French courts strictly observe the criteria of Articles 2 (h) and 3 EIR. In 2005, the *Court of Appeal Paris* reversed the decision of the *Commercial Court Paris*, which had opened on its own motion territorial proceedings on a registered branch of an English company prior to the opening of English main proceedings. The court considered that the first instance court had no international jurisdiction to open, of its own motion, liquidation proceedings against the French establishment of a company whose registered office was located in England. The court assumed that the opening of the insolvency proceedings were not requested by a creditor and therefore the proceedings could not be opened, as the conditions of the jurisdictional test set out in Article 3 (4) EIR were not met.

4.1.3.5.5 Germany

Recently, the *German Federal Supreme Court (BGH)* denied the opening of secondary proceedings on the grounds that the debtor, a public notary, did not operate an establishment in Germany in the sense of Article 3 (2) EIR.⁴⁵⁷

⁴⁵⁵ Case no 2-2/1269/05 of 6/14/2006; recently confirmed by the *Estonian Supreme Court*, 11/21/2011, case no 3-2-1-114 (with reference to ECJ, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*). Please also consult Moss/Fletcher/Isaacs, *The EC Regulation on Insolvency Proceedings* (2nd ed. 2009), para. 8.141.

⁴⁵⁶ Please also consult the Czech National Report raising the question of whether the sole existence of assets was sufficient to define an “establishment”.

⁴⁵⁷ *BGH*, 3/8/2012, NZI 2012, 377, see also for the 1st instance *AG Wuppertal*, 3/14/2011, BeckRS 2012, 07471 and for the 2nd instance *LG Wuppertal*, 5/9/2011, BeckRS 2012, 07469.

The debtor, who previously worked as a notary in Germany, registered a business (as a photographer) in England where he filed a petition for bankruptcy. In 2009, the *English High Court* opened insolvency proceedings. Subsequently, a creditor applied for the commencement of secondary proceedings in Germany. Following the arguments of the *ECJ* in *Interedil*⁴⁵⁸, the *BGH* held that an establishment requires a minimum level of organisation and a degree of stability. The mere presence of goods or bank accounts does not satisfy the requirements for classification as an “*establishment*”.⁴⁵⁹ As the debtor had ceased his occasional activities of a public notary and was forbidden by law to do so, he did not perform any economic activity in Germany.

The *District Court Hannover*⁴⁶⁰ opened secondary proceedings over a German medical doctor who lived and worked in England, but also worked as a head physician two days a week in a hospital in Germany. The debtor was not in a formal contractual relationship with the company running the hospital. In 2007, the debtor filed for insolvency proceedings before the *High Court of Justice* in London, which granted the request. Subsequently, a German creditor applied for secondary proceedings pursuant to Article 3 (2) EIR in Hannover. The court held that the debtor disposed of an establishment in Germany notwithstanding the fact that he had not retained employees. The court based its decision on the argument that, from a third party’s perspective, the staff appeared to be employed by the debtor.⁴⁶¹

4.1.3.5.6 Greece

There is one decision relating to the interpretation of the wording “*establishment*”. With regard to a German company, the Greek court found

⁴⁵⁸ *ECJ*, case C-396/09, 10/20/2011, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, para. 62.

⁴⁵⁹ Similarly, the *BGH*, 12/21/2010, WM 2011, 243 held that secondary proceedings cannot be opened merely because the debtor’s assets (including immovable property) are located in Germany. In this case, the debtor lived and worked in England, where the main insolvency proceedings were opened.

⁴⁶⁰ *District Court Hannover*, 4/10/2008, NZI 2008, 631.

⁴⁶¹ Similarly, the *AG Munich*, 2/5/2007, ZIP 2007, 495 held that although BenQ holding only uses human means through its subsidiary (BenQ OHG), it is sufficient to qualify it as an establishment as long as it is visible for third parties that the employees are working for the debtor.

that the requirements of an establishment were met.⁴⁶² The judgment also gives rise to the question as to whether a subsidiary qualifies, as such, as an establishment. The court held that the notion “*establishment*” has to be interpreted in accordance with the definition laid down in Article 2 (h) EIR independently of the company’s legal personality. The court left open whether a subsidiary could, as such, qualify as an establishment.

According to the national reporter, it might be possible to interpret the notion of “*services*” as tantamount to the term “*economic activity*” so that the carrying out of services meets the requirements of an establishment.

4.1.3.5.7 Hungary

According to Hungarian courts, the notion “*establishment*” requires continuous, permanent business activities with a minimum level of organisation and human means.⁴⁶³ Furthermore, at the lower instance⁴⁶⁴, the question was raised as to whether there is a possibility to appeal against the decision of the court on the commencement of secondary proceedings and, if so, who is entitled to appeal. If the trustee of the main proceeding can file the appeal, the trustee could remove assets from the country before there is a final decision on the opening of secondary proceedings. According to the court, this risk should be avoided by the Regulation.

4.1.3.5.8 Latvia

The national reporter referred to a case mentioned by one of his interview partners in which the Latvian court rejected the application to open secondary proceedings due to a lack of an “*establishment*”, although the Estonian company had assets (real estate) in Latvia used for conducting business there, which could be seen as an establishment within the meaning of Articles 2 and 3 of the EIR. As soon as a Latvian creditor applied for secondary proceeding, the Estonian company had ceased to conduct business in Latvia; however, all assets and all of the company’s creditors were still located there.

⁴⁶² Decision No. 693/2003.

⁴⁶³ *Supreme Court* no. Gfv.XI.30.516/2008, BH 2010, 156 and EBH 2009, 1970. A report in German on the decision of the Court of Appeal can be found at *Harsági*, GPR 2010, 170, 172.

⁴⁶⁴ *Court of Appeal Budapest* no. 12.Fpk.44.232/2007, BDT 2008, 1822 (BDT 2008, 6.103).

4.1.3.5.9 Lithuania

The national reporter pointed out the difficulties caused by the different interpretations of the term “*establishment*” in the various European languages. Regarding Lithuania, the term is translated into Lithuanian language with the words “*debtor has a company*”. This may lead to inconsistent interpretation. Therefore, he stressed that national courts must always take into account other language versions and other Member States’ doctrines.

4.1.3.5.10 Luxembourg

There is one case reported from Luxembourg.⁴⁶⁵ German courts opened main insolvency proceedings against Schuring Beton GmbH in June 2008. The company’s Luxembourgian branch did not pay nine of their employees for the work they performed from January until March 2008. Additionally, these employees did not benefit from German employment regulations. Consequently, the employees requested the opening of secondary proceedings in Luxembourg. The court held that Schuring Beton GmbH operated an establishment in Luxembourg and opened secondary proceedings without requiring the proof of the debtor’s insolvency in Luxembourg.

4.1.3.5.11 Netherlands

Regarding the term “*establishment*”, the reporter emphasizes the pertinent judgments of the *ECJ*, especially *Interedil*, and states that the case law provides for helpful guidance to the national courts. Nevertheless, there are numerous Dutch corporations whose sole purpose is to own (and administer) real estate in other Member States. The question often arises as to whether these companies have an establishment in the Member State in which the relevant real estate is located and, in particular, whether arrangements concerning the servicing of such property play a decisive role. Does it, make a difference, for example, whether the servicing of the property is conducted

⁴⁶⁵ First instance court - Tribunal d’arrondissement de et à Luxembourg, quinzième chambre 2/9/2009, INSOL EIR-case register No. 90.

by the company's own employees, the employees of a group company or a third party?

There is one reported case with Dutch interests in which a Belgian court dealt with the term establishment.⁴⁶⁶ Main insolvency proceedings were opened against a Dutch company in the Netherlands. The company operated a shop in Belgium and rented business premises for that purpose. The Dutch liquidator terminated the rental agreement. Consequently, the landlord asked for compensation and lodged its claim in the main insolvency proceedings. Additionally, the landlord requested the opening of secondary proceedings in Belgium (Article 3 (3) EIR). It was, however, questionable whether the debtor still possessed an establishment (under Article 2 lit. h EIR) in Belgium at the time the landlord filed his request. The court found that an establishment in Belgium no longer existed, since the rental agreement had been terminated months prior to the request and the premises had been emptied. Therefore, the debtor no longer possessed any assets in Belgium.

4.1.3.5.12 Poland

No difficulties have been reported in interpreting the term “*establishment*” in Polish practice. However, the national reporter stressed that, in some cases, objective circumstances, which otherwise could have led to the assumption that the debtor's COMI was located in Poland (i.e. registered office, most or all assets, all production activities etc. in Poland), were qualified as an establishment, because main proceedings were opened by a court of another Member State.

4.1.3.5.13 Romania

Romanian judges, lawyers and insolvency practitioners have not experienced any difficulties in interpreting the term “*establishment*”. However, the ambiguity of the definition as provided in Article 2 (h) is regarded as a potential source of problems. In particular, the reporter invokes the lack of definition of “*non-transitory economic activity*” as well as the uncertainty with regard to the determination of the term “*establishment*” in the event the debtor solely carries out services.

⁴⁶⁶ Appellate court - Hof van Beroep te Gent, 1/19/2009, www.juridat.be.

The *Commercial Tribunal Cluj*⁴⁶⁷ held that a local establishment (“*sucursala*”) of a Greek company did not constitute an establishment within the meaning of Article 2 (h) EIR, as it did not have a distinct legal personality. Based on this erroneous interpretation of the term “establishment”, the court dismissed the application for the commencement of secondary proceedings. The *Court of Appeal Cluj*⁴⁶⁸ reversed this decision: The court came to the conclusion that the “*sucursala*” did in fact have a distinct legal personality and opened main (!) insolvency proceedings saying nothing about the right interpretation of Article 3 EIR.

In another case, the *Court of Appeal of Bucharest* adhered to the above-mentioned interpretation of the term establishment by the *Commercial Tribunal Cluj*.

4.1.3.5.14 Slovakia

In Slovakia, problems concerning the definition of the establishment of natural persons were reported. In one case, a Slovak court commenced main insolvency proceedings against a dentist residing in Germany; the latter filed an insolvency petition in Slovakia following the opening of insolvency proceedings in Germany, but the Slovak Court held that the debtor had no establishment in Slovakia.

4.1.3.5.15 Slovenia

Many Slovenian experts refer to the issue of whether the existence of substantial assets in a Member State should be considered (*de lege ferenda*) to be sufficient for the commencement of secondary insolvency proceedings. In addition, they state that the determination of the establishment may give rise to significant problems in case the debtor no longer possesses an establishment at the time the insolvency petition is filed.

4.1.3.5.16 Spain

It has been noticed that Spanish Courts have dealt with the issue as to whether secondary proceedings have to be opened in case the debtor has no

⁴⁶⁷ *Commercial Tribunal Cluj*, 10/9/2008, Judgment 2249, No. 860/1285/2008.

⁴⁶⁸ *Court of Appeal Cluj*, 2/3/2009, Judgment No. 471.

operative establishment in the period extending to the last two years prior to the filing of insolvency application. However, no information has been provided as to the outcome of the proceedings.

4.1.3.5.17 Sweden

The Swedish national reporter did not refer to problems concerning the interpretation of the term “*establishment*” with the exception, however, of cases in which an operative establishment no longer exists at the time of the insolvency application.

4.1.3.5.18 United Kingdom (England and Wales)

English courts have not experienced any problems with regard to the determination of the “*establishment*” within the meaning of Article 2 (h) EIR. It should be further noted that English courts have dealt with the interpretation of the COMI in several cases:

In *Re Malcom Brian Shierson v Clive Vlieland-Boddy*⁴⁶⁹, the Court had to decide whether territorial insolvency proceedings can be initiated in England against a debtor having moved his residence, business activities and the centre of his life to Spain, while retaining an interest (legal and beneficial ownership) in Millennium House, Unit 2A Sunrise Business Park, Blandford Forum. It held that the latter was carrying out a non-transitory economic activity with means and goods because Millennium was managing the Unit 2A as a front or nominee of the debtor.

The *High Court of Justice*⁴⁷⁰ dealt in *Re Trillium (Nelson) Properties v Office Metro Limited* with the question of whether the debtor (Metro Limited), a company incorporated in England, over whose estate main insolvency proceedings were commenced in Luxembourg, has an establishment in England. The Metro Limited was an affiliate of the Regus group and was principally involved in providing funding for other companies of the group; it had no business activity in England other than paying for guarantees given to third parties. The Court pointed out that the non-transitory character of the

⁴⁶⁹ *Malcolm Brian Shierson (as trustee in bankruptcy of Martin Vlieland-Boddy) v Clive Vlieland-Boddy* [2005] EWCA Civ 974.

⁴⁷⁰ *Trillium (Nelson) Properties Ltd. v Office Metro Ltd.* [2012] EWHC 1191 (Ch).

debtor's activities was contingent upon the frequency, the nature, the accidental or not character and the length of time of the activities at issue. On these grounds, it held that the payment guarantees should be regarded as a transitory activity for the purposes of the EIR and concluded that the debtor did not possess any establishment in England.

4.1.3.6 Policy options and recommendations

4.1.3.6.1 The general concept of COMI

The overview of the practice in the Member States generally demonstrates that case law of the *ECJ*, especially in *Eurofood* and *Interedil*, has clarified the definition left open of the COMI in Article 3 (1) EIR. The COMI must be determined in accordance with the circumstances of each individual case; according to the objective approach of the *ECJ*, it must be identified by reference to criteria ascertainable by third parties. In general, these criteria are fulfilled at the place where the debtor performs his business activities or where his main administration is located. The reported case law of the Member States shows that the national courts follow the lines of the *ECJ*. There is therefore no need to change the basic structure of Article 3 (1) EIR, but the wording of the provision should be clarified in light of the criteria developed by the Court of Justice. Furthermore, it seems advisable to provide for minimum procedural rules in order to discourage so-called abusive relocations of COMI.

4.1.3.6.2 The COMI of corporations

At present, Article 3 (1) EIR distinguishes between the COMI of corporations and of individuals. This distinction seems to be appropriate, as Article 3 (1), 2nd sentence provides for a rebuttable presumption of the COMI of legal persons to be located at their place of registration (which usually does not apply to individuals).⁴⁷¹ As the national reports revealed considerable and also inconsistent case law, it seems to be advisable to clarify this provision in alignment with the case-law of the *ECJ*.

⁴⁷¹ But see *supra* 2.4.2.

In order to provide more guidance to national courts, the wording of recital 13 should be implemented into Article 3 (1) EIR. Therefore, the text of Article 3 (1) EIR itself shall state that the COMI is to be assessed by objective criteria ascertainable by third parties. In addition, it seems suitable to incorporate the criteria elaborated by the *ECJ* in *Interedil* in a new recital 13. The wording of the recital should be as follows:

The centre of main interests of a corporation is presumed to be the place of its registration. However, if the responsible bodies of a company are located at the place of the company's registered office and all management decisions are made there in a manner ascertainable by third parties, the presumption cannot be rebutted. If a company's central administration does not correspond to its registered office, the presence of assets and the existence of contracts for the financial exploitation of said assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption, unless a comprehensive assessment of all the relevant factors establishes that the company's actual centre of management and supervision is located in said other Member State."

4.1.3.6.3 The COMI of natural persons

The present wording of Article 3 (1) EIR does not address the COMI of individuals. In this respect, the national reports show inconsistencies in the practice of EU-Member States. Some courts held a presumption that the COMI was located at the debtor's domicile, whereas other courts simply applied national concepts to the COMI of individuals.⁴⁷² It therefore seems advisable to provide more guidance with regard to the COMI of individuals in a new subparagraph. The centre of main interests should usually be located at the place of habitual residence.⁴⁷³ However, the COMI of individuals exercising professional activities should be the place of their business.⁴⁷⁴

⁴⁷² See *supra* 4.1.3.2.

⁴⁷³ Generally, it seems to be advisable not to refer to the domicile (a term differently applied in the national laws), but rather to the (objective) concept of the habitual residence, *Hess/Pfeiffer/Schlosser*, The Heidelberg Report on the Regulation Brussels I, para. 172 et seq.; *Pannen*, in: *Pannen* (ed.), *Europäische Insolvenzverordnung* (2007), Article 3, para. 22.

⁴⁷⁴ This definition corresponds to Article 19 (1) of the Rome I Regulation and to Article 23 (2) of the Rome II Regulation.

Furthermore, the Regulation should not include a presumption of the COMI of individuals. As these persons can easily relocate their habitual residence, the requested court must carefully assess the place of the COMI in each individual case. The wording of the new subparagraph should clarify that the debtor (or any other person) filing for the opening of insolvency proceedings must prove the factual conditions of his or her COMI.

4.1.3.6.4 Improving the procedural framework

The most important proposal for practical improvement with regard to the COMI is to provide for the procedural framework for the examination of the jurisdiction by the requested court. At present, the Regulation does not address this issue, which is dealt with by the procedural laws of the Member States and by the general principles of efficiency and non-discrimination.⁴⁷⁵ However, the national reports show that the jurisdiction under Article 3 is assessed differently by the national courts. In some Member States, the opening of insolvency proceedings is based on the information given by the debtor without any further factual inquiries of the court. In other Member States, the courts examine *ex officio* whether the factual requirements of Article 3 (1) EIR are met or appoint a provisional liquidator for the necessary inquiries. As a result, the duration of opening proceedings varies considerably in the Member States.

From the perspective of European Union law, the different procedural standards hamper the coherent application of Article 3 EIR. However, the principles of efficiency and mutual trust among the Member States, as cornerstones of the Regulation⁴⁷⁶, require that the courts of the Member States carefully assess the COMI of the debtor, since the decisions opening insolvency proceedings are recognized in other Member States without any review (see Article 16 EIR). In practice, however, the main problem for the court assessing jurisdiction under Article 3 EIR is the limited information which is usually provided by the applicant (often the debtor).⁴⁷⁷ This factual situation encourages “insolvency tourism”, e.g. the relocation of the COMI to

⁴⁷⁵ Hess, *Europäisches Zivilprozessrecht* (2010), § 11, paras 4 et seq.

⁴⁷⁶ See also recital 22 EIR.

⁴⁷⁷ *Supra* 4.1.3.3. Cf. Moss/Fletcher/Isaacs, *The EC Regulation on Insolvency Proceedings* (2nd ed. 2009), paras 8.123 et seq.; Vallender, *VIA* 2011, 17, 18.

Member States in which debtors expect a more favourable insolvency regime (a quicker discharge of debts). Sometimes, applications for the opening of main insolvency proceedings are based on false or misleading statements on the COMI.⁴⁷⁸

Against this backdrop, an improvement seems necessary. The Regulation should provide for a procedural framework which empowers and obliges the court seized to comprehensively assess its jurisdiction. It seems advisable to provide for the following procedural tools: Firstly, an obligation of the court to examine its jurisdiction *ex officio* and to motivate its decision. Secondly, it seems advisable to provide for additional procedural safeguards when the debtor relocated its COMI to another Member State in the eve of the insolvency proceedings.⁴⁷⁹ Accordingly, the debtor should be obliged to inform the court as to whether it has relocated its residence within a period of six months before filing for insolvency proceedings and to indicate its main creditors. This information (which could be provided on a standard form) will enable the court to (informally) contact the main creditors prior to the opening of the insolvency proceedings. Accordingly, the decision on the opening of the main insolvency proceedings will be based on a comprehensive hearing of the most important interested parties (i.e. the debtor and the main creditors).⁴⁸⁰ Finally, the creditors and the debtor should be entitled to challenge the decision opening the main insolvency proceedings within a specified period of time. Accordingly, Member States should be obliged to introduce a remedy in their national laws and to provide information for the Judicial Atlas of the European Union.

The proposed improvements are not unusual: Providing for a procedural framework is not a new legislative step in the European law of civil procedure. The Brussels Convention of 1968 introduced a specific obligation of the court

⁴⁷⁸ See *supra* 4.1.2.2.

⁴⁷⁹ Some authors proposed a look back period (of six months or even a year) in accordance with which only the courts at the former COMI should be competent for the opening of insolvency proceedings (cf. the proposal of INSOL Europe for the revision of the EIR, 43 - 44). However, this proposal does not seem to be compatible with Articles 45 and 49 TFEU, as it would amount to a considerable impediment to the fundamental guarantees of free movement and establishment, *ECJ*, 7/12/2012, case C-378/10, *VALE Építési kft*; *ECJ*, case C-461/11, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten*, Opinion of AG Sharpston, 9/13/2012, paras 29 et seq.

⁴⁸⁰ Before opening insolvency proceedings, the court must hear the debtor and the main creditors on its own initiative, as it shall assess its jurisdiction *ex officio*.

seized to control the service of the document initiating the proceedings in the event of the default of the defendant.⁴⁸¹ In the context of the recognition of judgments from other EU Member States, the Convention (now the Regulation) introduced common procedures on the recognition of foreign judgments.⁴⁸² Against this model, the introduction of procedural minimum standards (and safeguards) cannot be regarded as a deviation from the usual legislative techniques in the European law of civil procedure.

4.1.3.7 Territorial proceedings (Articles 3 (2) – (4) EIR)

With regard to territorial proceedings, the national reports reveal that these proceedings (especially secondary proceedings) are often used in order to shield domestic creditors from the effects of foreign insolvency proceedings. However, secondary proceedings can entail considerable costs and delay in the coordination of parallel proceedings. Therefore, the experience reported from the Member States demonstrates that a reassessment of secondary proceedings is needed.

Therefore, the right to apply for secondary proceedings should be limited to those in need of protection. In the European law of civil procedure, usually employees and consumers (and not every local creditor⁴⁸³) are specifically protected. From that perspective, Article 29 (b) EIR should be amended and limited to specific creditors. However, the entitlement of the liquidator in the main proceedings to request the opening of secondary proceedings (Article 29 (a) EIR) should remain unchanged. Furthermore, the limitation of secondary proceedings to winding-up proceedings in Article 3 (3), 2nd sentence EIR should be deleted and the main liquidator should be empowered to use secondary proceedings for the restructuring of insolvent businesses operating establishments in other Member States. The procedural framework could be inserted as a new Article 3b of the Regulation.

⁴⁸¹ See Article 27 No. 2 of the Brussels Convention; further *Jenard-Report*, OJ C 59, 44.

⁴⁸² Hess, *Europäisches Zivilprozessrecht* (2010), § 3 para. 46 and § 6, paras 170 et seq.

⁴⁸³ Hess, *Europäisches Zivilprozessrecht* (2010), § 6 para. 94.

4.2 Annex proceedings

4.2.1 Introduction and underlying policy⁴⁸⁴

(1) The delimitation between the Brussels I Regulation and the European Insolvency Regulation is one of the most discussed and controversial problems related to cross-border insolvencies.⁴⁸⁵ The ongoing dispute concerns both the international jurisdiction and the recognition of foreign decisions. However, the relevant European legal instruments regulate this issue in a fragmentary and, therefore, insufficient manner. Starting point is the insolvency exemption set forth in Article 1(2)(b) Brussels I Regulation⁴⁸⁶ which excludes

“[...] bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”

from its scope encompassing civil and commercial matters. This exception rule is to be explained in the light of its historical background, i.e. the fact that the introduction of rules concerning cross-border insolvencies at European level had been planned as early as by the end of the 1960's. The first preliminary draft of a European Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings as of 1970 provided for rules on the international jurisdiction not only for the opening of insolvency proceedings, but also for insolvency-related actions (*vis attractiva concursus*).⁴⁸⁷ The ECJ ruling in *Gourdain v. Nadler*⁴⁸⁸ in 1979, in which the Court decided for the first time on the scope of Article 1 of the Judgments Convention must therefore be interpreted in this context. In that case, the ECJ dealt with the preliminary question of whether the exception rule of Article 1(2)

⁴⁸⁴ I especially would like to thank *Georgia Koutsoukou* for her research assistance.

⁴⁸⁵ For references cf. *Oberhammer*, in: *Festschrift Koziol* (2010), 1239, 1240 et seq. (footnote 4).

⁴⁸⁶ Cf. also Article 1(2) No 2 of the Judgment Convention.

⁴⁸⁷ See Article 17, printed in: *Kegel/Thieme* (eds.), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens* (1988), 88 et seq. Cf. also Article 15 of the Draft Convention on bankruptcy, winding-up, arrangements, compositions and similar proceedings (1980), in: *ibid.*, 50 et seq.

⁴⁸⁸ *ECJ*, 22 February 1979, Case 133/78, *Gourdain v. Nadler* [1979] ECR, 733 et seq., para. 4.

No 2 comprehends a French '*action en comblement de passif social*'⁴⁸⁹, namely a claim for wrongful trading. The Court thereby established the well-known formula excluding from the Convention's scope all decisions that derive directly from bankruptcy or winding-up and are closely connected with such proceedings.⁴⁹⁰

Later, this two-stage criterion was adopted with a slight linguistic adjustment in Article 25(1) subpara. 2 EIR with regard to recognition. According to this provision, the basic principle of automatic recognition laid down in Article 16 EIR applies also to decisions

"[...] deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court."

By contrast, the EIR does not contain any jurisdictional provisions on insolvency-related civil proceedings. Recital 6 stresses that, on grounds of proportionality, the Regulation should be confined to jurisdictional rules on the opening of the insolvency proceedings and on

"judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings".

Nonetheless, as far as insolvency-related actions are concerned, neither Article 1(1) nor Article 3 EIR adheres to this regulatory objective, since they are apparently limited to collective proceedings and therefore remain silent on the competent court to hand down individual actions.⁴⁹¹ Taking this into consideration, Article 25(1) EIR mirrors an asymmetry between the scope of the recognition rules and the jurisdictional provisions of the Insolvency Regulation.⁴⁹²

⁴⁸⁹ S. Article 99 of the French Law No 67-563 of 13 July 1967 on the '*règlement judiciaire*', the '*liquidation des biens*', the '*faillite personnelle*' and '*banqueroutes*'.

⁴⁹⁰ The original English text of the judgment (ECJ, 22 February 1979, 133/78, *Gourdain v. Nadler* [1979] ECR, 733 et seq., para. 4) stipulates: "*that they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings for the 'liquidation des biens' or the 'règlement judiciaire'.*"

⁴⁹¹ However, *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 77, assume: "*Logically, to avoid unjustifiable loopholes between the two Conventions, these actions are now subject to the Convention on insolvency proceedings and to its rules of jurisdiction [accentuation by the author]*".

⁴⁹² Cf. *Bariatti*, in: *Liber Fausto Pocar*, Vol. 2 (2009), 23, 32 et seq.; *Leipold*, in: *Festschrift A. Ishikawa* (2001), 221, 231; *Mörsdorf-Schulte*, NZI 2008, 282, 285.

(2) Almost thirty years after its seminal decision, the ECJ refrained from overruling the *Gourdain*-formula.⁴⁹³ Making this classification criterion fruitful for the jurisdictional regime of the EIR the ECJ rather determined a European *vis attractiva concursus*, that is to say a principle which, though confined to international jurisdiction⁴⁹⁴, was (and still is) far from being common ground within the insolvency and procedural laws of the Member States.⁴⁹⁵ The Court thereby assumed jurisdiction of the courts of the Member State within the territory of which insolvency proceedings are initiated over avoidance actions by applying Article 3(1) EIR.⁴⁹⁶ In its subsequent decision (*Alpenblume*), the ECJ applied the criteria set out in its previous rulings to an action for declaratory judgment relying on the alleged invalidity of a transfer of shares effected in the context of insolvency proceedings as a preliminary matter. The Court held that such actions fell within the exception rule of Article 1(2)(b) of the Brussels I Regime.⁴⁹⁷ In its two latest rulings, however, the ECJ did not qualify the relevant actions as closely linked to insolvency proceedings: In *German Graphics* the Court dealt with an action brought by a vendor on the basis of a reservation title against an insolvent purchaser⁴⁹⁸; in *F-Tex* it decided over an *actio Pauliana* based on a claim against third parties assigned by the liquidator to the sole creditor, which did not affect the legal interests of other creditors⁴⁹⁹. Nevertheless, the ECJ referred to the authoritative formula set out in *Gourdain* and meanwhile consolidated in its well-established case law since the decision of principle in *Seagon v. Deko Marty*.

⁴⁹³ In this regard, however, the proposal of Dutta, Lloyd's MCLQ 2008, 88, 95.

⁴⁹⁴ Since the jurisdiction *ratione loci* as well as substantive jurisdiction are determined according to national procedural law, the ECJ has not established an annex jurisdiction of the insolvency court. Therefore, the expression *vis attractiva concursus*, used in the following, is solely to be understood in the context of international jurisdiction. Cf. Konecny, ZIK 2009, 40, 41.

⁴⁹⁵ Cf., for instance, the broad conceptions of a *vis attractiva concursus* in **France** (Article R. 662-3 Code de commerce) and **Belgium** (Article 574(2) Code judiciaire and, with regard to an international connection, Article 118, § 2 Code de droit international privé), thereto Verougstraete, Manuel de la continuité des entreprises et de la faillite (2010/11), para. 5.4.0.1; for an overview see Willemer, Vis attractiva concursus (2006), 24 et seqq.

⁴⁹⁶ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 16 et seq.

⁴⁹⁷ ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-5655, para. 26 et seq.

⁴⁹⁸ ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schee* [2009] ECR I-8421, para. 29.

⁴⁹⁹ ECJ (First Chamber), 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "JadecLOUD-Vilma"*, NZI 2012, 469, para. 22.

On these grounds, the only possible meaning that can be attributed to Article 3 EIR is the conferral of a genuine *accessory jurisdiction* upon the courts of the Member State within the territory of which insolvency proceedings were opened over related civil actions. Accordingly, a further examination by the seized court of the jurisdictional prerequisites set out in Article 3 EIR is precluded.⁵⁰⁰

(3) The preceding remarks serve as a starting point for the current analysis, the goal of which is, on one hand to provide specification of the *Gourdain*-formula based on the example of insolvency-related types of actions, and on the other its critical assessment, which could result – to a certain extent – in drawing more effective conceptual borders between the EIR and the Brussels I Regulation. In addition to methodological aspects, it is also to be examined to which types of proceedings provided for in the EIR the *vis attractiva concursus* applies and whether the courts of the Member State in which insolvency proceedings were initiated have exclusive or elective jurisdiction over annex proceedings. A further issue concerns the determination of jurisdiction in the event that insolvency-derived actions and related actions in civil and commercial matters are accumulated before a court of a Member State.

4.2.2 The case-law of the ECJ

4.2.2.1 *Gourdain v. Nadler*⁵⁰¹

In *Gourdain v. Nadler* the main dispute arose after Mr Gourdain, the liquidator of the société Fromme France Manutention, applied in Germany for a declaration of enforceability of a judgement handed down by a French Court against Mr Nadler, the *de facto* manager of the company, for payment into the assets of the company (“*action en comblement de passif social*”⁵⁰²) in reliance on the Judgment Convention.

The ECJ ruling concerned the interpretation of Article 1(2) No 2 of the Judgment Convention, in particular the question referred by the *Bundesgerichtshof* as to whether the French judgment was given in “civil and commercial matters” in the meaning of Article 1(1) or, conversely, falls within the ambit of the exception. The

⁵⁰⁰ See *Oberhammer*, in: Festschrift Koziol (2010), 1239, 1257 et seq.

⁵⁰¹ ECJ, 22 February 1979, Case 133/78, *Gourdain v. Nadler* [1979] ECR, 733 et seq.

⁵⁰² S. Article 99 of the French Law No 67-563 of 13 July 1967 on the ‘règlement judiciaire’, the ‘liquidation des biens’, the ‘faillite personnelle’ and ‘banqueroutes’.

Court held that the “*action en comblement de passif social*” was excluded from the Convention’s scope as deriving directly from the insolvency proceedings and closely connected with them. It interpreted the notion “civil and commercial matters” autonomously with reference, first, to the scheme and objectives of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems. It adjudged that Article 1(2) No 2 should be perceived to encompass proceedings which meet this double delimitation criterion. The ECJ thereby referred to the following reasons: the exclusive competence of the insolvency court; the liquidator’s exclusive right to sue on behalf of and in the interest of the general body of creditors; the presumption of the general manager’s liability derogating from general rules and which can only be rebutted by proving that he acted with the requisite diligence; further the limitation period running from the date when the final list of claims is drawn up and suspended during any scheme of arrangement; finally, the fact that all creditors would benefit from the successful outcome of the proceedings.

4.2.2.2 **Seagon v. Deko Marty Belgium**⁵⁰³

In the main proceedings that gave rise to the ECJ ruling in *Seagon v. Deko Marty Belgium*, Mr Seagon, in his capacity as liquidator of the insolvent company Frick, brought an action to set aside a transaction (transfer of 50 000 € to an account in the name of Deko, a company with its registered office in Belgium) by virtue of the debtor’s insolvency and therefore requested the court to order Deko to repay the money. The preliminary question provided by the German *Bundesgerichtshof* concerned the delimitation of the EIR and the Brussels I Regulation in the light of its Article 1(2)(b) and, consequently, the international jurisdiction according to Article 3 EIR in respect of such avoidance claims. The ECJ adjudged that the courts of the Member State opening insolvency proceedings had jurisdiction in respect of such claims initiated against a person whose registered office is located in another Member State⁵⁰⁴. The ECJ justified its decision with reference to the context and purpose of the Regulation. First and foremost, it pointed out, in line with the criteria laid down in its judgment in *Gourdain v. Nadler*, that the liquidator might bring such an action in the event of insolvency with the sole purpose of protecting the interests of the general body of creditors as they would benefit from a successful outcome of the proceedings increasing the assets of the insolvency estate. Further, the concentration of insolvency- related actions before the courts of the Member State with jurisdiction to initiate insolvency proceedings could also enhance the effectiveness and efficiency of cross-border proceedings, a purpose enshrined in the recitals 2 and 8 EIR, and additionally prevent *forum shopping* (recital 4 EIR). For this reason, recital 6 EIR states that the Regulation should be confined to jurisdictional

⁵⁰³ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR I-767.

⁵⁰⁴ Apparently, the ECJ applied Article 3 EIR directly and not by analogy; with regard to this matter see *Mankowski/Willemer*, RIW 2009, 669, 673 et seq.

rules on the opening of insolvency proceedings and proceedings deriving directly from the insolvency proceedings and closely linked with them. This conclusion is reinforced by Article 25(1) subpara. 2 EIR contemplating that the recognition rules of the Regulation apply to judgments on this kind of claims; the wording 'even if they were handed down by another court' at the end of Article 25(1) subpara. 2 EIR implies that it is incumbent upon the Member States to determine which court has territorial and substantive jurisdiction. This does not necessarily have to be the court opening the insolvency proceedings.

4.2.2.3 SCT Industri AB i likvidation v. Alpenblume AB⁵⁰⁵

The main Swedish proceedings between SCT Industri AB and Alpenblume AB, two Swedish companies, concerned an action to recover ownership of shares held in an Austrian company by SCT Industri and which were sold to Alpenblume. The proceedings in Sweden were initiated after an Austrian court had delivered a judgment declaring Alpenblume's acquisition of those shares invalid. The core issue of the ECJ ruling was the question as to whether a decision declaring the transfer of shares, effected in the context of insolvency proceedings, invalid fell within the scope of Article 1(2)(b) Regulation No 44/2001.

It is remarkable that the ECJ did not mention its former judgment in *Seagon v. Deko Marty*. Rather, it examined the closeness of the link in accordance with the principles laid down in *Gourdain v. Nadler* and assumed that an action such as that at issue is closely linked with the insolvency proceedings, since the transfer of shares was based on insolvency provisions derogating from general rules of property law. Likewise, the liquidator's power to dispose of the assets is construed as insolvency-specific under national law. It is noteworthy, that the ECJ relied on the mere increase in the assets of the undertaking following the sale of shares.⁵⁰⁶

4.2.2.4 German Graphics Graphische Maschinen GmbH v. Alice van der Schree, acting as liquidator of Holland Binding BV⁵⁰⁷

A German company (German Graphics) applied in the Netherlands for a declaration of enforceability of an interim order. This order was issued by a German court (*Landgericht Braunschweig*) against Holland Binding subsequent to the opening of main insolvency proceedings in the Netherlands against the latter. The protective measure ordered the withdrawal of a certain number of machines situated at the premises of Holland Binding in the Netherlands for the attention of a sequestrator.

⁵⁰⁵ ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-5655.

⁵⁰⁶ The mere fact, however, that the insolvency proceedings had been closed when the action was brought before the Austrian courts, was deemed irrelevant.

⁵⁰⁷ ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schree* [2009] ECR I-8421.

The application was based on a reservation of title clause stipulated in a sale contract between these companies.

The decision of the ECJ on the preliminary question of the Dutch *Hoge Raad der Nederlanden* mainly concerned the delineation of the Regulation No 44/2001 and the EIR. It adjudged that Article 1(2)(b) Brussels I Regulation, read in conjunction with Article 7 EIR, was to be interpreted to mean that an action brought by a vendor on the basis of a reservation of title against an insolvent purchaser, is excluded from the ambit of the Regulation No 44/2001. The court based its decision on a restrictive interpretation of the criteria established in *Gourdain v. Nadler*. It stressed that an action concerning the separation of an object from the insolvency estate under a right *in rem* was not insolvency-related as neither the opening of insolvency proceedings nor the involvement of a liquidator is presupposed. The mere fact that the office holder was a party to the action could not be sufficient to qualify them as deriving directly from insolvency proceedings and closely linked to them.

4.2.2.5 F-Tex SIA v. Lietuvos-Anglijos UAB “JadecLOUD-Vilma”⁵⁰⁸

In the proceedings between the Latvian F-Tex SIA and the Lithuanian company JadecLOUD-Vilma, which led to the ECJ ruling, F-Tex requested the return of a money sum paid by NPLC (debtor) to JadecLOUD-Vilma prior to the opening of insolvency proceedings over its estate in Germany. The application was based on the assignment of all NPLC’s claims against third parties to F-Tex, the sole creditor of NPLC.

The ECJ ruled on the reference made by the Supreme Court of Lithuania (*Lietuvos Aukščiausioji Teisma*) that such actions were not directly related to insolvency proceedings. Referring to the precedent case-law (*Gourdain*, *Seagon*, *Alpenblume*), the court based its judgment on the following arguments: the applicant in the main proceedings was not acting as a liquidator, but rather as the assignee of a right so that the proceedings did not relate to the liquidator’s power to set aside a transaction or to assign such a right; furthermore, the exercise of the assignee’s right was not subject to the applicable law, hence the assignee could freely decide upon it, acting in his own interest and personal benefit; the consequences of the action were therefore different from that of an avoidance action, as only the plaintiff, and not the general body of creditors, benefitted from the proceeds of the action; under *the lex fori concursus* (German Law), the assignee’s right might be exercised even after the closure of the insolvency proceedings. The ECJ deliberately left open whether the *vis attractiva concursus* established an exclusive jurisdiction pursuant to Article 3 EIR.

⁵⁰⁸ ECJ, 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB “JadecLOUD-Vilma”*, NZI 2012, 469.

4.2.2.6 ERSTE Bank Hungary Nyrt v. Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt⁵⁰⁹

Postabank, a Hungarian financial institution, whose legal successor became ERSTE Bank (plaintiff) in 2006, issued a letter of credit in favour of BCL Trading. This company, with registered office in Vienna, assigned that letter to several banks; however, Postabank refused to pay the corresponding amount. Subsequently, BCL Trading transferred the shares in Postabank as a guarantee which it held in case the letter of credit was drawn upon. The shares were a security deposit. In December 2003, insolvency proceedings were initiated against BCL Trading in Austria. ERSTE Bank brought an action before the Hungarian courts against the defendants seeking a declaratory judgment that it had, according to Hungarian Law, a security right over the money paid by the Hungarian State for the acquisition of shares in Postabank.

Although the preliminary question solely concerned the interpretation of Article 5 EIR as well as the temporal scope of the EIR, the Advocate General *J.Mazák* in his opinion criticized the question referred to the ECJ as not addressing the jurisdictional problems. He stated – as an obiter dictum – that the action instituted by ERSTE Bank derived directly from insolvency proceedings and closely linked to them simply because the shares formed part of the insolvency estate of BCL.⁵¹⁰ The Court concluded that the Hungarian courts lacked international jurisdiction.

4.2.2.7 Rastelli v. Hidoux⁵¹¹

The ECJ ruling in *Rastelli v. Hidoux* dealt i.a. with the question of whether the international jurisdiction over an action for the purposes of joinder of insolvency proceedings can be based on Article 3(1) EIR merely relying on the finding that the property had been intermixed. Mr Hidoux and the French government contended that the action at issue derived directly from the insolvency proceedings and was closely linked to them, since new proceedings were not instituted and solely the initial proceedings were extended to another legal entity. The Court dismissed these arguments and pointed out that the jurisdiction of the insolvency court over joinder of insolvency proceedings according to national law would result in a circumvention of the jurisdictional system established by the EIR. As a result, it held that the court having opened the insolvency proceedings was competent only in the event that the COMI of the second entity was located in the Member State within the territory of which insolvency proceedings were initiated.

⁵⁰⁹ ECJ, 5 July 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt v. Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt*, BeckRS 2012, 81360.

⁵¹⁰ Opinion of the Advocate General *J.Mazák*, 26 January 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt*, para. 41.

⁵¹¹ ECJ, 15 December 2011, Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, NZI 2012, 147.

4.2.2.8 Pending cases

Another case with connection to third states is still pending before the ECJ: The German *Bundesgerichtshof* referred to the Court the preliminary question of whether the courts of the Member State within the territory of which insolvency proceedings have been opened had jurisdiction pursuant to Article 3 EIR to decide on an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence or registered office is not within the territory of a Member State (Switzerland). With regard hereto, the *Bundesgerichtshof* implicitly favours a negative answer.⁵¹²

In a second case, the *Landgericht Essen*⁵¹³ asked whether the courts of the Member State within the territory of which insolvency proceedings have been opened had jurisdiction according to Article 3 EIR to decide on an action to set the transaction aside by virtue of insolvency that is brought against a defendant domiciled in another Member State, in the event that the avoidance claim is asserted in addition to the primary claim concerning the capital maintenance and has its legal basis in national company law. However, the Appellate Court decided not to uphold the preliminary proceedings before the ECJ.⁵¹⁴

4.2.3 The implementation of the ECJ's ruling in the Member States

The case law of the ECJ has provided legal certainty in particular fields, notably with regard to avoidance claims.⁵¹⁵ Moreover, the ECJ's ruling in

⁵¹² *Bundesgerichtshof*, 21 June 2012, IX ZR 2/12, ZIP 2012, 1467 [Case C-328/12], note Laukemann, LMK 2012, 339261.

⁵¹³ *Landgericht Essen*, 25 November 2010, 43 O 129/09, BeckRS 2011, 06041 as well as *Landgericht Essen*, 30 September 2010, 43 O 129/09, BeckRS 2011, 06042.

⁵¹⁴ *Landgericht Essen*, 20 April 2012; cf. ECJ, 7 May 2012, Case C-494/10, *Dr. Biner Bähr als Insolvenzverwalter über das Vermögen der Hertie GmbH v. HIDD Hamburg-Bramfeld B.V.* 1, BeckRS 2012, 80987.

⁵¹⁵ **Belgium:** *Tribunal de Commerce de Charleroi*, 14 September 2004, *Revue Régionale de Droit*, 358 et seq.: avoidance action (*action en déclaration d'inopposabilité*) brought by the secondary insolvency administrator before the courts of the State of the opening of secondary proceedings;

Germany: *Oberlandesgericht Naumburg*, 6 October 2010, 5 U 73/10, ZIP 2011, 677: jurisdiction based on Article 3 EIR concerning an avoidance action under §§ 135(1) No 2; 131(1), 129, 143(1) InsO;

Landgericht Detmold, 5 January 2010, 6 O 3/09, BeckRS 2011, 19353: insolvency derived counterclaim brought by the German liquidator against the Dutch plaintiff based on §§ 135(1) No 2; 131(1), 129, 143(1) InsO;

Bundesgerichtshof, 19 May 2009, IX ZR 39/06, NZI 2009, 532: In this context, the BGH was confronted with difficulties in implementing the ECJ ruling in the *Seagon v. Deko Marty* decision, as the German legal order does not provide for specific rules on territorial jurisdiction based on the principle of *vis attractiva concursus*. The German court filled the regulatory loophole by applying Article 19a ZPO in conjunction with § 3 InsO and Article 102 § 1 EGIinsO by analogy. It, thus, decided that the competent court *ratione materiae* at the place in which insolvency proceedings were initiated shall have territorial jurisdiction;

Bundesgerichtshof, 11 January 1990, IX ZR 27/89, NJW 1990, 990;

German Graphics, which excluded actions to segregate from the scope of the EIR, has been strongly supported. Despite these clarifications⁵¹⁶, the case law of the Member States reveals that major delimitation problems arise in situations at the interface of insolvency law, general civil law and in particular company law.⁵¹⁷ In this context, the *Gourdain*-formula has often proven to be imprecise. Further specification is therefore required, particularly with respect to the different types of actions and claims within the Member States' substantive laws. In terms of company law, this holds true for actions concerning the director's liability⁵¹⁸, actions related to the maintenance of

Hungary: *Legfelsőbb Bíróság* (Supreme Court of Hungary), 21 April 2011, Pfv. X.21.978/2010/5 szám: Request for a declaration of enforceability of a decision on an avoidance claim rendered by a Finnish insolvency court on the basis of Article 3 EIR. Referring to the *Seagon*-decision of the ECJ, the Supreme Court of Hungary assumed recognition and enforceability pursuant to Article 25(1) EIR in conjunction with Article 41 Brussels I Regulation, available at: <http://www.archive-hu.com> (last accessed on 20 November 2012).

Italy: *Corte di Cassazione* (sez. unite), 14 April 2008, No 9745, *Chantiers de l'Atlantique s.a. v. Fallimento Festival Crociere s.p.a.*, Il diritto del commercio internazionale 2008, 480: The EIR does not apply to avoidance claims *alternatively* brought by the liquidator.

UK: *High Court of Justice*, Chancery Division, Birmingham District Registry, 6 January 2012, *Hornan v. Baillie* [2012] EWHC 285 (Ch): denied the applicability of Article 3 EIR to a claim setting aside a transaction defrauding creditors pursuant to IA 1986, s. 423;

High Court of Justice, Chancery Division, 1 February 2010, *Byers v. Yacht Bull Corp* [2010] EWHC 133 (Ch), para. 23: IA 1986, s. 238 (transaction at an undervalue) falls within the exception of Article 1(2)(b) Regulation No 44/2001;

Sweden: *Hovrätten för Övre Norrland* (Court of Appeal for Northern Norrland), 15 January 2008, Ö 749-07 (RH 2008:9), BeckRS extract from *Morgell*, Council Regulation on Insolvency Proceedings – Judgements from Swedish Courts, IILR 2012, 66.

⁵¹⁶ As for criticism on the *Alpenblume* decision of the ECJ see *infra* 4.2.5.2.1.

⁵¹⁷ Most National Reporters (15) either did not refer to any unresolved problems concerning the interaction of the EIR and the Brussels I Regulation or refrained from taking a stand on the issue.

⁵¹⁸ **Austria:** *Oberlandesgericht Wien*, 26 May 2003, 3 R 49/03b: applied Article 5 No 1 Brussels I Regulation to a liability claim according to § 22 URG (Unternehmensreorganisationsgesetz/Business Reorganisation Act), but the EIR was yet not applicable to the case;

France: *Cour de Cassation*, 5 May 2004, Recueil Dalloz 2004, 1796: The insolvency courts enjoy international jurisdiction with regard to an *action en comblement de l'insuffisance d'actif* pursuant to Article L. 651-2 Code de commerce (new version). Nevertheless, the French court did not refer to Article 3 EIR;

Germany: *Oberlandesgericht Köln*, 9 June 2011, 18 W 34/11, NZI 2012, 52: left open whether Article 3 EIR or Article 5 No 1 or 3 Brussels I Regulation was applicable;

Oberlandesgericht Hamm, 26 February 1993, 20 W 3/93, EuZW 1993, 519: *action en comblement de passif* pursuant to Article 180 of the French Law of 25 January 1985 falls under Article 1(2) No 2 Judgment Convention;

The Netherlands: *Rechtbank Breda*, 25 March 2009, *Luchtman/Ermer Beheer B.V. et al.*, LJN: BH9042; RO (Rechtspraak Ondernemingsrecht) 2009, 44: determined jurisdiction by virtue of Article 3 EIR over actions relating to the director's liability according to Article 2:248 Dutch Civil Codes, referred to by *Wessels*, International Insolvency Law (2012), para. 10606c;

Rechtbank Dordrecht, 3 February 2010, LJN: BL2214, JOR 2010/90; RO (Rechtspraak Ondernemingsrecht) 2010, 34: Article 3 EIR applies with regard to the director's liability in case

capital requirements⁵¹⁹, actions brought by the liquidator in the context of the recovery of equity-replacing loans⁵²⁰, further actions concerning liability for payments made subsequent to the illiquidity or over-indebtedness⁵²¹ or actions for the recovery of the company's debts brought by the liquidator in fiduciary capacity⁵²².

There is a wide range of different opinions with respect to actions for the determination of a lodged claim⁵²³ or the liability of an asset for payment of the insolvent's debts⁵²⁴. As for liability claims against the insolvency

of insolvency based on Article 2:138 Dutch Civil Code (under reference to ECJ, *Seagon v. Deko Marty*);

UK: *Court of Appeal*, Civil Division, 11 November 2009, *Chaitan Choudhary & Ors v. Damodar Prasad Bhattar & Ors* [2009] EWCA Civ 1176; [2010] 2 All ER (Comm) 419: Brussels I Regulation applicable to proceedings pursuant to s. 92 of the Companies Act 1985.

⁵¹⁹ **Austria:** *Oberlandesgericht Wien*, 18 April 2008, 4 R 20/08b, ZIK 2009, 67: compensation claims of a limited company (GmbH) against its manager (§§ 25, 81 ff. GmbHG) falls within in the ambit of the Brussels I Regulation;

Germany: *Landgericht Essen*, 30 September 2010, 43 O 129/09, BeckRS 2011, 06042 (§§ 30, 31 GmbHG old version): Brussels I Regulation applies;

Oberlandesgericht München, 6 June 2006, 7 U 2287/06, IPRax 2007, 212, 213 (§§ 30, 31 GmbHG old version): Brussels I Regulation applies.

⁵²⁰ **Germany:** *Oberlandesgericht München*, 6 June 2006, 7 U 2287/06, IPRax 2007, 212 et seq. (§§ 135 InsO old version in conjunction with §§ 32a, 32 b GmbHG old version): no applicability of the Lugano Convention (Article 1(2) No 2).

⁵²¹ **Germany:** *Oberlandesgericht Karlsruhe*, 22 December 2009, 13 U 102/09, NZG 2010, 509 et seq.: Article 5 No 3 Brussels I Regulation applies;

Kammergericht Berlin, 24 September 2009, 8 U 250/08, NZG 2010, 71 (§ 64 II GmbHG old version: insolvency nature).

⁵²² **Germany:** *Oberlandesgericht Köln*, 14 May 2004, 16 W 11/04, NZG 2004, 1009: Article 5 No 3 Brussels I Regulation applies.

⁵²³ **Austria:** *Oberster Gerichtshof*, 22 April 2010, 8 Ob 78/09t, RdW 2010, 633: an action for restitution in relation to a claim that was verified in the insolvency proceedings falls under the jurisdiction of Article 3 EIR;

Oberlandesgericht Wien, 30 October 2006, 10 Ra 47/06i, ZIK 2007, 165 (Brussels I Regulation);

UK: *High Court of Justice*, Queen's Bench Division, 19 October 2010, *Gibraltar Residential Properties Limited v. Gibralcon 2004 SA* [2010] EWHC 2595 (TCC): Article 23 Brussels I Regulation applies;

High Court of Justice, Chancery Division, 8/12/29 July 1999, *UBS AG v. Omni Holding AG (in liquidation)* [2000] 1 W.L.R. 916: Article 1(2) No 2 Lugano Convention does not apply.

⁵²⁴ **UK:** *High Court of Justice*, Chancery Division, 1 February 2010, *Byers & Ors (Liquidators of Madoff Securities International Ltd) v. Yacht Bull Corporation Ltd & Ors* [2010] EWHC 133 (Ch), IILR 2011, 22: a claim with regard to the beneficial ownership does not fall within the exception rule of Article 1(2)(b) Brussels I Regulation;

High Court of Justice, Chancery Division, 25 May 2005, *Derek Oakley v. Ultra Vehicle Design Ltd (in liquidation) and Behlke Electronic GmbH*, [2005] EWHC 872 (Ch): The supervisor of a company subject to a company voluntary arrangement (CVA) issued an application under IA 1986, s. 7(4)(a) seeking court directions as to whether the debtor was entitled to ownership of a vehicle and an individual creditor to a security interest over that asset. The court, applying Article 6(1) Brussels I Regulation, held that the EIR did not govern the underlying claims.

practitioner⁵²⁵, proceedings concerning the admissibility of execution measures into the insolvency estate⁵²⁶ as well as the practically important claims for separate satisfaction⁵²⁷, there is still need for clarification. The same holds true for the nature of the *vis attractiva concursus* as establishing exclusive or elective jurisdiction.⁵²⁸ By contrast, the characterization of actions concerning the assets and liabilities of the insolvency estate seems to be a little clearer: Their jurisdictional classification under Article 3 EIR has widely received criticism.⁵²⁹ Furthermore, claims primarily concerning the debtor's ownership over his assets are equally regarded as falling within the ambit of the Brussels I regime.⁵³⁰

⁵²⁵ **UK:** *High Court of Justice*, Queen's Bench Division (Comm), 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14, applied Article 3 EIR to a claim concerning the personal liability of the bankruptcy trustee arising from a court approved settlement concluded between the office holder and individual creditors.

⁵²⁶ **Luxembourg:** *Tribunal d'arrondissement de et à Luxembourg*, 24 October 2008, no 221/2008: assumes jurisdiction of the German courts with reference to § 89(3) German InsO with regard to Proceedings concerning the admissibility of execution measures into the insolvency estate or into the debtor's property.

⁵²⁷ To this see the Opinion of the Advocate General *J.Mazák*, 26 January 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt.*, para. 41 and *infra* 4.2.5.3.7.

⁵²⁸ **The Netherlands:** *Rechtbank Amsterdam*, 17 February 2010, *Liersch v. Subway international BV*, *Jurisprudentie Onderneming & Recht* (JOR) 2011, 155;

Gerechtshof Amsterdam, 3 November 2009, LJN: BL8405, *Groet Houdstermaatschappij v. Conrads*, *Jurisprudentie Onderneming & Recht* (JOR) 2010, 244 (exclusive jurisdiction), referred to by the **Dutch** National Reporter;

⁵²⁹ **France:** *Cour d'Appel de Lyon*, 20 May 2009, 08/04260, *Société Ketton Stone v. M. Z.*, INSOL EIR-case register: action, filed by the *commissaire à l'exécution du plan*, for payment arising out of a contract concluded by the debtor with a third party is governed by the jurisdictional rules of the Brussels I Regulation, Article 5(1)(b);

Cour de Cassation (Ch. Com.), 24 May 2005, *Consorts D'Auria v Perrota et SPC Mizon-Thoux*, *ès qual.*, *Rev.crit.DIP* 2005, 489 et seq.: the exemption rule provided for in Article 1(2)(b) Brussels I Regulation does not apply to a claim belonging to the debtor's estate but founded prior to the opening of the insolvency proceedings;

Germany: *Oberlandesgericht Hamm*, 15 September 2011, 18 U 226/10, *IPRax* 2012, 251: left the question open for an action of the German administrator based on unjust enrichment, § 816(2) BGB;

Oberlandesgericht Zweibrücken, 30 June 1992, 3 W 13/92, *EuZW* 1993, 165 et seq.: scope of the Judgment Convention (Article 1(2) No 2) is not opened concerning a claim arising out of an agreement concluded between the insolvency practitioner and the debtor;

The Netherlands: *Rechtbank Utrecht*, 30 June 2010, LJN: BN2487, *Roucar Gear Technologies B.V. v. Liquidator of Four Stroke SARL*: denied jurisdiction by virtue of Article 3 EIR with regard to a claim based on a contract against the debtor; referred to by *Wessels*, *International Insolvency Law* (2012), para. 10606c;

Rechtbank Amsterdam, 17 February 2010, *Liersch v. Subway international BV*, *Jurisprudentie Onderneming & Recht* (JOR) 2011, 155.

⁵³⁰ **UK:** *High Court of Justice*, Chancery Division, 1 February 2010, *Byers v. Yacht Bull Corp* [2010] EWHC 133 (Ch), para. 26: Brussels I Regulation applies concerning a claim for ownership;

In addition to these main problems, the courts of the Member States dealt with further significant questions⁵³¹ which will be answered in the near future by the ECJ, such as the applicability of the *vis attractiva concursus* to cases connected with third states⁵³².

4.2.4 Methodological aspects

(1) According to the view uttered by the ECJ and adopted almost unanimously by the scholars, Article 1(2)(b) of the Brussels I Regulation has to be interpreted in a manner precluding the emergence of lacunae and classification questions⁵³³, with the exemption, however, of special rules on

Court of Appeal, 27 October/21 November 2000, *Ashurst v. Pollard and Another* [2001] Ch 595: Brussels I Regulation applied (proceedings concerning rights *in rem* in immoveable property);

High Court of Justice, Chancery Division, 27/28 March 1996, *In re Hayward*, [1997] Ch. 45: Article 16(1)(a) Judgment Convention applied with regard to proceedings instituted by the English trustee in bankruptcy which had as their subject matter a right *in rem* in immoveable property situated in Spain.

⁵³¹ **Belgium:** *Grondwettelijk Hof* (Constitutional Court), 27 July 2011, No 142/2011, *Vereecke v. ING, België*: The Belgian Constitutional Court had to decide on the applicability of the EIR to an action brought by a guarantor against the creditor of the insolvent debtor for the annulment of a gratuitously given personal guarantee. The Court held (under B.5.2) that the alleged proceedings had to be classified as annex proceedings falling within the ambit of Article 3 EIR. This is because the guarantor, pursuant to Articles 72bis, 80 of the Belgian *Loi sur les faillites*, can solely seek discharge from liability for the debtor's debts if the latter is insolvent;

Germany: *Oberlandesgericht Saarbrücken*, 9 April 2009, 4 W 134/09, EuZW 2009, 710: the principle of *vis attractiva concursus* pursuant to Article 3 EIR is applicable to all types of debtors (natural person, private individual or merchant or legal person);

Belgium: *Tribunal de Commerce de Charleroi*, 14 September 2004, *SARL Bati France vs. Alongi et cts*, *Revue Régionale de Droit*, 358 et seq.: Annex action (*action en déclaration d'inopposabilité à la masse*) related to secondary insolvency proceedings;

The Netherlands: *Rechtbank Rotterdam*, 1 June 2011, LJN: BQ8200, *Vriesveem Wibaco B.V.*: jurisdiction under Article 3 EIR for a claim concerning the creditor's right of retention of a certain document (agrim-certificate) against the liquidator of a Belgian company, without making a reference to the *Seagon*-decision of the ECJ, referred to by *Wessels*, *International Insolvency Law* (2012), para. 10606c.

⁵³² **Germany:** *Bundesgerichtshof*, 21 June 2012, IX ZR 2/12, ZIP 2012, 1467: avoidance claim against a defendant domiciled in a third state, pending before the ECJ;

Italy: *Corte di Cassazione*, 7 February 2007, Nr. 2692, *Banca agricola commerciale della Repubblica di San Marino v. Fallimento Mirone*, *Il foro italiano* 2007, 2815 et seq: The Italian Supreme Court held, in a case regarding insolvency proceedings opened prior to the entry into force of the EIR in an *obiter dictum*, that the courts of the state of the opening of the insolvency proceedings should not have jurisdiction over an action to set aside transactions by virtue of insolvency, brought against a defendant bank domiciled in a non-EU Member State (San Marino).

⁵³³ Cf. ECJ (First Chamber), 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, NZI 2012, 469, para. 21, 48; *Schlosser Report*, Official Journal of the European Union, No C 59/89, 5 March 1979, para. 53; *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 77; *Dutta*, *Lloyd's MCLQ* 2008, 88, 93; *M.Stürner*, *IPRax* 2005, 416, 417, 418 with further references (footnote No 30). Contra *Oberlandesgericht München*, 27 July 2006, BeckRS 2006, 10643 (application of § 22 ZPO to

the insolvency of particular companies⁵³⁴. The EIR and the Regulation No 44/2001, if applicable *ratione loci* and *ratione personae*, provide for harmonized and complete rules on international jurisdiction over insolvency-related actions based on a system of mutual recognition of court judgments.⁵³⁵ Hence, as a matter of principle⁵³⁶, there is no regulatory loophole between the EIR and the Brussels I Regulation and, consequently, no room left for the application of the autonomous international insolvency law of the Member States⁵³⁷.

(2) The resulting methodological question of whether an action derives directly from insolvency proceedings and is closely connected with them should be interpreted autonomously in order to ensure a uniform application of the harmonized jurisdiction and enforcement rules at EU level⁵³⁸. Therefore, the delimitation between the scope *ratione materiae* of the EIR and that of the Brussels I Regulation is not contingent upon the classification of the specific type of action according to the *lex fori concursus* or the *lex fori processus*.⁵³⁹

The subject-matter of every classification is determined by the pleas of the claimant put forward in the light of its particular legal basis or procedural form. The criteria established by the ECJ for the ascertainment of the action's characteristic as insolvency-related rely on one hand on a teleological interpretation taking into consideration the objects and purposes pursued by both the EIR and the Brussels I Regulation: The idiosyncrasies of the action's

an avoidance claim pursuant to § 135(1) No 2 InsO; Article 1(2) No 2 Lugano Convention applies to §§ 32a, b GmbHG). However, Article 3 EIR should have been applied to this case.

⁵³⁴ Cf. the exception rule set forth in Article 1(2) EIR, thereto *M.Stürmer*, in: *Festschrift Kaissis* (2012), 975 et seqq.

⁵³⁵ See also *Willemer*, *Vis attractiva concursus* (2006), 110.

⁵³⁶ In the event of collective proceedings under national law not falling within the scope of the EIR (i.e. proceedings over the indebtedness of natural persons which are neither mentioned in Annex A nor fulfilling the criteria laid down in Article 1(1) EIR), individual actions related to them are therefore excluded from the scope of Article 3 EIR as well, cf. the **Finnish** National Report under Q 11.

⁵³⁷ Whereas the *Oberlandesgericht München*, 23 April 2008, 5 U 2983/07, IPRspr 2008 No 227, applied the exorbitant jurisdiction § 23 ZPO to an avoidance claim. Nevertheless, by virtue of Articles 43, 47 EIR, the EIR was not yet applicable to the case. See also the Swedish *Hovrätten för Övre Norrland* (Court of Appeal for Northern Norrland), 15 January 2008, Ö 749-07 (RH 2008:9), BeckRS extract from *Morgell*, IILR 2012, 66.

⁵³⁸ Cf. recital 15 Brussels I Regulation.

⁵³⁹ Cf. *Brinkmann*, IPRax 2010, 324, 327 et seq.; *Oberhammer*, KTS 2009, 27, 44; *M.Stürmer*, IPRax 2005, 416, 417 et seq.

structure and function, as set out in “its” national law⁵⁴⁰, is to be examined on the basis of the EIR’s principal objectives, in particular the efficient and accelerated administration of cross-border insolvencies and the avoidance of *forum shopping* for the purpose of ensuring the proper functioning of the internal market.⁵⁴¹ On the other hand, the ECJ scrutinizes the insolvency-specific purpose of the action at issue, deriving from the general principles common to the *national* insolvency laws. Thereby, the collective interest of creditors in maximizing returns seems to be the prevailing factor.⁵⁴² At least, this has been the approach in *Gourdain v. Nadler*, the only case in which the ECJ has taken position on this methodological matter so far:

“The concepts used in Article 1 the Judgment Convention must be regarded as independent concepts which must be interpreted by reference, first, to the objectives and scheme of the Convention and, secondly, to the general principles which stem from the corpus of the national legal systems”.⁵⁴³

This demonstrates that the determination by the ECJ of whether an action is insolvency-derived or not is dependent upon a twofold, ‘teleological’ interpretive method.

(3) According to the approach adopted by the ECJ and in the prevailing legal doctrine the relationship between the EIR and the Brussels I Regulation is determined through a narrow interpretation of its Article 1(2)(b).⁵⁴⁴

However, arguing with the principle of proportionality, which is anchored in recital 6 EIR, does not seem to be convincing. In the context under examination, this principle purports, if need be, to delineate the competences between the European Union and the Member States, whereas it is irrelevant with respect to drawing a borderline between the Regulations’ scopes of application at a *horizontal* level. Their delimitation has to result in striking a fair balance among the (procedural) interests at

⁵⁴⁰ Exemplary ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 16-17 and 21-24.; ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-5655, para. 27.

⁵⁴¹ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 21-24.

⁵⁴² Explicitly ECJ 22 February 1979, 133/78, *Gourdain v. Nadler* [1979] ECR, 733, 743, para. 3 and 5, implicitly in *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 16.

⁵⁴³ ECJ, 22 February 1979, 133/78, *Gourdain v. Nadler* [1979] ECR, 733, 743, para. 3.

⁵⁴⁴ See, for instance, ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schee* [2009] ECR I-8421, para. 25.

stake – regardless as to whether they are related to the protection of the defendant, which is inherent in the *actor sequitur forum rei*- principle (Article 2 Brussels I Regulation) or rather the insolvency liability regime and, thus, to the proper and efficient administration of the insolvency estate. It therefore remains unclear in which form and at which stage of this balancing process it is appropriate to give effect to a narrow interpretive pattern with regard to Article 1(2)(b) Brussels I Regulation.⁵⁴⁵ As a consequence, the practical implementation of this rule becomes unduly complicated.⁵⁴⁶ This illustrates why the ECJ abstains from having recourse to interpretive arguments based on recital 6 EIR in decisions in which it assumes the action in question not to be characterized as insolvency-derived.⁵⁴⁷

4.2.5 Delimitation between the scope of the EIR and the Brussels I Regulation

4.2.5.1 Principles

(1) The *Gourdain*-formula primarily assumes a jurisdiction-specific function. It shall provide reliable information on whether an insolvency-related civil action is to be brought before a unitary insolvency forum. However, it is still unclear for what reasons at all different jurisdictional principles should apply to insolvency-related civil proceedings which constitute, due to their formal structure, the prototype of actions falling within the ambit of Article 1 Brussels I Regulation. Furthermore, the formula leaves open whether additional, unstated requirements outreaching the insolvency-specific classification of a claim should be met in order to assume annex jurisdiction.

Thereby, social policy considerations underlying Articles 8 et seq. Brussels I Regulation and regarding the protection of certain groups of persons

⁵⁴⁵ M. Stürner, IPRax 2005, 416, 419, advocates a narrow interpretation of Article 1(2)(b) Brussels I Regulation with the argument that Articles 24-30 of the Brussels regime shall principally apply to insolvency annex proceedings due to their close relation to the rule of law. The provision of Article 25(1) subpara. 2 EIR, however, militates against this opinion: The reference to the recognition regime of the EIR indicates that Articles 24-30 Brussels I Regulation are not applicable to insolvency annex proceedings despite their basic *formal* character as individual civil proceedings. Therefore, it cannot be inferred any inclination to a specific interpretive approach from these rules; see also Willemer, Vis attractiva concursus (2006), 108 et seq.

⁵⁴⁶ In fact, in *Alpenblume* the ECJ adopted an extremely extensive interpretation practically diluting the *Gourdain*-formula.

⁵⁴⁷ Cf. ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schee* [2009] ECR I-8421, para. 29 et seq.; ECJ (First Chamber), 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "JadecLOUD-Vilma"*, NZI 2012, 469, para. 35 et seq.

participating in private legal transactions from a structurally inferior position do not hold true for the (heterogeneous) group of insolvency creditors. In contrast to § 19a of the German Code of Civil Procedure (ZPO), the European *vis attractiva concursus* does not (primarily) purport to prevent the establishment of an administrator's general venue.⁵⁴⁸ Rather, the latter aims at privileging cross-border insolvency proceedings in the sense that their functioning must be ensured *at its core*, in other words: a system of decentralized jurisdictions should not jeopardize the achievement of the respective insolvency purposes. Indeed, as an institutional cornerstone of a state's economic order⁵⁴⁹, the liability function of insolvency law deserves protection by specific procedural means. In respect of annex actions, every jurisdictional regime lies in the conflict area between general and insolvency-related jurisdictional interests. In the light of the purposes of national insolvency laws, the legitimacy of the objectives underlying the Brussels jurisdictional rules for civil proceedings among solvent parties suffers necessarily a loss. This is the case when and because a decentralized system of annex jurisdiction, in the event that one of the parties becomes insolvent, *might* considerably hinder an efficient and simplified enforcement of insolvency-specific claims by disregarding, to the detriment of unsecured creditors, their close interplay with the liability order or the court's proximity to the applicable law or the facts of the case.⁵⁵⁰ At this point, it is essential to draw the mentioned line leading to a concentration of jurisdiction in the state of the opening of the proceedings in order to mitigate the said risk.

(2) Notwithstanding the functional similarity they accomplish, insolvency-specific actions are developed rather diversely within the national legal orders. That being so, general criteria specifying the broadly formulated *Gourdain*-criterion and facilitating the classification of particular types of actions as included within the scope of either the EIR or the Brussels I Regulation should be established in the following part. In line with the ECJ jurisprudence, the assumption of an annex jurisdiction pursuant to Article 3

⁵⁴⁸ Wern, in: Prütting/Gehrlein (eds.), ZPO, 3rd ed. (2011), § 19a, para. 1.

⁵⁴⁹ With regard to both aspects see Häsemeyer, *Insolvenzrecht*, 4th ed. (2007), 5, 76 et seq.; Henckel, in: *Grundfragen des Privatrechts*, Symposium für G. Jahr (1989), 1 et seq.

⁵⁵⁰ Cf. Thole, ZEuP 2010, 904, 912; further the Opinion of the Advocate General R.-J. Colomer, 16 October 2008, Case C-339/07, *Seagon v. Deko Marty Belgium*, para. 60.

EIR is contingent upon three key elements: First, an insolvency-specific purpose of the action is required (i); in addition, the international jurisdiction of the courts of the state in which insolvency proceedings were initiated must give rise to an efficient and accelerated administration of cross-border insolvencies, which therefore represents the central regulatory objective of the EIR (ii). Provided that both *necessary* conditions are fulfilled, one must finally examine from a *general* perspective whether common jurisdictional interests militate against the assumption of a *vis attractiva concursus* (iii).

4.2.5.2 Key criteria

4.2.5.2.1 Insolvency-specific purpose of the related actions

Generally, an insolvency-specific purpose of the action is to be assumed if its *core* purpose includes either adjusting the rules and principles on which general civil law or other areas of substantive law rely, or compensating insolvency-conditioned detriments in order to protect the rights of the general body of creditors over the debtor's assets⁵⁵¹.⁵⁵² Basing the delimitation on the purpose of each particular action means not to give decisive significance to formal criteria: Neither the systematic context in which the action is provided for nor the competent court, i.e. the insolvency court, another court in the district of the insolvency court or the general civil courts, carries weight. The same holds true for the mere fact that the insolvency practitioner is, by law, party to the proceedings in lieu of the debtor; this is neither a necessary⁵⁵³ nor a sufficient⁵⁵⁴ delimitation criterion.

On the other hand, the classification's dependence on the purpose of each action implies that the only relevant criterion in this regard is the insolvency-

⁵⁵¹ A court order setting aside a transaction defrauding creditors pursuant to IA 1986, s. 423 does not presuppose insolvency proceedings; any victim, including the company itself, can bring a claim by virtue of s. 423. Therefore, the *High Court of Justice*, Chancery Division, Birmingham District Registry, 6 January 2012, *Hornan v. Baillie* [2012] EWHC 285 (Ch), para. 13, denied its insolvency-specific purpose, s. also Goode, *Principles of Corporate Insolvency Law*, 4th ed. (2011), para. 13-137.

⁵⁵² For a narrower approach see *Lüke*, ZZP 111 [1998], 275, 293 et seq. By contrast, in favour of a very broad approach see *Konecny*, ZIK 2009, 40, 41.

⁵⁵³ For this reason, proceedings for the determination of an insolvency claim pursuant to § 179 et seq. German InsO can take place between two insolvency creditors without any participation of the insolvency practitioner.

⁵⁵⁴ Explicitly *ECJ*, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schee* [2009] ECR I-8421, para. 32.

specific purpose of the proceedings, irrespective of whether the substantive legal claim on which the action is based has itself an insolvency-related character.⁵⁵⁵ In addition, it is not decisive whether the action could also be filed outside of insolvency proceedings (e.g. in case the opening of insolvency proceedings is refused due to insufficiency of assets⁵⁵⁶), but only whether the action, in the context of pending insolvency proceedings, attains an insolvency-specific purpose, which *essentially* shapes or rather modifies the aim of the action. As indicator for an action's procedural connection to the insolvency proceedings may serve, for instance, the legal standing on behalf of and in the interest of the general body of creditors⁵⁵⁷, the binding effect of the decision (*res iudicata*) upon persons other than the parties to the proceedings⁵⁵⁸ or, albeit of less importance⁵⁵⁹, a time-limit for bringing an action dependent on the closure of the proceedings⁵⁶⁰.

In view of the above considerations, the ECJ goes too far when determining in *Alpenblume* the action's proximity to the collective proceedings by referring to insolvency-related preliminary questions.⁵⁶¹ According to general principles, preliminary questions are deprived of any jurisdictional pertinence.⁵⁶² Furthermore, it should be irrelevant whether a specific action is merely temporally, economically or personally related to the insolvency proceedings⁵⁶³ or whether the outcome of the proceedings may affect the

⁵⁵⁵ This is relevant for actions for the determination of insolvency claims (§ 179 German InsO).

⁵⁵⁶ Cf. in German Law: § 26 InsO.

⁵⁵⁷ This is the case with actions for the determination of insolvency claims (§§ 179 et seq. of the German InsO). Another example is provided in § 60 German InsO: This provision empowers all participants to the proceedings to assert liability claims against the liquidator for breach of insolvency-specific duties.

⁵⁵⁸ § 183(1) German InsO extends the binding effect of the decision rendered on the action for the determination of insolvency claims to the liquidator and all insolvency creditors.

⁵⁵⁹ See *infra* 4.2.5.3.1.

⁵⁶⁰ See *ECJ*, 22 February 1979, 133/78, *Gourdain v. Nadler* [1979] ECR, 733, 744, para. 5.

⁵⁶¹ *ECJ*, 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-5655, para. 27 et seq. However, in the *F-Tex* case, the *ECJ* abstained from relying on insolvency-related preliminary questions in order to characterize the action at issue, *ECJ* (First Chamber), 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, NZI 2012, 469, para. 41 et seq.

⁵⁶² Also critical: *Mankowski*, NZI 2009, 571, 572; *Oberhammer*, IPRax 2010, 317, 322; *Klicka*, *ecolex* 2010, 1060, 1063.

⁵⁶³ § 19a of the German ZPO establishes a general venue at the seat of the insolvency court for all proceedings related to the insolvency estate and brought against the liquidator; this provision is also applicable to actions for segregation or separate satisfaction as well as to actions concerning liabilities and rights of the insolvency estate. This quite broad scope is

insolvency estate's value *at all*, independently of whether the liable property may be diminished or enriched.⁵⁶⁴ When the ECJ makes such ambiguous statements,⁵⁶⁵ it overlooks that almost all actions filed on the occasion of insolvency have such a (reflexive) effect.⁵⁶⁶

4.2.5.2.2 Regulatory objectives of the EIR

In order to establish a *vis attractiva concursus* in European insolvency law, the ECJ referred in *Seagon v. Deko Marty* to the programmatic purpose of improving the efficiency of cross-border insolvency proceedings, as explicitly provided for in the recitals 2 and 8 of the EIR (*effet utile*).⁵⁶⁷ The meaning is most likely, in the first place, the accelerated administration of insolvency proceedings. Closely related to the efficiency objective is the EIR's regulatory purpose to prevent improper *forum shopping*⁵⁶⁸, as well as the synchronisation of international jurisdiction and applicable law⁵⁶⁹, as principally enshrined in Article 4 EIR.⁵⁷⁰ This criterion so far not resorted to by the ECJ in the context of Article 3 EIR results in the prevention of procedural delays related to the application of foreign law and safeguards the correctness of court judgments.⁵⁷¹

The difficulty attached to the application of these criteria consists of determining in a suitable and reliable manner whether a specific action *generally* classifies as annex actions in all cases related to a specific type of

attributed to the provision's primary purpose to exclude the liquidator's general venue, see *Patzina*, in: MünchKomm-ZPO, 3rd ed. (2008), § 19a, para. 1.

⁵⁶⁴ Cf. *Oberlandesgericht München*, 6 June 2006, 7 U 2287/06, IPRax 2007, 212, 213.

⁵⁶⁵ Cf. ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 17; ECJ, 2 July 2009, Case C-111/08, *SCT Industri AB i likvidation v. Alpenblume AB* [2009] ECR I-5655, para. 29; further *Oberhammer*, ZIK 2010, 6, 10.

⁵⁶⁶ Against this background, the English *High Court of Justice*, Queen's Bench Division (Comm), 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14, para. 58, requires a "direct juridical derivation".

⁵⁶⁷ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 22. In later decisions, the ECJ did not refer again to this criterion.

⁵⁶⁸ Recital 4 EIR, see ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, para. 23-24.

⁵⁶⁹ Explicitly, the English *High Court of Justice*, Queen's Bench Division, 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14, para. 90.

⁵⁷⁰ The parallelism between *forum* and *ius* weakens the counter argument that a concentration of jurisdiction cannot be achieved by a European *vis attractiva concursus* since national rules on local competence might not follow the doctrine of attractive jurisdiction; to this point of view see *Dutta*, Lloyd's MCLQ 2008, 88, 91.

⁵⁷¹ Detailed on this matter *Mankowski*, in: Festschrift A. Heldrich (2005), 867 et seq.

action and not solely in a particular case. From a conflict of laws perspective, the examination illustrates that the synchronization of *forum* and *ius* is by no means warranted as it depends on the idiosyncrasies of the applicable law by virtue of Articles 4(2)(m), 13 EIR⁵⁷². Furthermore, the mere fact that the respective claim or its underlying subject is listed in the catalogue of Article 4(2) EIR is not sufficient for its classification as insolvency derived. Apart from that, an efficient and accelerated completion of insolvency proceedings is essentially contingent on additional circumstances, such as the proximity of the seized court to the facts of the case, the place of enforcement or where evidence is taken, as well as the general effectiveness and capacity of each procedural system. These open-ended criteria depending on the specific facts of every single case may in one case give rise to the assumption of jurisdiction in the Member State in which proceedings have been opened, whilst leading to the opposite result in another case. Accordingly, the relevant question is whether the procedural efficiency criterion and its related forms *tend*, from a general perspective, to attest to an insolvency-specific classification of a specific type of action.

4.2.5.2.3 General jurisdictional interests

Supposing a particular action classifies as insolvency-derived in the light of its insolvency-specific purpose and the Regulation's objectives, this classification can only be rebutted, if, from a *general* perspective, common jurisdictional interests militate against it. In this balancing of interests, criteria such as the proximity of the court seized to the facts of the case, the place of enforcement or where evidence is taken⁵⁷³, further the applicable law as well as the predictability of the competent court have to be taken into consideration. Particular emphasis is placed on the protection of the defendant given that the *actor sequitur forum rei*-rule, as an overarching principle of the European jurisdictional regime (Article 2 Brussels I Regulation), establishes a familiar, readily ascertainable and accessible jurisdiction at the centre of the defendant's interests.⁵⁷⁴

⁵⁷² Cf. also *Koller*, *ecolex* 2012, 693, 695.

⁵⁷³ Cf. *Thole*, *ZEuP* 2010, 904, 913 et seq.

⁵⁷⁴ Comprehensively *Buchner*, *Kläger- und Beklagenschutz im Recht der internationalen Zuständigkeit* (1998), 50 et seq.

Taking into account the particular need for clear and foreseeable jurisdictional rules in international insolvency law, particular actions typically filed in the context of insolvency proceedings are jurisdictionally to be classified according to the above mentioned criteria. At this point, it has to be emphasized that the classification invariably concerns a specific action provided for in domestic law and, therefore, drawing conclusions with regard to (functionally) similar types of actions in other Member States is only possible to a limited extent.⁵⁷⁵

4.2.5.3 The objective scope of the vis attractiva concursus at the example of specific types of actions

4.2.5.3.1 Actions to segregate assets from the insolvent debtor's estate

The action to segregate assets from the insolvent debtor's estate has the specific purpose of recovering an asset which does not form part of the insolvency estate due to the existence of a right *in rem* or an equivalent right *in personam*.⁵⁷⁶ The right to segregate defines the limits of the rights conferred upon individual creditors by virtue of the insolvency liability regime.⁵⁷⁷ Respectively, the principle *par conditio creditorum* does not apply to the right to segregate, since the latter aims at protecting primarily rights *in rem*. Therefore, its personal scope of application is confined to the insolvency practitioner and the party entitled to segregate on occasion of but outside the insolvency proceedings.⁵⁷⁸ In other words: The right to segregate exists not because of, but rather in spite of insolvency proceedings.⁵⁷⁹ Even certain insolvency-related modifications, for instance through preclusion time-limits, do not confer insolvency-specific character to the action to segregate.⁵⁸⁰ Thus, due to the lack of any insolvency-specific purpose, the ECJ allocated –

⁵⁷⁵ Cf. to this point also Lüke, ZZP 111 [1998], 275, 294; Wessels, *Insolv.Int.* 2008, 133, 141.

⁵⁷⁶ Cf. for the German Law: § 47, 1st sentence InsO.

⁵⁷⁷ Häsemeyer, *Insolvenzrecht*, 4th ed. (2007), para. 18.03.

⁵⁷⁸ Cf. in German Law: § 47, 2nd sentence InsO.

⁵⁷⁹ Willemer, *Vis attractiva concursus* (2006), 360.

⁵⁸⁰ Should the moveable or immovable property be located in another Member State than the one in which insolvency proceedings were initiated, there is regularly no need for a synchronization of *forum* and *ius* by establishing a *vis attractiva concursus*. This is due to the fact that the right to segregation is contingent upon preliminary issues concerning *rights in rem* which are subject to the *lex rei sitae* and, as a result, in such cases there exists lack of synchronization (cf. Articles 5, 7 EIR); contra Willemer, *Vis attractiva concursus* (2006), 360 et seq. (footnote 832).

in accordance with the legal doctrine⁵⁸¹ – the right to segregate to ambit of the Brussels I Regulation.⁵⁸² The same should apply to the right of segregation extending to the consideration received as a substitute for the object of segregation.⁵⁸³

4.2.5.3.2 Avoidance actions

(1) Regardless of their dogmatic classification, avoidance actions serve to protect the insolvency estate against changes in the debtor's or creditors' rights on the basis of private autonomy. Avoidance actions have an impact on all interested parties, i.e. they aim at protecting the general body of creditors⁵⁸⁴ and apply, independently of whether the general civil law provides for mechanisms securing the insolvency liability regime.⁵⁸⁵ For this reason, an insolvency-specific purpose is attached to an avoidance action, irrespective of whether the latter is designed broadly, so as to protect the insolvency estate against wilful impairment or value-outflow⁵⁸⁶, or rather narrowly, so as to promote the implementation of the *pari passu principle*⁵⁸⁷.

The legal situation is different if the liquidator's right to invoke a ground for contesting the transaction does not constitute the cause of action, but merely a preliminary question in the context of the proceedings. The ECJ therefore

⁵⁸¹ Duursma, in: Duursma-Kepplinger/Duursma/Chalupsky (eds.), EuInsVO (2002), Art. 25, para. 55; Brinkmann, IPRax 2010, 324, 327 with further references; Haubold, IPRax 2002, 157, 163; also: Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), para. 196. For the jurisdiction of the courts of the State in which insolvency proceedings were opened had further advocated the Article 17 No 5 of the Preliminary Draft of a European Convention on Bankruptcy (1970) as well as the Article 15 No 5 of the Draft Convention on bankruptcy (1980); contra Monsérié-Bon, Sauvegarde, redressement et liquidation judiciaires, Juris-classeur (2011), Fasc. 3125, para. 91.

⁵⁸² ECJ, 10 September 2009, Case C-292/08, *German Graphics Graphische Maschinen GmbH v. Alice van der Schee* [2009] ECR I-8421, para. 25 et seq.

⁵⁸³ Cf. in German Law § 48 InsO (so-called Ersatzaussonderung).

⁵⁸⁴ In Austrian Law: § 27 IO; in German Law: § 129 InsO; cf. in French Law: Articles L. 632-1 et seqq. Code de commerce; in Italian Law: Articles 64 et seqq. Legge Fallimentare. – This holds not true for an action under IA 1986, s. 423 setting aside a transaction defrauding creditors, see the English *High Court of Justice*, Chancery Division, Birmingham District Registry, 6.1.2012, *Hornan v. Baillie* [2012] EWHC 285 (Ch), para. 13.

⁵⁸⁵ Häsemeyer, Insolvenzrecht, 4th ed. (2007), para. 21.03 et seq.

⁵⁸⁶ See, for instance, the so-called contest of debtor's transaction for wilful disadvantage according to § 133 InsO (German Law).

⁵⁸⁷ This is the case in German Law pursuant to §§ 130, 131 InsO (so-called "congruent coverage"), cf. Häsemeyer, Insolvenzrecht, 4th ed. (2007), para. 21.01.

ruled in the *F-Tex case*⁵⁸⁸ with convincing arguments that an action for recovery of a sum of money on the basis of an assigned avoidance claim is not closely related to the insolvency proceedings provided that the assignee can freely decide upon the exercise and the initiation of judicial proceedings over his right (i) and the assignee is acting in his own interest or personal benefit (ii). Therefrom, one can deduce the supplementary requirement that an adequate consideration has to flow to the insolvency estate amounting to the same result as the liquidation of the assigned claim.⁵⁸⁹

(2) As the ECJ explained in *Seagon v. Deko Marty*, the concentration of avoidance actions before the courts of the state within the territory of which insolvency proceedings were opened may foster – even if not in every single case⁵⁹⁰ – the efficiency and acceleration of cross-border proceedings.⁵⁹¹ Against this backdrop, the (preliminary) drafts of 1970/80 contained provisions regarding the *vis attractiva concursus*; for similar reasons, some of the Member States’ laws have adhered to this approach *de lege lata*.⁵⁹² The synchronisation of *forum* and *ius* is, in fact, not relevant for the assumption of an annex jurisdiction, which relativizes to a certain extent the formulaic argument put forward by the ECJ that a jurisdictional concentration pursuant to Article 3 EIR would be capable of preventing improper *forum shopping*.⁵⁹³

Although the vast majority of legal scholars⁵⁹⁴ believe that the ECJ ruling is to be followed, an exception should be made for reasons of procedural economy with regard to *individual* avoidance actions pending outside insolvency

⁵⁸⁸ ECJ (First Chamber), 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB “Jadecloud-Vilma”*, NZI 2012, 469, para. 36 et seq.

⁵⁸⁹ Convincing Koller, *ecolex* 2012, 693, 695.

⁵⁹⁰ In this way, the EIR’s lack of provisions on the *jurisdiction ratione loci* could result in a situation in which the competent court over the insolvency-related action is not the insolvency court, see to this issue *Bundesgerichtshof*, 19 May 2009, IX ZR 39/06, NZI 2009, 532 (*forum necessitates*). Critical to the efficiency criterion *Lent*, KTS 1959, 73, 78 f.; *Berges*, KTS 1965, 73, 74.

⁵⁹¹ Article 17 No 3 of the Preliminary Draft of a European Convention on Bankruptcy (1970) and Article 15 No 1 and 2 of the Draft Convention on Bankruptcy (1980).

⁵⁹² See, for instance, in Austrian Law § 43(5), 1st indent IO which states: “Should the right to contest the debtor’s transactions be asserted by the insolvency practitioner or the insolvency creditors pursuant to § 189, the insolvency court has exclusive jurisdiction over actions for contest of the debtor’s transactions.” Nevertheless, it confers upon a special chamber to decide on the issue.

⁵⁹³ Critical also *Klöhn/Berner*, ZIP 2007, 1418, 1419; *Mörsdorf-Schulte*, ZIP 2009, 1456, 1457.

⁵⁹⁴ Contra e.g. *Stürner/Kern*, LMK 2009, 278572; *Hau*, KTS 2009, 382, 383 et seqq.

proceedings. Should the national law empower the liquidator to resume the proceedings before the court already seized at the time of the opening of the insolvency proceedings⁵⁹⁵, the court seized jurisdiction on the basis of the Brussels I Regulation remains competent (*perpetuatio fori*).⁵⁹⁶

4.2.5.3.3 Actions for the determination of a lodged claim

(1) This type of action initiates judicial proceedings over the determination of a lodged claim in case it has been formally contested. According to German Law, the competent court has to decide on all peremptory prerequisites for the admission of the lodged proofs, namely the ground and the total amount of the claim, the classification of the claim as insolvency debt and its ranking – priority or subordinate debt⁵⁹⁷ – on the basis of which the satisfaction of the company's liabilities takes place.⁵⁹⁸ Accordingly, this action stands at the crossroads between the procedural participation in the distribution of the debtor's assets on one hand and the protection of individual substantive rights on the other. This gives rise to difficulties in classifying such proceedings on the basis of Article 1(2)(b) Brussels I Regulation.

(2) As a preliminary point, it has to be emphasized that the classification question cannot be answered with reference to the concrete cause of action, but uniformly and therefore irrespective of whether the plaintiff contests the ground⁵⁹⁹, the ranking of the claim or its character as insolvency debt. The reason is that the courts – if provided for by national procedural law – may decide on both sets of questions and a classification based on the centre of gravity would entail legal uncertainty.⁶⁰⁰ In addition to this, national

⁵⁹⁵ In Austrian Law see § 37(3), 2nd sentence IO in conjunction with § 43(5), 2nd indent IO (“this does not apply when the insolvency practitioner resumes pending lawsuits [§ 37(3)]”); accordingly, in German Law § 17(1) AnfG (Act on Contestation of the debtor's transactions) applies.

⁵⁹⁶ A counter exception should be allowed, in case the applicable *lex processus* (cf. Article 15 EIR) transfers the process to the insolvency court following the resuming of the process by the liquidator.

⁵⁹⁷ Cf. in German Law: §§ 38, 39 InsO.

⁵⁹⁸ Cf. in German Law § 181 InsO; see Häsemeyer, *Insolvenzrecht*, 4th ed. (2007), para. 22.03, 22.20; 22.41.

⁵⁹⁹ According to the understanding in German Law, there is a procedural, but not a substantive right, see Schumacher, in: MünchKomm-InsO, 2nd ed. (2008), § 178, para. 12.

⁶⁰⁰ See also Trunk, *Internationales Insolvenzrecht* (1998), 212, under reference to Articles 20-23 of the German-Austrian Bankruptcy Convention. Differentiating, however, Virgós/Schmit,

preconceptions of cause of action differ widely. With respect to actions for the determination of a lodged claim, diverging opinions are even expressed within the Member States' procedural laws. Whereas, for instance, the prevailing opinion in Germany considers that the cause of action is constituted by the determination of the ground, ranking and characterisation of the claim as insolvency debt, other academics perceive these as mere preliminary questions without prejudicial effect and prefer to classify as cause of action the creditors' right to participate in the distribution of the liquidation proceeds.⁶⁰¹

(3) Frequently, the insolvency courts' lack of proximity to the facts of the case is invoked as an argument against the concentration of jurisdiction in the state of the opening of proceedings.⁶⁰² According to this view, the variety of grounds of jurisdiction based on a close link between case-specific conditions and the respective court is reflected much more efficiently by the Brussels I regime than by the jurisdiction of a single forum, which neither takes sufficiently into consideration the purpose of protecting certain groups of persons, as provided for in Articles 8 et seq., 15 et seq., 18 et seq. Brussels I Regulation, nor the objective criteria underlying its jurisdictional rules in Article 22.⁶⁰³

(a) But for what reasons can actions for the determination of a lodged claim be classified as *principally* deriving directly from insolvency proceedings and being closely linked to them? The answer is to be found in their insolvency-specific purpose, i.e. the inclusion of the contested claim in the insolvency proceedings obliging the creditor to participate in the distribution of the debtor's assets. This procedural objective is also expressed by the right conferred upon all individual creditors to sue. And finally, all decisions on legal relationships concerning the insolvency estate shall take legal effect (*res*

Report on the Convention on Insolvency Proceedings (1996), para. 196, and, with regard to national law: *Jahr*, ZZP 79 (1966), 347, 382 et seq.

⁶⁰¹ Cf. *Schumacher*, in: MünchKomm-InsO, 2nd ed. (2008), § 179, para. 7 et seqq.; § 178, para. 11 et seq. with further references.

⁶⁰² Cf. *Oberlandesgericht Wien*, 30 October 2006, 10 Ra 47/06i, ZIK 2007, 165.

⁶⁰³ See *M. Stürner*, IPRax 2005, 416, 419, with reference to the proximity to the facts and the evidence of the jurisdiction at the place of performance of the obligation, namely in construction proceedings; further *Homann*, System der Anerkennung eines ausländischen Insolvenzverfahrens und die Zulässigkeit der Einzelrechtsverfolgung (2000), 145; *Haubold*, IPRax 2002, 157, 163.

iudicata) for and against the insolvency practitioner and all insolvency creditors.⁶⁰⁴

(b) Moreover, there is a fundamental interest in the adjudication of all cases relating to the determination of lodged claims through a single court, in order to prevent – to the furthest extent possible – inconsistent decisions over their classification and ranking.⁶⁰⁵ This aspect of procedural economy is particularly significant for cross-border insolvencies, for instance when creditors from different Member States assert a considerable number of insolvency claims having an identical legal basis, as is the case with capital investment damages: Due to the jurisdiction of a single competent forum, it would be possible to prevent a time- and cost consuming decentralization of jurisdiction by virtue of Article 16(1) option 2 (contract claims) or Article 5(3) Brussels I Regulation (tort claims in the place where the harmful event occurred).⁶⁰⁶

(c) The central question, however, is why protection afforded to employees, consumers or insured persons under the jurisdictional rules of the Brussels I regime should extend to annex actions in cases in which national legal orders deliberately abstain from privileging these groups of persons by granting insolvency preferential rights, as this would flagrantly contradict the equal treatment of insolvency creditors. Neither the Regulation No 44/2001 nor the EIR provides a direct answer to this question. Nevertheless, the Member States' proceedings over the lodgement and verification of claims are, from a functional perspective, fairly similar: They pursue the common purpose of preventing the filing of an action for performance or satisfaction in circumvention of the insolvency liability regime, since they provide for mandatory participation of all creditors willing to lodge their claims in the distribution of the debtor's assets.⁶⁰⁷ The jurisdictional system of the Brussels I Regulation does not correspond to these needs, not least because

⁶⁰⁴ This is the case in German Law, cf. § 183 InsO.

⁶⁰⁵ This also admits *Haubold*, IPRax 2002, 157, 163. Obviously, this does not hold true when such questions do not constitute the cause of action to determine the claim as it is the case in Austrian insolvency law, cf. *Oberlandesgericht Wien*, 30 October 2006, 10 Ra 47/06i, ZIK 2007, 165.

⁶⁰⁶ Cf. *ECJ*, 10 June 2004, Case C-168/02, *Kronhofer/Maier u.a.* [2004] ECR, I-6022 = NJW 2004, 2441.

⁶⁰⁷ Cf. in German Law: § 87 InsO.

insolvency-specific questions concerning the verification proceedings (ranking, classification or voidability of claims) are subject to the *lex concursus* (Article 4(2)(g), (h) EIR), a fact advocating, in this respect, the concentration of jurisdiction in the state of the opening of insolvency proceedings. The specific rules of the Brussels I regime protecting the weaker party (Article 8, 15, 18) are not tailored to an action for the determination of lodged claims as a specific instrument realising the insolvency liability regime. Particularly, the general hypothesis of structural inferiority between the parties⁶⁰⁸ cannot (automatically) be transferred to the situation of insolvency: Even though the liquidator takes over the position of the insolvent debtor as employer, insurer or seller, he brings an action in the interest of all individual creditors and only to this extent in the interest of the insolvent debtor.⁶⁰⁹ If an insolvency creditor contests a lodged claim in the verification procedure and the action for its determination takes place among the insolvency creditors⁶¹⁰, the role of the parties, as laid down in Articles 19, 20 Brussels I Regulation for instance, as well as the principles underlying these rules, lose their significance completely. Nonetheless, provided that one would adhere to the jurisdictional rules of sections 4-6 Brussels I Regulation, specific insolvency creditors could be prevented from exercising their right to contest, if and because – depending on the particularities of each case – they have to expect to be sued before a foreign *forum* other than the one situated in the state of the opening of the insolvency proceedings⁶¹¹ or to bring a respective action in that place⁶¹². To that extent, the principal need for greater jurisdictional predictability substantiates the applicability of Article 3 EIR.

(4) In conclusion: Article 3 EIR applies *in principle* to actions for the determination of lodged claims.⁶¹³ As this rule establishing annex jurisdiction

⁶⁰⁸ Cf. *Staudinger*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 8, para. 6 (for insurance contracts); *Mankowski*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 18, para. 2 (for employment contracts).

⁶⁰⁹ Cf. in German Law: § 1, 1st sentence InsO.

⁶¹⁰ This applies irrespective of the person filing the action according to § 179 InsO.

⁶¹¹ For instance based on Article 19 Brussels I Regulation in case of § 179(1) InsO.

⁶¹² For instance based on Article 20 Brussels I Regulation in case of § 179(2) InsO.

⁶¹³ A similar conclusion draws the Austrian *Oberster Gerichtshof*, 22 April 2010, 8 Ob 78/09t, RdW 2010, 633 (Article 3 EIR) with regard to an action for restitution in relation to a claim that was verified in the insolvency proceedings); further *Willemer*, *Vis attractiva concursus* (2006), 319 et seqq., 347; *Trunk*, *Internationales Insolvenzrecht* (1998), 212 et seq.; *Mankowski*, ZIP 1994, 1577, 1581; contra *Oberlandesgericht Wien*, 30 October 2006, 10 Ra 47/06i, ZIK 2007, 165.

solely governs international, but not local or substantive jurisdiction, sufficient room is left for *local* derogations from the concentration of jurisdiction, i.e. in the interest of the proximity to the facts of a case (through special jurisdiction rules⁶¹⁴) or the particular value of the claim⁶¹⁵.

However, two exceptions should be allowed in this respect:

(i) Due to its proximity to the facts of the case and the applicable law⁶¹⁶, the exclusive jurisdiction established in Article 22 Brussels I Regulation should, as a matter of principle, derogate the applicability of Article 3 EIR. However, this exception does not affect Article 23 Brussels I Regulation since choice of forum clauses may not encompass insolvency-related actions falling under the scope of Article 3 EIR.⁶¹⁷

(ii) The second exception concerns, along with avoidance claims⁶¹⁸, actions for declaratory relief interrupted following the commencement of insolvency proceedings.⁶¹⁹ At this point, reasons of procedural economy militate in favour of resuming the proceedings before the competent court according to the Regulation No 44/2001^{620, 621}. By contrast, this can principally not hold true for actions for declaratory relief filed prior to the lodgement of the underlying claim, but *after* the opening of insolvency proceedings – even if its cause of action does not contain a matter specifically concerning insolvency.⁶²² Initially, it is incumbent upon the *lex concursus* to determine the effects of insolvency proceedings on actions brought by individual creditors as well as if and in what way claims have to be lodged (Article 4(2)(f),(g),(h) EIR): If the *lex concursus* bars individual creditors from enforcing their claim against the debtor outside the insolvency proceedings, this dictum claims validity in all

Cf. also the English *High Court of Justice*, Chancery Division, 8/12/29 July 1999, *UBS AG v. Omni Holding AG (in liquidation)* [2000] 1 W.L.R. 916, 921 et seqq.

⁶¹⁴ In German Law: § 185 InsO.

⁶¹⁵ In German Law: § 180(1), 3rd sentence InsO.

⁶¹⁶ See to this *Hess*, *Europäisches Zivilprozessrecht* (2010), 302 et seq.

⁶¹⁷ *Vallens*, *Recueil Dalloz* 2009, 1311, 1315; *M.Stürner*, *IPRax* 2005, 416, 419; cf. also *Brinkmann*, *IPRax* 2010, 324, 329 et seq.

⁶¹⁸ See *supra* 4.2.5.3.2.

⁶¹⁹ In Austrian Law: § 113 IO; in German Law: §§ 180(2), 184(1), 2nd sentence InsO.

⁶²⁰ Cf. the similar regulatory purpose enunciated in Article 15 EIR.

⁶²¹ A counter-exception should, however, be admitted in the event that the national law does provide for transfer to the insolvency court.

⁶²² Cf. the English *High Court of Justice*, Queen's Bench Division, 19 October 2010, *Gibraltar Residential Properties Limited v. Gibralcon 2004 SA* [2010] EWHC 2595 (TCC).

other Member States by virtue of universality, even with effect to the Community institutions⁶²³.⁶²⁴ Under German Law, for instance, it is prohibited to bring an action for the determination of a lodged claim or to resume the proceedings until the claim has been formally contested.⁶²⁵ In this event, it follows from the above mentioned approach that the Brussels I regime will principally⁶²⁶ not apply.⁶²⁷ That being so, the claimant is capable of manoeuvring the competent *forum* in an appropriate manner: If he brings the action for declaratory relief prior to the opening of the insolvency proceedings, the Brussels I Regulation, involving choice of forum clauses, will apply; otherwise, the international jurisdiction will be determined pursuant to Article 3 EIR.

4.2.5.3.4 Actions for the determination of the assets forming part of the insolvency estate

Should proceedings between the insolvent debtor and the liquidator concern the question of whether an asset belonging to the debtor forms part of the insolvency estate (*i.e. regarding limits to attachments*)⁶²⁸, this action is to be characterized as insolvency-specific (Article 3 EIR) and subject to the applicable *lex concursus*, Article 4(2)(b) EIR.⁶²⁹ On the contrary, if a dispute arising between a creditor and the liquidator regards the question as to

⁶²³ Accordingly, the ECJ (First Chamber), 17 March 2005, Case C-294/02, *Commission v. AMI Semiconductor Belgium BVBA a.O.*, ECR I-2175, para. 69, stated that “in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible. Moreover, the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them. That is clear from Article 4(2)(f) of Regulation No 1346/2000 according to which the law governing the effects of insolvency proceedings brought by individual creditors is that of the State in which they were opened (...)”.

⁶²⁴ In this regard, Article 4(2) EIR has jurisdictional effect; Article 15 EIR does not apply. This aspect was overlooked by the English *High Court of Justice*, Queen’s Bench Division, 19 October 2010, *Gibraltar Residential Properties Limited v. Gibralcon 2004 SA* [2010] EWHC 2595 (TCC), para. 18 et seqq., approved by *Phillips*, *Insolv.Int.* 2012, 73, 74. Unfortunately, the *High Court* failed to request the ECJ to give a preliminary ruling thereon (Article 267 TFEU).

⁶²⁵ Cf. §§ 87, 179 et seqq. *InsO*; *Bundesgerichtshof*, 15 October 2004, V ZR 100/04, NZI 2005, 108, 109.

⁶²⁶ With regard to Article 22 Brussels I Regulation, see *supra*.

⁶²⁷ This might only be assessed differently if the *lex concursus* regulates this issue in the opposite matter.

⁶²⁸ Cf. in German Law: §§ 35, 36 *InsO*.

⁶²⁹ In this regard *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 196.

whether an asset belongs to the insolvency estate, the action primarily concerns the debtor's ownership over this asset. This question is regularly governed by general civil law.⁶³⁰ Therefore, the respective action does not fall within the exception rule set forth in Article 1(2)(b) Brussels I Regulation.⁶³¹

4.2.5.3.5 Liability claims against the insolvency practitioner

Liability claims against the insolvency practitioner regularly seek sanction against breaches of insolvency-specific duties that the office holder incurs towards the parties to the proceedings.⁶³² They aim at compensating damages suffered by the insolvent debtor and the general body of creditors or those incurred by an individual creditor as a result of the administrator's activities.⁶³³ Irrespective of the concrete type of damage, such liability claims are to be characterized as insolvency-related⁶³⁴: This holds true for the legal basis of the liability claim if and to the extent to which the action is linked to an insolvency-specific breach of duties and, thus, derives directly from insolvency proceedings. Cases in which the liquidator frustrates rights to segregation or separate satisfaction in breach of his duties are not to be

⁶³⁰ Also the English *High Court of Justice*, Chancery Division, 1 February 2010, *Byers v. Yacht Bull Corp* [2010] EWHC 133 (Ch), para. 26: claim for ownership; *High Court of Justice*, Chancery Division, 27/28 March 1996, *In re Hayward*, [1997] Ch. 45, 53 et seqq.: Article 16(1)(a) Judgment Convention applied with regard to proceedings instituted by the English trustee in bankruptcy which had as their subject matter a right *in rem* in immoveable property situated in Spain; further *Court of Appeal*, 27 October/21 November 2000, *Ashurst v. Pollard and Another* [2001] Ch 595, 602 et seqq.: Brussels I Regulation applied (proceedings concerning rights *in rem* in immoveable property).

⁶³¹ In this sense the *High Court of Justice*, Chancery Division, 1 February 2010, *Byers & Ors (Liquidators of Madoff Securities International Ltd) v. Yacht Bull Corporation Ltd & Ors* [2010] EWHC 133 (Ch), IILR 2011, 22: claim for ownership does not fall under the exception rule of Article 1(2)(b) Brussels I Regulation. The same conclusion is reached by the English *High Court of Justice*, Chancery Division, 25 May 2005, *Derek Oakley v. Ultra Vehicle Design Ltd (in Liquidation) and Behlke Electronic GmbH* [2005] EWHC 872 (Ch): The supervisor of a company subject to a company voluntary arrangement (CVA) issued an application under IA 1986, s. 7(4)(a) seeking court directions as to whether the debtor was entitled to ownership of a vehicle and an individual creditor to a security interest over that asset. The court, applying Article 6(1) Brussels I Regulation, held that the EIR did not govern the underlying claims (para. 40-43, 56). Contra Lüke, ZJP 111 [1998], 275, 295.

⁶³² Cf. in Austrian Law: § 81(3) IO; in German Law: §§ 60, 61 InsO.

⁶³³ Cf. in German Law: § 61 InsO on the creation of debts incumbent on the insolvency estate despite the insufficiency of the latter.

⁶³⁴ In this sense, see also the English *High Court of Justice*, Queen's Bench Division (Comm), 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14, para. 67 et seq., 72 (personal liability of the Dutch bankruptcy trustee); the same view shares Piñeiro, *Il Diritto fallimentare e delle società commerciali* (2010), 360, 379; Schlosser, in: *Festschrift F. Weber* (1975), 395, 407; Willemer, *Vis attractiva concursus* (2006), 388, 392 et seq.; Lüke, ZJP 111 [1998], 275, 295. Also Article 15 No 9 of the 1980 Draft as well as Article 17 No 7 of 1970 Draft.

assessed differently. Although the holder of these rights does not participate in the distribution of the insolvency estate, the takeover of the estate's administration by the office holder gives rise to an unpredictable risk, which is not covered by court's or creditor's supervision measures.⁶³⁵ The liquidator's personal liability reflects his insolvency-specific influence and provides in preventive terms an incentive for the proper exercise of his duties and, thereby for the efficient administration of (cross-border) insolvencies.⁶³⁶

Liability claims arising out of damages caused to the general body of creditors are closely linked to the insolvency proceedings, as their assertion requires the appointment of an independent special administrator or the adoption of other supervision measures.⁶³⁷ As the office holder is mainly active in the state in which insolvency proceedings are initiated, the proximity to the facts of the case supports an annex jurisdiction of the courts of this Member State⁶³⁸; in principle, this leads to a synchronization of *forum* and *ius*⁶³⁹.

4.2.5.3.6 Corporate actions

The jurisdictional classification of actions lying at the intersection of company, insolvency and general civil law poses major difficulties. It must be emphasized that any schematic solution for this problem is not feasible. The decisive question is as follows: Does the core purpose of the action include either adjusting the rules and principles on which general civil law or other

⁶³⁵ Respectively, these creditors are considered to have *locus standi* as participants in the proceedings within the meaning of § 60 InsO. As a result, the liquidator is not allowed to include assets in the insolvency estate evidently belonging to third parties. As far as the holders of rights to separate satisfaction are concerned, he has to ensure that the security asset does not suffer loss of value, cf. *Brandes*, in: MünchKomm-InsO, 2nd ed. (2007), §§ 60, 61 para. 54; similarly in the Austrian Law, § 81(3) IO, see *Duursma-Kepplinger/Chalupsky*, in: *Duursma-Kepplinger/Duursma/Chalupsky* (eds.), EulnsVO (2002), Art. 31, para. 26.

⁶³⁶ Cf. *Willemer*, *Vis attractiva concursus* (2006), 384 et seq.

⁶³⁷ Detailed *Laukemann*, *Die Unabhängigkeit des Insolvenzverwalters* (2010), 350 et seqq.

⁶³⁸ Against this view militates *Jahr*, in: *Kegel/Thieme* (eds.), *Vorschläge und Gutachten zum Entwurf eines EG-Konkursübereinkommens* (1988), 305, 309 et seq.; with regard to liability for damage suffered by individual creditors, he supports the applicability of the Brussels I Regulation, either the jurisdiction at the place of the administrator's domicile (Article 2), the jurisdiction in tort (Article 5 No 3) or in contract (Article 5 No 1: liability against preferential creditors): However, in most cases, these jurisdictional rules shall result in the jurisdiction of the courts of the Member State in which insolvency proceedings have been initiated.

⁶³⁹ In this manner, the duties of the insolvency practitioner are determined by virtue of Article 4(1), 2nd sentence EIR. For the extension of the scope of this rule to the liquidator's personal liability see *Duursma-Kepplinger*, in: *Duursma-Kepplinger/Duursma/Chalupsky* (eds.), EulnsVO (2002), Art. 31, para. 30; *Paulus*, EulnsVO, 3rd ed. (2010), Art. 4, para. 21 (with regard to the duties of the insolvency practitioner).

areas of substantive law rely, or compensating insolvency-conditioned detriments in order to protect the rights of the general body of creditors over the debtor's assets?⁶⁴⁰ In this regard, the systematic context of the underlying substantive rules does not play a relevant role.

The courts of the Member States have dealt i.a. with the following characteristic types of actions⁶⁴¹:

4.2.5.3.6.1 Actions related to the maintenance of capital requirements

Provisions purported to *generally* prevent nominal capital outflows to the company's partners in order to protect the creditors of the company do not presuppose the opening of insolvency proceedings. These rules depending on the legal form of the company relate to the minimum capital requirements and, hence, regulate the partners' *corporate* responsibility for the financing of the company.⁶⁴² This is the reason why actions seeking the recovery of such outflows are not to be classified as insolvency-derived and, therefore, fall within the ambit of the Brussels I Regulation⁶⁴³. On the contrary, an action not legally based on rules serving the maintenance of nominal capital to the (mere) purpose of continuing the company's operations, but conversely seeking to hamper the continuation of the company in need of restructuring or

⁶⁴⁰ See *supra* 4.2.5.2.1.

⁶⁴¹ With respect to the classification of actions based on Article 2:248 of the Dutch Civil Code (liability of the directors in the event of a bankruptcy of the closed corporation, the Dutch version of "wrongful trading"), see *Wessels*, *Insolv.Int.* 2008, 21(9), 133, 139; cf. also *Cour de Cassation*, 5 May 2004, *Recueil Dalloz* 2004, 1796: The insolvency courts enjoy international jurisdiction with regard to an *action en comblement de l'insuffisance d'actif* pursuant to Article L.651-2 Code de commerce (new version). Nevertheless, the French court did not refer to Article 3 EIR.

⁶⁴² Cf. *Ulmer*, *KTS* 2004, 291, 298 et seq. with further references.

⁶⁴³ See *Oberlandesgericht Wien*, 18 April 2008, 4 R 20/08b, *ZIK* 2009, 67: Compensation claims of a limited company (GmbH) against its manager (§§ 25, 81 ff. Austrian GmbHG); in German Law (§§ 30, 31 GmbHG old version): *Oberlandesgericht München*, 6 June 2006, 7 U 2287/06, *IPRax* 2007, 212, 213; *Landgericht Essen*, 30 September 2010, 43 O 129/09, *BeckRS* 2011, 06042.

In another case, the *Oberlandesgericht Wien* (26 May 2003, 3 R 49/03b) had to decide on a liability according to § 22 URG (*Unternehmensreorganisationsgesetz*). The liability of the organs authorized to represent the legal person regardless of fault ensures the fulfilment of the managing director's obligations to react upon a report within the meaning of § 22(1) No 1 URG with adequate restructuring measures or to submit the annual account in time. The Court applied the special jurisdiction in contract (Article 5 No 1 Brussels I Regulation) to the special relation between the company and its managing director due to the close connection to the latter's contractual obligations. By virtue of Articles 43, 47 the EIR was not yet applicable to the case.

recapitalization, is to be classified as insolvency-derived as it preserves the estate in favour of other creditors.⁶⁴⁴

4.2.5.3.6.2 *Liability for payments made subsequent to the illiquidity or over-indebtedness*

The jurisdictional classification is disputed in case the manager of a limited company is liable for payments made subsequent to the company's (factual) insolvency or over-indebtedness.⁶⁴⁵ If the liability claim is asserted by the liquidator after the opening of the insolvency proceedings, the classification of the claim as insolvency-derived is indicated by its regulatory purpose to protect the general body of creditors against the privileging of individual creditors and, therefore, to prevent insolvency as such. Due to its link to insolvency reasons, the mere fact that the claim can also be asserted outside insolvency proceedings does not preclude an annex jurisdiction by analogy to Article 3 EIR.⁶⁴⁶

4.2.5.3.6.3 *Actions for recovery of the company's debts by the liquidator in fiduciary capacity*

In the event that the partners of a company without legal personality (general commercial company, limited partnership or company under the Civil Code) are directly, personally and unlimited liable for its debts⁶⁴⁷, German Law⁶⁴⁸ hinders the company's creditors from filing an action or enforcing a liability

⁶⁴⁴ Cf. in German Law: §§ 35(1) No 5, 135 InsO; with regard to private international law aspects see the decision of the *Oberlandesgericht Köln* (28 September 2010, 18 U 3/10, *PIN*, NZI 2010, 1001), to this *Mankowski*, NZI 2010, 1004 with further references. With regard to jurisdictional aspects see *Oberlandesgericht Naumburg*, 6 October 2010, 5 U 73/10, ZIP 2011, 677 (avoidance action under §§ 135(1) No 2; 131(1), 129, 143(1) InsO); *Oberlandesgericht München* (6 June 2006, 7 U 2287/06, IPRax 2007, 212 et seq.): avoidance action brought by the liquidator in the context of the return of equity-replacing loans, §§ 135 InsO old version in conjunction with §§ 32a, 32 b GmbHG old version; no applicability of the Lugano Convention (Article 1(2) No 2).

⁶⁴⁵ Cf. in German Law § 64, 1st sentence GmbHG.

⁶⁴⁶ *Haas*, NZG 2010, 495, 496; as well as *Kammergericht Berlin*, 24 September 2009, 8 U 250/08, NZG 2010, 71; further *Goette*, in: Festschrift G. Kreft (2004), 53 et seq.; *Greulich/Rau*, NZG 2008, 565, 566 et seq; contra *Oberlandesgericht Karlsruhe*, 22 December 2009, 13 U 102/09, NZG 2010, 509 et seq. (Article 5 No 3 Brussels I Regulation); similarly *Ringe/Willemer*, NZG 2010, 56 et seq. Left undecided by *Oberlandesgericht Köln*, 9 June 2011, 18 W 34/11, NZI 2012, 52.

⁶⁴⁷ Cf. in German Law: §§ 128, 161(2) HGB (Commercial Code).

⁶⁴⁸ §§ 93 InsO, 171(2) HGB (Commercial Code).

claim against the partners in the course of insolvency proceedings.⁶⁴⁹ At the same time, the liquidator is empowered to pursue the claim of the company's creditors against its partners in fiduciary capacity.⁶⁵⁰ Although the fundamental legal basis of the creditors' claim against the company is not *per se* in insolvency law, its pursuit by the liquidator serves an insolvency-specific objective. As the liability claim is *procedurally* allocated to the insolvency estate⁶⁵¹, a creditors' race for the satisfaction of their claims should be prevented and, therefore, the *pari passu* principle be extended to the partners' liability for the debts of the company.⁶⁵²

Accordingly: When the liquidator files an action in fiduciary capacity, significant reasons militate for a bundling of such proceedings in the state of the opening of the insolvency proceedings.⁶⁵³ Nevertheless, an exception seems to be appropriate for pending liability claims against the partners of the company. In the event that the action is interrupted due to the opening of insolvency proceedings over the company's estate⁶⁵⁴, the liquidator has to resume the proceedings before the competent court under the Brussels I Regulation.

4.2.5.3.7 Actions for separate satisfaction

(1) The insolvency-proof priority right over an asset forming part of the insolvency estate and, consequently, being liable for the insolvent's debts is commonly understood to be a right to separate satisfaction.⁶⁵⁵ It is a right to preferential satisfaction out of the liquidation proceeds of this asset.⁶⁵⁶ The holder of the right can thereby be satisfied out of the proceeds up to the full

⁶⁴⁹ The so-called "Sperrfunktion".

⁶⁵⁰ The so-called "Ermächtigungsfunktion".

⁶⁵¹ The creditors of the company retain their rights; a *cessio legis* does not take place.

⁶⁵² Hence, the rule contributes at the same time to the overcoming of the insufficiency of the liable assets, see *Brandes*, in: MünchKomm-InsO, 2nd ed. (2007), § 93, para. 1.

⁶⁵³ To a similar conclusion comes *Haas*, NZG 1999, 1148, 1152 et seq. contra *Oberlandesgericht Köln*, 14 May 2004, NZG 2004, 1009 (Article 5 No 3 Brussels I Regulation); *Haubold*, IPRax 2002, 157, 163 (footnote 100).

⁶⁵⁴ *Bundesgerichtshof*, 14 November 2002, IX ZR 236/99, NJW 2003, 590; *Bundesgerichtshof*, 28 October 1981, II ZR 129/80, BGHZ 82, 209, 216 et seqq. = NJW 1982, 883.

⁶⁵⁵ With regard thereto *Häsemeyer*, Insolvenzrecht, 4th ed. (2007), para. 18.01 et seq.; *Ganter*, in: MünchKomm-InsO, 2nd ed. (2007), vor §§ 49-52, para. 1 et seq.

⁶⁵⁶ Cf. in German Law: §§ 49 et seq. InsO. With respect to other European legal orders see *infra* 6.2.4.2.

amount of his claim, irrespective of whether he or the liquidator realises the assets upon which a security right is granted⁶⁵⁷.⁶⁵⁸ In case the creditor is empowered to realise the assets, he can file an action seeking a sentence to tolerate compulsory enforcement measures against the objecting liquidator; in case the liquidator is entitled to this right, the action aims at recovering the liquidation proceeds.

(2) With that in mind, the conclusion that actions for separate satisfaction derive directly from the insolvency proceedings and are closely linked to them does not seem to be that far-fetched.⁶⁵⁹ Against this, however, militates decisively that the right to separate satisfaction has its legal basis primarily in a security or usage right which does not entitle one to segregation. This legal position is not significantly modified through insolvency proceedings, since the security right protects the holder's trust in satisfaction of his debt out of the collateral's value – without obliging him to participate in the collective proceedings.⁶⁶⁰ This holds true irrespective of whether or not the creditor has a right to realise the asset.⁶⁶¹ Furthermore, the rules on separate satisfaction affect all – unsecured – parties only to the extent to which they grant a priority right over an asset belonging to the insolvency estate. This security right nevertheless does not functionally interfere with the insolvency liability regime⁶⁶²; its execution is not governed by the *pari passu* principle.⁶⁶³ In contrast to the proceedings for the determination of a lodged claim, the insolvency creditors are not entitled to contest an alleged right to separate

⁶⁵⁷ In the event of a liquidation by the insolvency administrator, expenses arising out of the determination and liquidation of the asset are to be deducted in favour of the insolvency estate, cf. in German Law §§ 170 et seqq. InsO.

⁶⁵⁸ Cf. in German Law: §§ 165 et seq. InsO.

⁶⁵⁹ In this way *Schlosser*, in: Festschrift F. Weber (1975), 395, 411; as for the right to separate satisfaction out of the liquidation proceeds see *Reinhart*, in: MünchKomm-InsO, 2nd ed. (2008), Art. 25, para. 10.

⁶⁶⁰ Cf. in German Law § 52 InsO: “Creditors with a right to separate satisfaction shall be deemed insolvency creditors if they also have a personal claim against the debtor. However, they shall be entitled to proportionate satisfaction of their claim from the insolvency estate only to the extent that they waive their right to separate satisfaction, or that such separate satisfaction has failed [accentuation by the author]”.

⁶⁶¹ See also *Willemer*, Vis attractiva concursus (2006), 366; contra *Schlosser*, in: Festschrift F. Weber (1975), 395, 411; *ibid.*, EU-Zivilprozessrecht, 3rd ed. (2009), Art. 1 EuGVVO, para. 21.

⁶⁶² *Häsemeyer*, Insolvenzrecht, 4th ed. (2007), para. 18.03; 18.06.

⁶⁶³ Hence, the comparison with individual enforcement measures is not appropriate, in case the holder of a security right *in rem* has a right to separate satisfaction out of the liquidation proceeds, cf. § 805(1) German ZPO, contra *Schlosser*, in: Festschrift F. Weber (1975), 395, 411.

satisfaction; the dispute over its existence merely takes place between the right holder and the liquidator.⁶⁶⁴ From a jurisdictional perspective, it is irrelevant whether the asset over which the security right is created forms part of the insolvency estate⁶⁶⁵ or whether it is not affected by the opening of insolvency proceedings (as it is the case with the right to segregate)⁶⁶⁶.

The Advocate General *J.Mazák* ignored this aspect in his opinion in the *ERSTE Bank* case, as he assumed an annex jurisdiction on the basis of Article 3 EIR for an action for declaratory relief concerning the existence of a security right. He justified his view with the sole argument that the security right was ordered on an asset, or to be more accurate: on the liquidation proceeds which formed part of the insolvency estate.⁶⁶⁷

(3) In the light of the above, significant arguments justify the classification of actions to separate satisfaction within the scope of the Brussels I Regulation.⁶⁶⁸ Should the opposite view be endorsed, the location of the secured asset in a Member State other than the state of the opening of the proceedings would necessarily entail, in view of Article 5 EIR, an asymmetry between *forum* and *ius*. Choice of forum clauses which, in practice, often bestow jurisdiction upon the courts at the lender's domicile would lose their validity in the event that a single forum-jurisdiction was assumed by analogy to Article 3 EIR. Furthermore, in cases concerning immovable property, the proximity to the facts, as ensured by the exclusive jurisdiction of Article 22 No 1 Brussels I Regulation, would not be taken into consideration.

4.2.5.3.8 Actions concerning liabilities and rights of the insolvency estate

The administration and liquidation of the insolvency estate depends on sufficient financial resources. Debts incumbent on the estate therefore have a

⁶⁶⁴ Häsemeyer, *Insolvenzrecht*, 4th ed. (2007), para. 18.73.

⁶⁶⁵ Cf. the current version of the German Insolvency Act.

⁶⁶⁶ Cf. the previous version of the German Insolvency Act ("Konkursordnung").

⁶⁶⁷ Opinion of the Advocate General *J.Mazák*, 26 January 2012, Case C-527/10, *ERSTE Bank Hungary Nyrt.*, para. 41.

⁶⁶⁸ The same conclusion draws *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 196; *Gebauer*, in: *Gebauer/Wiedmann* (eds.), *Zivilrecht unter europäischem Einfluss*, 2nd ed. (2010), Art. 1 EuGVVO, para. 23; *Willemer*, *Vis attractiva concursus* (2006), 366; *Haubold*, *IPRax* 2002, 157, 163; cf. also *Jahr*, *ZZP* 79 (1966), 347, 373.

privileged status, taking precedence over the insolvency creditors' claims.⁶⁶⁹ These debts, incurred after the opening of insolvency proceedings and mostly subject to a limit enforceable⁶⁷⁰, include the costs of the proceedings⁶⁷¹, transactions entered into and actions taken by the liquidator, i.e. through the option to perform contracts in the interest of the general body of creditors⁶⁷² as well as mutual claims arising out of the continuity of specific contracts by virtue of law⁶⁷³.

(1) Such claims arising out of *contractual* agreements entered into by the liquidator do not justify a single court's jurisdiction according to Article 3 EIR.⁶⁷⁴ They lack an insolvency-specific procedural purpose. As a result, national insolvency laws are confined to provisions on the liquidator's power to conclude contracts or to exercise an option right, further to the continuation of obligations or to the privileged ranking of debts. Although such priority rights are capable of enhancing the respective restructuring or reorganisation efforts, they are not relevant for the realization of the insolvency liability regime. Since they are not linked to the *pari passu* principle, these rights are to be asserted outside insolvency proceedings like typical civil actions.⁶⁷⁵ If the jurisdictional rules of the Brussels I Regulation apply to this kind of liabilities and rights⁶⁷⁶, the liquidator will be in a position to conclude choice of court agreements in the interest of the insolvency estate.⁶⁷⁷ The same applies in principle to claims deriving from a contractual activity of the liquidator and forming part of the insolvency estate.⁶⁷⁸

⁶⁶⁹ See *Hefermehl*, in: MünchKomm-InsO, 2nd ed. (2007), § 53, para. 5 et seq.

⁶⁷⁰ Cf. in German Law: § 90 InsO.

⁶⁷¹ Cf. in German Law: § 54 InsO.

⁶⁷² Cf. in German Law: § 55 I No 1 and 2, 1st option InsO.

⁶⁷³ Cf. in German Law: § 55 I No 2, 2nd option InsO.

⁶⁷⁴ Also *Schlosser*, in: Festschrift F. Weber (1975), 395, 409; contra *Oberlandesgericht Zweibrücken*, 30 June 1992, 3 W 13/92, EuZW 1993, 165 et seq. (concerning the execution of a claim arising out of an agreement concluded between the insolvency practitioner and the debtor).

⁶⁷⁵ Cf. *Häsemeyer*, *Insolvenzrecht*, 4th ed. (2007), para. 14.03.

⁶⁷⁶ This must hold equally true for liabilities due to restitution for unjust enrichment of the insolvency estate, cf. in German Law § 55(3) No 3 InsO.

⁶⁷⁷ Also *Schlosser*, in: Festschrift F. Weber (1975), 395, 409; *Willemer*, *Vis attractiva concursus* (2006), 372 et seq.

⁶⁷⁸ However, *statutory* claims belonging to the insolvency estate and founded consequent on the opening of insolvency proceedings, such as unjust enrichment claims, could be assessed differently. Nonetheless, the *Oberlandesgericht Hamm*, 15 September 2011, 18 U 226/10, IPRax 2012, 251, left this issue open for a claim arising out of § 816(2) BGB. By contrast,

By contrast, disputes arising from a court approved settlement⁶⁷⁹ concluded between the bankruptcy trustee and individual creditors and dealing with the office holder's statutory power to sell the debtor's assets for inter alia the benefit of the general creditors are to be classified as falling under the jurisdiction of Article 3 EIR.⁶⁸⁰

(2) The costs of the insolvency proceedings (cost of legal proceedings and remuneration of the insolvency administrator⁶⁸¹) should be assessed differently as well. These debts serve a genuine insolvency-specific procedural purpose. In this regard, the classification of Article 4(2)(I) EIR and the proximity of the courts of the Member State in which insolvency proceedings are initiated justifies an annex jurisdiction by analogy to Article 3 EIR.⁶⁸²

4.2.5.3.9 Proceedings concerning the admissibility of execution measures into the insolvency estate or into the debtor's property

If a creditor executes in assets forming part of the estate (to be) subsequent to the insolvency petition or to the opening of insolvency proceedings, the (provisional) liquidator, a third-party debtor or – if appropriate – the debtor itself are entitled to challenge the admissibility of enforcement measures. The international jurisdiction is to be determined, as in the case of other types of actions, autonomously: National provisions conferring jurisdiction on the

(statutory) claims belonging to the debtor's estate but founded prior to the opening of insolvency proceedings do not fall within the exemption rule of Article 1(2)(b) Brussels I Regulation; in this regard also the French *Cour de Cassation* (Ch. Com.), 24 May 2005, *Consorts D'Auria v Perrota et SPC Mizon-Thoux*, ès qual., Rev.crit.DIP 2005, 489 et seq., further *Cour d'Appel de Lyon*, 20 May 2009, 08/04260, *Société Ketton Stone v. M. Z.*, INSOL EIR-case register: action, filed by the *commissaire à l'exécution du plan*, for payment arising out of a contract concluded by the debtor with a third party is governed by the jurisdictional rules of the Brussels I Regulation, Article 5(1)(b); cf. further *Corte di Cassazione* (sez. unite), 14 April 2008, No 9745, *Chantiers de l'Atlantique s.a. v. Fallimento Festival Crociere s.p.a.*, Il diritto del commercio internazionale 2008, 480 (Art. 23 Brussels I Regulation applies).

⁶⁷⁹ Cf. Article 25(1) subpara. 1, 1st sentence EIR.

⁶⁸⁰ English *High Court of Justice*, Queen's Bench Division, 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14: The proceedings instituted against the office holder sought damages for misrepresentation and/or breach of contract.

⁶⁸¹ Cf. in German law: § 54 InsO.

⁶⁸² Similarly *Willemer*, Vis attractiva concursus (2006), 374.

insolvency court over objections against enforcement measures⁶⁸³ should be disregarded.⁶⁸⁴

Although such actions are filed on the occasion of insolvency proceedings and in the interest of the general body of creditors, it seems more appropriate to apply the exclusive jurisdictional rule of Article 22(5) Brussels I Regulation.⁶⁸⁵ The principle that only the state in which enforcement measures take place is empowered to supervise its enforcement authorities underlies this rule – it prevents, irrespective of Article 25(1) EIR, infringements upon state sovereignty in the field of enforcement and, therefore, leaves the jurisdictional interests of the sued executing creditor unconsidered.⁶⁸⁶ Indeed, the *lex concursus* regulates in principle the effects of the opening of insolvency proceedings on individual enforcement measures, Article 4(2)(f) EIR. This does not apply, however, to creditors holding rights *in rem* and pursuing enforcement in another Member State than that of the opening of insolvency proceedings (for instance, over a pledged asset of the debtor)⁶⁸⁷: According to Article 5 EIR, the *lex situs* governs the enforceability of security rights in case of insolvency – in these significant situations, Article 22(5) Brussels I Regulation leads to a synchronization of *forum* and *ius*.

4.2.6 Exclusive or elective jurisdiction

4.2.6.1 Current legal situation

The classification-formula, as established by the ECJ, relates to the pleas submitted by the plaintiff, as specified by their legal basis and procedural form. Therefore, either the Brussels I Regulation *or* the EIR is exclusively

⁶⁸³ Cf. in German Law: § 89(3) InsO. The provision derogates from the jurisdiction of the court of execution with the purpose of achieving a higher degree of proximity to the facts of the case.

⁶⁸⁴ Assuming the jurisdiction of the German courts with reference to § 89(3) German InsO, the *Tribunal d'arrondissement de et à Luxembourg*, 24 October 2008, no 221/2008, overlooks this fact.

⁶⁸⁵ Handled differently by the Belgian courts according to the **Belgian** National Report.

⁶⁸⁶ *ECJ*, 26 March 1992, Case C-261/90, *Reichert/Dresdner Bank* [1992] ECR, I-2149, 2182, para. 26; *Mankowski*, in: Rauscher (ed.), *EuZPR/EuIPR* (2011), Art. 22, para. 54.

⁶⁸⁷ However, from the scope of Article 22(5) Brussels I Regulation are excluded proceedings producing an enforceable title, such as proceedings seeking acquiescence to the enforcement, or concerning contest of the debtor's transaction or the avoidance claims, to this see *Mankowski*, in: Rauscher (ed.), *EuZPR/EuIPR* (2011), Art. 22, para. 58.

applicable. *De lege lata*, an insolvency-derived action can, directly or by analogy, only be subject to the jurisdictional rule of Article 3 EIR: Due to its mandatory nature⁶⁸⁸, this provision applies to insolvency-related actions (by analogy) as well as to the opening of collective proceedings.⁶⁸⁹ Consequently, irrespective of whether the liquidator is plaintiff or defendant, insolvency-derived actions are subject to the principle of *vis attractiva concursus*; Article 3 EIR therefore establishes exclusive jurisdiction. Although the ECJ left this question open⁶⁹⁰, assuming exclusive jurisdiction is a necessary result of the fact that the *Gourdain*-formula is specified through objective *jurisdictional* criteria, but decides – one step ahead – upon the Regulations' *applicability*.⁶⁹¹

4.2.6.2 Policy options

However, as an alternative policy option one could principally envisage a (liquidator's) right of choice between the centralized jurisdiction of the courts of the Member State in the territory of which insolvency proceedings have been initiated on one hand and Article 2 Brussels I Regulation on the other.⁶⁹² On a *case-by-case basis*, this may enable the liquidator to benefit from the proximity of the seized court to the place of enforcement or an attractive

⁶⁸⁸ Cf. ECJ, 15 December 2011, Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, para. 27 ("exclusive jurisdiction" with regard to the collective proceedings), NZI 2012, 147.

⁶⁸⁹ If the liquidator, in disregard of Article 3(1) EIR, files an avoidance action before the courts of the Member State in which the defendant's domicile is located, the international jurisdiction of the court before which the defendant enters an appearance shall be excluded in accordance with the general legal concept laid down in Article 24, 2nd sentence Brussels I Regulation.

⁶⁹⁰ Cf. ECJ, 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "JadecLOUD-Vilma"*, NZI 2012, 469, para. 50 et seq. Nevertheless, the passage at para. 24 of the *Seagon*-decision in particular points at the interpretation of an exclusive jurisdiction: "*The possibility for more than one court to exercise jurisdiction as regards actions to set a transaction aside by virtue of insolvency brought in various Member States would undermine the pursuit of such an objective.*", ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767.

⁶⁹¹ Therefore, the delimitation between the EIR and the Regulation No 44/2001 is not comparable to the delimitation among the jurisdictional rules of the Brussels I regime. Whereas its basic types of jurisdiction (general, specific and exclusive) are in competition with each other within a *closed* jurisdictional system, the annex jurisdiction solely based on Article 3 EIR lies outside, i.e. without concurrent relation to the jurisdictional rules of the Brussels I Regulation.

⁶⁹² Taking this approach, a new Article 3a(1), sentence 2 EIR could be formulated as follows:
"The liquidator may also bring such an action [which derives directly from the insolvency proceedings and is closely linked with them] in the courts of the Member State within the territory of which the defendant is domiciled."

Regarding the alternative recommended formulation, see *infra* 4.2.10.

procedural or legal system as such⁶⁹³, whereas usually not from a parallelism of *forum* and *ius*⁶⁹⁴.

Nonetheless, at second glance, this approach appears less persuasive: First of all, an elective jurisdiction would only be relevant with respect to avoidance actions or similar (corporate) actions falling within the exemption rule of Article 1(2)(b) Brussels I Regulation. If the *actor sequitur forum rei*-principle applied cumulatively, this could contradict the interplay between the respective action and the insolvency liability regime⁶⁹⁵ without significantly improving procedural economy in the event that the office holder is acting as defendant⁶⁹⁶. On this premise, the values underlying the *Gourdain*-formula would be relativized, the foreseeability of the competent court be deteriorated.⁶⁹⁷

Rather, the exclusive character of the *vis attractiva* should be seen as the downside of sparing liquidators the obligation to take action in a foreign court⁶⁹⁸, whilst simultaneously profiting from facilitated recognition (Article 25(1) subpara. 2 EIR)⁶⁹⁹ and enforceability (under the forthcoming Brussels I regime). Finally: The problem of “torpedo actions” for negative declaratory relief brought for example by the debtor of an avoidance claim outside the state of the opening of proceedings can be countered by jurisdictional means,

⁶⁹³ Cf. *Vallens*, Recueil Dalloz 2009, 1311, 1314.

⁶⁹⁴ This is related to the general applicability of the *lex concursus* (Article 4 EIR). Article 13 EIR, for instance, has solely been designed as a veto rule in the interest of the person objecting against the invalidity of the act. The provision therefore does not entitle the liquidator to opt for a favourable law different from the *lex concursus*, cf. *Moss/Fletcher/Isaacs* (eds.), *The EC-Regulation on Insolvency Proceedings*, 2nd ed. (2009), para. 4.39.

⁶⁹⁵ For example, this is the case with the action for the determination of a lodged claim brought by the liquidator against an individual creditor domiciled abroad (cf. § 179(2) German InsO), see *supra* 4.2.5.3.3.

⁶⁹⁶ With regard to actions brought against the liquidator (representing the interests of the insolvency estate), the general jurisdiction of Article 2 Brussels I Regulation typically corresponds to the *vis attractiva concursus* pursuant to Article 3 EIR, provided that the general venue of the office holder is determined by the seat of the insolvency court (cf. § 19a German ZPO).

⁶⁹⁷ This is even more true if the jurisdictional rules of the Brussels I Regulation cumulatively applied as a whole.

⁶⁹⁸ This objective would be undermined if the jurisdictional rules of the Brussels I regime cumulatively applied as a whole and, following the principle of equality of arms, bilaterally, irrespective of the liquidator’s party role in the process.

⁶⁹⁹ Cf. *Legfelsőbb Bíróság* (Supreme Court of Hungary), 21 April 2011, Pfv. X.21.978/2010/5 szám, available at: <http://www.archive-hu.com> (last accessed on 20 November 2012).

that is to say by an exclusive head of jurisdiction at the debtor's centre of main interests.⁷⁰⁰

Article 18(2) EIR does not allow any other conclusion: By conferring upon the insolvency practitioner the (procedural) power to recover debtor's assets removed to the territory of another Member State, this exception rule solely protects the integrity and proper functioning of territorial proceedings as such.⁷⁰¹ Deducing jurisdictional consequences from a provision which invests the office holder with a specific legal entitlement does not seem to be a compelling argument. It is questionable why Article 18(2) EIR should be designed to fill a regulatory loophole in the context of a particular constellation, whereas the wording of Article 3(1) EIR has not even implemented the *vis attractiva*-principle for main insolvency proceedings.⁷⁰²

Although principally an alternative policy option, the introduction of a liquidator's unilateral right of choice between Article 3 EIR and the general jurisdiction set forth in Article 2 Brussels I Regulation will therefore not be recommended.⁷⁰³

4.2.6.3 Related claims and jurisdiction on the ground of connectedness

Criticism on the exclusive character of the *vis attractiva concursus*⁷⁰⁴ has mostly arisen with regard to its practical consequences arising in case of an accumulation of related claims: Should the plaintiff's plea be qualified as

⁷⁰⁰ Concerning this problem see *Thole*, ZIP 2012, 605 et seqq.

⁷⁰¹ See *Moss/Fletcher/Isaacs* (eds.), *The EC-Regulation on Insolvency Proceedings*, 2nd ed. (2009), para. 8.228; *Paulus*, EulnsVO, 3rd ed. (2010), Art. 18, para. 10 et seq.; cf. also *Riedemann*, in: Pannen (ed.), EulnsVO (2007), Art. 18, para. 38, 41.

⁷⁰² In this sense, however, *Machtinger*, ZIK 2009, 151; reluctant in turn: Advocate General R.-J. Colomer in his opinion in Case C-339/07 (*Seagon/Deko Marty*), 16 October 2008, para. 47.

⁷⁰³ In favour of an exclusive jurisdiction see *Gerechtshof Amsterdam*, 3 November 2009, LJN: BL8405, *Groet Houdstermaatschappij v. Conrads*, Jurisprudentie Onderneming & Recht (JOR) 2010, 244; further *Rechtbank Amsterdam*, 17 February 2010, *Liersch v. Subway international BV*, Jurisprudentie Onderneming & Recht (JOR) 2011, 155 referred to by the **Dutch** National Reporter. Left open by ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR, I-767, at para. 21 et seq. as well as in ECJ, 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB "Jadecloud-Vilma"*, NZI 2012, 469, para. 50 et seq.; further *Wessels*, *International Insolvency Law* (2012), para. 10606d; *Fumagalli*, IILR 2011, 460, 465.

⁷⁰⁴ See, for instance, *Oberhammer*, KTS 2009, 27, 47; *Hau*, KTS 2009, 382, 385; *Thole*, ZEuP 2010, 904, 924; *Stürner/Kern*, LMK 2009, 278572. Advocate General R.-J. Colomer adopts in his opinion in the Case C-339/07 (*Seagon/Deko Marty*), 16 October 2008, para. 65 the term of a "*relatively exclusive jurisdiction*" with reference to *Virgós/Garcimartín*, *The European Insolvency Regulation: Law and Practice* (2004), para. 97; cf. also the English *High Court of Justice*, Queen's Bench Division (Comm), 17 November 2011, *Polymer Vision R&D Ltd v. Van Dooren* [2012] I.L.Pr. 14, para. 88; *Stoecker/Zschaler*, NZI 2010, 757, 760 et seq.

directly relating to insolvency law on one hand and to civil law (company or tort law) on the other, the application of both the EIR and the Brussels I Regulation can, in particular cases, open jurisdiction over a single life situation to the courts of different Member States. This result has proven to be procedurally uneconomic – (regularly) not only for the liquidator as a plaintiff, but also from a defendant's perspective; moreover, incoherent judgments would certainly contravene the proper administration of justice in the European Union.

A preliminary question which was initially pending before the ECJ fits within this context.⁷⁰⁵ In civil proceedings instituted before the *Landgericht* (Appellate Court of) *Essen*, the liquidator based the claim for repayment to the insolvency estate on both insolvency avoidance⁷⁰⁶ and corporate rules, whereby the latter was not contingent upon the opening of insolvency proceedings.⁷⁰⁷

In view of the above, a reform is to be recommended *de lege ferenda*, including, in case of the accumulation of related claims, the power of the liquidator⁷⁰⁸ to file the insolvency-derived action optionally before the courts of the Member State within the territory of which the defendant is domiciled, if and to the extent to which said courts have jurisdiction over the connected claim in civil and commercial matters under the provisions of the Regulation No 44/2001.⁷⁰⁹ This jurisdiction on the ground of connectedness leaves to the liquidator greater room for strategic and operative manoeuvre with regard to the administration of the proceedings without obliging the defendant to appear before the courts located outside the Member State of his domicile.⁷¹⁰ At the

⁷⁰⁵ *Landgericht Essen*, 25 November 2010, 43 O 129/09, BeckRS 2011, 06041 as well as *Landgericht Essen*, 30 September 2010, 43 O 129/09, BeckRS 2011, 06042. However, the Appellate Court decided not to uphold the preliminary proceedings before the ECJ, cf. *ECJ*, 7 May 2012, Case C-494/10, *Dr. Biner Bähr als Insolvenzverwalter über das Vermögen der Hertie GmbH v. HIDD Hamburg-Bramfeld B.V.* 1, BeckRS 2012, 80987.

⁷⁰⁶ Cf. in German Law: §§ 143, 129, 135 InsO.

⁷⁰⁷ Cf. in German Law: §§ 30, 31 GmbHG old version.

⁷⁰⁸ The scope *ratione personae* of the proposed rule should be formulated unilaterally, i.e. from a liquidator's perspective. It is true that, in the event of reversed party roles, the accumulation rule could also result in a jurisdiction shifting, if, for instance, liability claims brought against the liquidator are based on breach of insolvency-specific duties as well as on tort. Nevertheless, in the few cases where the general venue of the liquidator differs from the debtor's centre of main interests, the accumulation rule would be of very little practical relevance.

⁷⁰⁹ Cf. also *Van Galen et al.*, INSOL Europe Proposals (2012), para. 3.21.

⁷¹⁰ Choice of forum clauses, binding upon the insolvency practitioner with regard to claims falling within the ambit of Regulation No 44/2001 (on this issue see *Bayerisches Oberstes*

same time, this relativizes the classification of insolvency-related actions in cases lying at the interface of insolvency, company or general civil law. The same principles should apply in the event that the liquidator files an insolvency-derived counterclaim before a foreign *forum*.⁷¹¹

The connectedness of concurrent claims should be modeled upon the wording of Article 6 No 1, 28(3) of the Brussels I Regulation. According to Article 28(3), actions are deemed to be related,

“when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

In such cases, a basically homogenous life situation would be sufficient.⁷¹²

4.2.7 Annex proceedings related to secondary or territorial insolvency proceedings

The ECJ has established the principle of a European *vis attractiva concursus* with regard to actions linked to main insolvency proceedings. Admittedly, there is no apparent reason why the concentration of jurisdiction shall not apply accordingly to actions deriving directly from secondary or territorial proceedings according to Article 3(2) and Article 3(4) EIR and being closely

Landesgericht, 9 March 1999, 1Z AR 5/99, NJW-RR 2000, 660, 661; further *Brinkmann*, IPRax 2010, 324, 329 et seq.), do not apply to insolvency-related actions, see *supra* 4.2.5.3.3. If, in the event of the accumulation of related claims, such a choice of forum clause gives jurisdiction to the courts of a Member State in which neither the defendant's domicile is located nor the insolvency proceedings were opened, the liquidator should, following the above mentioned approach, not be empowered to bring the insolvency-related action alternatively before these courts.

⁷¹¹ Also *Landgericht Detmold*, 5 January 2010, 6 O 3/09, BeckRS 2011, 19353 (insolvency derived counterclaim brought by the German liquidator against the Dutch plaintiff based on §§ 135(1) No 2, 129, 143(1) InsO); further *Virgós/Garcimartín*, The European Insolvency Regulation: Law and Practice (2004), para. 100.

⁷¹² Since Articles 6 No 1, 28(3) Brussels I Regulation do not presuppose the identity of the parties, these provisions are based on a narrower understanding of connectedness than the one necessary in the case of accumulation of related claims. In this procedural situation, an identical cause of action is deliberately not preconditioned as it is, in the context of the *Gourdain*-formula, relevant for the classification and, therefore, leads to the jurisdiction of courts in different Member States. With regard to the term “cause of action”, see *ECJ*, 8 December 1987, Case C- 144/86, *Gubisch Maschinenfabrik v. Palumbo* [1987] ECR I-4871, para. 14 et seq., concerning the delimitation of Article 5 No 1 und 3 Brussels I Regulation: *ECJ*, 27 September 1988, Case C-189/87, *Kalfelis v. Schröder u.a.* [1988] ECR I-5579, para. 19 et seq.

linked to them.⁷¹³ It is thereby preconditioned that the secondary administrator's right to contest the debtor's transactions arises from the facts coherently submitted by the plaintiff (doctrine of double pertinence of facts).

The Belgian *Tribunal de Commerce de Charleroi* decided on an avoidance action brought by the secondary insolvency administrator before the courts of the state of the opening of secondary proceedings and assumed international jurisdiction of the Belgian courts.⁷¹⁴ Since the defendant's domicile was located in Belgium, however, the Court did not respond to a *vis attractiva concursus* according to Article 3(2) EIR.

Should secondary proceedings be opened after the main insolvency administrator has initiated avoidance proceedings over an asset henceforth forming part of the insolvency estate of the secondary proceedings, there is no change of jurisdiction: Pursuant to the *perpetuatio fori*-principle, the initial proceedings are to be resumed by the secondary insolvency administrator as the new plaintiff.

4.2.8 Conflicting proceedings and decisions

According to their formal structure insolvency-related actions are "ordinary" civil proceedings. Therefore, neither the risk of conflicting decisions or competing proceedings involving the same subject matter nor the situation in which the right to be heard has been disregarded (e.g. in the course of the service) are excluded. Certainly: In contrast to its unclear wording, Article 26 EIR applies to annex actions in the sense of Article 25(1) subpara. 2 EIR and therefore encompasses grounds for non-recognition on the basis of public policy.⁷¹⁵ Apart from that, however, the EIR, being tailored to collective proceedings, is lacking from rules as provided for by Articles 27 et seq. Brussels I Regulation concerning conflicting proceedings in civil and

⁷¹³ See also *Stürner/Kern*, LMK 2009, 278572; contra *Mankowski/Willemer*, RIW 2009, 669, 678, preferring an elective jurisdiction with reference to Article 18(2), 2nd sentence EIR; against this argument see *supra* 4.2.6.2.

⁷¹⁴ *Tribunal de Commerce de Charleroi*, 14 September 2004, *SARL Bati France v. Alongi et crts*, *Revue Régionale de Droit*, 358 et seq. (action en déclaration d'inopposabilité).

⁷¹⁵ *Duursma-Kepplinger*, in: *Duursma-Kepplinger/Duursma/Chalupsky* (eds.), *EulnsVO* (2002), Art. 26, para. 15; *Paulus*, *EulnsVO*, 3rd ed. (2010), Art. 26, para. 4. This also includes violations of the right to be heard pursuant to Article 34 No. 2 Brussels I Regulation.

commercial matters; Article 16 EIR does not apply.⁷¹⁶ Nevertheless, there is no substantive reason why these provisions⁷¹⁷ should not be applied *mutatis mutandis* to annex actions.⁷¹⁸ It is therefore recommendable to include a corresponding reference in the recitals of the Regulation.⁷¹⁹

4.2.9 Annex proceedings against third state defendants on the example of avoidance actions

4.2.9.1 General remarks

Cross-border insolvencies concerning third states have not explicitly been regulated in the EIR. Only a few provisions marginally refer to this issue;⁷²⁰ for the rest, the autonomous national jurisdictional and recognition regime is applicable. The consensus view is as follows: In the event that the centre of a debtor's main interests is located in a third state, the territorial scope of the

⁷¹⁶ It would be conceivable that actions for the determination of a lodged claim involving the same cause of action (existence of the claim) are brought in parallel both in the main and in the secondary proceedings. Accordingly, this conflict of competence is to be resolved by applying Articles 27 et seq. Brussels I Regulation *mutatis mutandis*.

⁷¹⁷ Even though annex actions fall within the exclusive jurisdiction, Article 35(1) Brussels I Regulation is not applied *mutatis mutandis*. This would be contrary to the predominant interpretation of Article 26 EIR, according to which jurisdiction may not be reviewed on the basis of public policy, cf. Laukemann, IPRax 2012, 207, 210 et seq. However, recognition may be refused assuming that the subject matter does not fall within the scope of the EIR, for the comparable problem in the framework of the Brussels I Regulation see Leible, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 35, para. 2; cf. further Thole, ZIP 2012, 605, 612. In this case, recognition is subject to Articles 34 et seq. Brussels I Regulation and Articles 25 et seq. EIR do consequently not apply.

⁷¹⁸ See also Leipold, in: Festschrift A. Ishikawa (2001), 221, 233; *ibid.*, in: Stoll (ed.), Vorschläge und Gutachten zur Umsetzung des EU-Übereinkommens über Insolvenzverfahren im deutschen Recht (1997), 185, 193, 199 (with regard to German International Insolvency Law). Contra Thole, ZIP 2012, 605, 610 et seq.

⁷¹⁹ *De lege lata*, this situation is different with regard to Article 34 No 3, 4 Brussels I Regulation since Article 25(1) subpara. 2 EIR intends to facilitate recognition compared to the Brussels I regime, cf. Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), para. 192; Ambach, Reichweite und Bedeutung von Art. 25 EuInsVO (2009), 157 et seq.; Mankowski, NZI 2010, 508, 509. However, avoiding conflicting decisions involving the same cause of action between the same parties constitutes a fundamental principle of European procedural law and should therefore outweigh the regulative objective laid down in Article 25(1) subpara. 2 EIR, which is to accelerate the administration of insolvency proceedings. For these reasons, irreconcilable decisions over insolvency-related claims, although rarely present in insolvency law, should be circumvented *de lege ferenda*, by establishing a priority rule modelled on Article 34 No. 4 Brussels I Regulation.

⁷²⁰ Cf. Articles 13 and 15 EIR which explicitly refer to the legal order of a Member State. Article 3 EIR also covers debtors which are nationals of third states or have been founded there but have their COMI within the territory of the EU.

Regulation would not be opened.⁷²¹ On the other hand, if the COMI is situated in an EU Member State, there exists disagreement on whether the Regulation's applicability *ratione loci* presupposes cross-border implications with another Member State or whether a simple connection to third states suffices.⁷²² This problem discussed with regard to the opening of *collective* proceedings equally concerns insolvency-related actions, although in different terms. Compared to collective proceedings, the defendant's protection guaranteed in civil procedure on the basis of the *actor sequitur forum rei*-principle enunciated in Article 2 Brussels I Regulation is of paramount importance and can thus only be ousted by overarching jurisdictional, i.e. insolvency-specific interests in this context. This particularly holds true for third-state defendants devoid of any sufficient connection to the state of the opening of insolvency proceedings.

As mentioned above, the ECJ has assumed, with regard to insolvency-related actions, a centralised jurisdiction of the courts of the state within the territory of which insolvency proceedings were opened. The Court's reasoning, which is based on the insolvency-specific purpose of such actions as well as on the regulatory purpose of improving the efficiency and accelerated administration of cross-border insolvencies (cf. recitals 2 and 8 EIR)⁷²³, can equally be applied to avoidance actions against defendants domiciled outside the EU.⁷²⁴ If, however, the *vis attractiva concursus*-concept is supposed to prevent unlawful *forum shopping* and thereby ensure the proper functioning of the internal market⁷²⁵, this regulatory objective may only apply to insolvency proceedings with cross-border elements to both third states and to other

⁷²¹ Cf. recital 14 EIR; *inter alia* see Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), para. 11, 44(a); Paulus, EulnsVO, 3rd ed. (2010), Intr., para. 34.

⁷²² In favour of a *qualified* connection to third states: Duursma-Kepplinger, in: Duursma-Kepplinger/Duursma/Chalupsky (eds.), EulnsVO (2002), Art. 1, para. 5; Pannen, in: Pannen (ed.), EulnsVO (2007), Art. 1, para. 120 et seq. In favour of a *simple* connection: High Court of Justice, Chancery Division Companies Court, 7 February 2003, 0042/2003, *In re BRAC Rent-A-Car International Inc* [2003] EWHC 128; Huber, ZJP 114 (2001), 133, 138 et seq.; Konecny, in: Smid (ed.), Neue Fragen des deutschen und internationalen Insolvenzrechts (2005), 106, 110 et seq.

⁷²³ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR I-767, para. 22.

⁷²⁴ Cf. the German *Bundesgerichtshof*, 21 June 2012, IX ZR 2/12, BeckRS 2012, 15722, para. 7 with note Laukemann, LMK 2012, 339261.

⁷²⁵ ECJ, 12 February 2009, Case C-339/07, *Seagon v. Deko Marty Belgium* [2009] ECR I-767, para. 23 et seq.

Member States. Therefore, general concerns regarding the unilateral extension of the EU's jurisdictional regime do not necessarily result from the fact that this might lead to tensions in international legal relations and jeopardize the recognition of the Members States' decisions abroad.⁷²⁶ Usually, protection against exorbitant jurisdictional rules is granted through rules of indirect jurisdiction as well as by means of a public policy exception⁷²⁷ or, where appropriate, through granting reciprocity⁷²⁸. Instead, the *vis attractiva concursus*, as a jurisdictional instrument for insolvency-related actions, as well as the criteria for its interpretation as established in the case law of the ECJ are far from common practice or widely recognised – for instance, the autonomous German international insolvency law does not provide for an annex jurisdiction over insolvency related actions initiated in Germany.⁷²⁹ Against this backdrop, the obligation of defendants domiciled in third states to appear before the courts within the EU has to meet particularly high requirements as set out by the principle of fair trial embodied in Article 6 ECHR.⁷³⁰

⁷²⁶ This argument is shared by the German *Bundesgerichtshof*, 27 May 2003, IX ZR 203/02, NZI 2003, 545 (para. 3) with regard to an avoidance action of a German insolvency administrator against a defendant domiciled in Thailand, though prior to the entry into force of the EIR. Nonetheless, the *BGH* has not reiterated this argument in its recent preliminary question of June 21, 2012 despite its (principally) critical stance toward the applicability of the EIR to cases related to third states.

⁷²⁷ In this way, the German autonomous Insolvency Law, § 343(1), 2nd sentence InsO.

⁷²⁸ In German Law: § 328(1) No 5 ZPO. Against a recognition on the basis of reciprocity see *Trunk*, Internationales Insolvenzrecht (1998), 279 et seq.; with regard to decisions for the opening of insolvency proceedings: *Bundesgerichtshof*, 27 May 1993, IX ZR 254/92, IPRax 1993, 402, 403.

⁷²⁹ Therefore, neither § 3 InsO nor § 19a ZPO is applicable. Solely the trial courts pursuant to §§ 12 et seqq. ZPO are competent. In addition, the recognition of foreign annex actions is governed by § 328 ZPO, but not by Article 25(1) subpara. 2 EIR or § 343 InsO, see *Reinhart*, in: MünchKomm-InsO, 2nd ed. (2008), § 343, para. 57 et seq.; *Kemper/Paulus*, in: Kübler/Prütting/Bork (eds.), InsO (8/2008), § 343, para. 24, 26; *Trunk*, KTS 1994, 33, 40; *ibid.*, Internationales Insolvenzrecht (1998), 279; *Leipold*, in: Stoll (ed.), Vorschläge und Gutachten zur Umsetzung des EU-Übereinkommens über Insolvenzverfahren im deutschen Recht (1997), 185, 199.

⁷³⁰ With regard to third state defendants, it may currently occur that the law governing the transaction is that of a non-EU Member State. In this event, several legal scholars militate for the applicability of the *lex concursus*, thereby rejecting the scope of Article 13 EIR, see *Moss/Fletcher/Isaacs* (eds.), The EC-Regulation on Insolvency Proceedings, 2nd ed. (2009), para. 4.38. However, following this approach, would mean not to meet the expectations of the counterparty protected by Article 13 EIR. Against a *vis attractiva concursus*, even though before the entry into force of the EIR (*obiter dictum*): *Corte di Cassazione*, 7 February 2007, No 2692, *Banca agricola commerciale della Repubblica di San Marino v. Fallimento Mirone*, Il foro italiano 2007, 2815 et seq. Concerning the Brussels I Regulation see *Schlosser*, in: Festschrift A. Heldrich (2005), 1007, 1008 et seqq.

4.2.9.2 Annex jurisdiction in cases related to third states?

If Article 3 EIR, however, applied in such circumstances both to collective proceedings and insolvency-related actions without a perceptible qualified connection to another EU Member State⁷³¹, this could turn out to be fruitless for the insolvency practitioner acting as plaintiff. The relationship between Germany and Switzerland provides a prime example, notably when insolvency proceedings are opened in Germany and the liquidator succeeds in a lawsuit before German courts concerning an avoidance claim against a defendant domiciled in Switzerland.⁷³² In such cases, the applicability of Article 3 EIR⁷³³ would by no means guarantee that the liquidator can take possession through coercive measures of sold, transferred or relinquished assets belonging to the liable property. In Switzerland, foreign judgments on avoidance actions are neither recognised nor enforced. According to the jurisprudence of the Swiss Supreme Court such decisions do not fall within the scope of the Lugano Convention (Article 1(2) No. 2), following the ECJ's interpretation of Article 1(2)(b) of the Brussels I Regulation⁷³⁴, and are not subject to the recognition rules of the autonomous Swiss Law on civil matters (Article 25 et seq. IPRG) or on the opening of insolvency proceedings (Article 166 IPRG).⁷³⁵ Rather, the foreign liquidator is, on the basis of local law, obliged to sue the defendant of the avoidance action in Switzerland before the courts of his domicile (Article 171 IPRG in conjunction with Article 285 et seq.,

⁷³¹ In this regard i.a. *Haubold*, EuZW 2003, 703, 704; *Willemer*, Vis attractiva concursus (2006), 107.

⁷³² Such is the case giving rise to the preliminary question of the *Bundesgerichtshof*, 21 June 2012, IX ZR 2/12, ZIP 2012, 1467 [Case C-328/12] with note *Laukemann*, LMK 2012, 339261.

⁷³³ The jurisdiction *ratione loci* of the German courts is based on § 19a ZPO in conjunction with § 3 InsO, Article 102 EGIInsO applicable by analogy to the jurisdictional rules for the opening of insolvency proceedings (for the latter see *Bundesgerichtshof*, 19 May 2009, IX ZR 39/06, NZI 2009, 532, para. 21).

⁷³⁴ *Bundesgericht*, 15 December 2004, BGE 131 III 227 (avoidance action against a Polish defendant according to Swiss Law; the international jurisdiction of the Swiss courts derives from Article 289, 2nd sentence SchKG; *Bundesgericht*, 6 June 2003, BGE 129 III 683, 685, at E. 3 (avoidance action based on Austrian Law); *Bundesgericht*, 23 April 2007, BGE 133 III 386 (action for the determination of a lodged claim according to Article 250 SchKG [Kollokationsklage]), at E. 4; *Bundesgericht*, 23 December 1998, BGE 125 III 108 (exception rule of Article 1(2) No 2 Lugano Convention was not applicable); differently in case of a claim accumulation: *Obergericht Zürich*, 8 February 2005, ZR 105 (2006) No 2, para. 9 (tort, company and insolvency-related claims); further *Dasser*, in: *Dasser/Oberhammer* (eds.), *LugÜ* (2008), Art. 1, para. 82.

⁷³⁵ Cf. *Bundesgericht*, 6 June 2003, 5P 456/2002, BGE 129 III 683, 685, at E. 5 and 5.3.

289 SchKG).⁷³⁶ Principally⁷³⁷, the liquidator has *locus standi* to include the local assets in the foreign estate only if (i) he has previously obtained recognition of the foreign insolvency proceedings (Articles 166 et seqq. IPRG) and if (ii) the Swiss insolvency department as well as the privileged creditors have waived the avoidance claim in the local “secondary” proceedings.⁷³⁸ The declared objective is to grant a privileged status to creditors domiciled in Switzerland implemented by the principle of territoriality.⁷³⁹ This obviously increases the costs of insolvency administration and provides undesired incentives for the transfer of assets acquired under voidable transactions to safe third states⁷⁴⁰, particularly in the event that the liquidator depends upon public bodies in order to enforce his claim.⁷⁴¹

If the liquidator assigns the avoidance claim for consideration, the action of the assignee would, according to the ECJ ruling in *F-Tex*⁷⁴², (likely) fall within the scope of the Lugano Convention; pursuant to its provisions, such a decision is to be recognised.⁷⁴³ From a liquidator’s perspective, however, this action would only be possible or opportune in individual cases.

⁷³⁶ *Bundesgericht*, 26 October 2011, 4A 389/2011, BGE 137 III 631, 635 et seq., at E. 2.3.3 et seq.; *Berti*, in: Honsell/Vogt/Schnyder/Berti (eds.), *Basler Kommentar*, 2nd ed. (2007), Art. 171 IPRG, para. 12.

⁷³⁷ According to the *Obergericht Zürich*, 22 November 2011, LN 100041-O/U (at E. 5), this shall not apply to cases falling within the scope of the Convention between the Swiss Confederation and the Bavarian Kingdom of 11 May/27 June 1834, as according to Article 1(2) IPRG, Article 30a SchKG international treaties take precedence over the IPRG and the SchKG. Accordingly, a German decision opening insolvency proceedings is to be recognised and enforced *ipso iure*, i.e. irrespective of the proceedings laid down in Article 166 IPRG, and entails the divestment of the debtor’s estate in Switzerland. *Contra* with regard to the Convention on Insolvency proceedings between the Swiss Confederation and the Crown Württemberg of 12 December 1825/13 May 1826: *Bundesgericht*, BGE 135 III 666, 7 September 2009, 5A 134/2009 (at E. 3.1.3: Subsequent to the entry into force of the IPRG the recognition according to Article 166 et seqq. IPRG is still necessary). As for the relation between Switzerland and Austria, cf. *Bundesgericht*, 6 June 2003, 5P 456/2002, BGE 129 III 683, 686 (at E. 4).

⁷³⁸ *Bundesgericht*, 7 September 2009, 5A 134/2009, BGE 135 III 666, 668 (at E. 3.2.1) with further references.

⁷³⁹ Explicitly *Bundesgericht*, 26 October 2011, 4A 389/2011, BGE 137 III 631, 634, at E. 2.3.3.

⁷⁴⁰ Cf. also *Kuhn*, ZInsO 2010, 607, 611, who refers to the risk of transferring the defendant’s residence to Switzerland after the avoidance judgment became legally binding.

⁷⁴¹ In German Law, the claim for restitution of movable objects sold under a voidable transaction is enforced in accordance with §§ 894, 897 ZPO. This also requires that the attachment is effected by the bailiff (*Gerichtsvollzieher*) for the purpose of delivering the object to the creditor.

⁷⁴² See *ECJ*, 19 April 2012, Case C-213/10, *F-Tex SIA v. Lietuvos-Anglijos UAB “Jadecloud-Vilma”*, NZI 2012, 469.

⁷⁴³ Subject to Article 1 Protocol No 2 of the Lugano Convention (2007), courts shall pay due account to the principles of the ECJ ruling on the Brussels I Regulation when applying and interpreting the Convention’s provisions.

The liquidator may only solve this recognition and enforcement dilemma if either the declaration of intent is deemed to have been made as soon as the avoidance judgment has attained legal force⁷⁴⁴ or the office holder is able to enforce the titled claim in *other* assets of the defendant which are located in the state within the territory of which insolvency proceedings were opened or in any other EU Member State (cf. Article 25(1) subpara. 2 EIR)⁷⁴⁵. In such cases, a centralised annex jurisdiction pursuant to Article 3 EIR would create a “European enforcement area”. In support thereof, it could be argued that avoidance claims are to be examined in ordinary court proceedings; but only through enforcing the claim may the insolvency liability order be implemented.⁷⁴⁶ Against this background, an annex jurisdiction would dispose of a stronger legitimating force compared to the exorbitant jurisdiction of assets provided for in national procedural laws: On this basis, decisions rendered in civil matters against third state defendants (i.e. concerning the insolvency-related right to separate satisfaction) do not fall under the jurisdictional regime of the Brussels I Regulation, but are, pursuant to Article 4, subject to its recognition rules.⁷⁴⁷

⁷⁴⁴ In this regard, § 894 ZPO applies when the avoidance claim is directed to the restitution of movable objects sold under a voidable transaction or to the consent in a right *in rem*-cancellation (§ 1183 BGB; § 843 ZPO), cf. *Bundesgerichtshof*, 11 January 1990, IX ZR 27/89, NJW 1990, 990.

⁷⁴⁵ This is the case if the restitution of the asset acquired under voidable transaction is impossible *in natura* (which is regularly true for the restitution of sums of money) or the defendant is in default of restitution. All assets of the defendant are liable for satisfying claims for compensation for value (§ 143(1), 2nd sentence InsO, §§ 819(1), 818(4), 292, 989 BGB) or for damages for delay in performance (§§ 280(2), 286 BGB), see *Kirchhof*, in: MünchKomm-InsO, 2nd ed. (2008), § 143, para. 21, 24, 30, 39, 74.

⁷⁴⁶ *Paulus* deduces from Article 2(g) EIR that avoidance claims are not located within the territory of a Member State and, therefore, do not fall within the scope of the EIR if the COMI of the claim’s debtor is situated in a third state, *Paulus*, EulnsVO, 3rd ed. (2010), Art. 13, para. 7; Art. 2, para. 23. It is, however, less convincing to draw jurisdictional conclusions on the basis of this provision. The *lex concursus* determines the assets belonging to the estate, Article 4(2)(b)EIR; this equally applies to avoidance claims. Their subject-matter consists of transactions diminishing the liable property of the insolvent debtor and thereby objectively affecting the general body of creditors. Therefore, it seems likely not to link avoidance claims to the state of the defendant’s COMI, but rather to the one in which the insolvency estate is located. The question of whether an avoidance claim forms part of the estate of the main or secondary proceedings should be answered in a similar way. The claim should thereby be allocated to the estate to which the voidable transaction, which is determined not only from a purely legal, but also an economic point of view, appears to have the closest link, cf. *Kirchhof*, in: MünchKomm-InsO, 2nd ed. (2008), § 143, para. 21.

⁷⁴⁷ Cf. *Mankowski*, in: Rauscher (ed.), EuZPR/EuIPR (2011), Art. 4, para. 2a, 4a. With a critical perspective: *Siehr*, in: Festschrift A. Heldrich (2005), 1045, 1050 et seq. with further references.

With respect to avoidance actions against third state defendants, however, it could also be envisaged to adopt an approach which strikes a balance between the applicability of autonomous national law on one hand and an annex jurisdiction with no further connection to any Member State on the other: Accordingly, jurisdiction pursuant to Article 3 EIR could only be assumed if the asset to be restituted is located in a EU Member State, not necessarily in one within the territory of which insolvency proceedings were opened.⁷⁴⁸ In such circumstances, the relevant date shall be deemed to be the performance of transaction, alternatively the filing of the insolvency petition or the opening of insolvency proceedings.⁷⁴⁹ This would equally apply if the asset's restitution *in natura* is impossible and other assets⁷⁵⁰ of the defendant are therefore liable for the satisfaction of the secondary claim.⁷⁵¹ The liquidator would thus have the option to file the avoidance action either before the third state's courts of the defendant's domicile, or before the courts of the Member State in the territory of which insolvency proceedings are opened on the basis of Article 3 EIR. However, this would mean an *ex officio* clarification of where the respective asset was located at the relevant time.

Since a preliminary ruling procedure regarding international jurisdiction for annex actions against third state defendants is currently pending before the ECJ⁷⁵² we do not recommend any respective clarifications of the EIR. Nevertheless, in the context of a subsequent reform process the awaited (and all further) decisions should be taken as an opportunity to issue a comprehensive revision not only of annex but also of collective proceedings related to third states.

⁷⁴⁸ The Member State in which the asset is situated should be relevant with regard to the restitution of tangible property; the Member State under the authority of which a public register is kept with respect to property and rights that have to be entered in those registers mandatorily, cf. Article 2 lit. g) EIR. As for the reassignment of claims, the connecting factor is the centre of the debtor's main interests, for the restitution of shares the COMI of the company, cf. *Paulus*, *EuInsVO*, 3rd ed. (2010), Art. 2, para. 17 et seq.

⁷⁴⁹ Should the date of the performance of transaction be deemed relevant, the incentive for a transfer of property outside the EU would be undermined.

⁷⁵⁰ Insolvency claims located in the state of the debtor's COMI should not be taken into consideration.

⁷⁵¹ Cf. § 143(1), 2nd sentence InsO. Indeed, this would presuppose that the EIR should also apply to *collective* proceedings exclusively connected to third states.

⁷⁵² *Bundesgerichtshof*, 21 June 2012, IX ZR 2/12, ZIP 2012, 1467 [Case C-328/12] with note Laukemann, LMK 2012, 339261.

4.2.10 Recommendations

1. Judgments on civil actions are to be classified as insolvency-related when they derive directly from insolvency proceedings and are closely linked to them. This delimitation formula, as established by the ECJ in *Gourdain v. Nadler*, reiterated in 2009 in *Seagon v. Deko Marty* for jurisdiction under the EIR and codified in Article 25(1) subpara. 2 EIR with regard to recognition should explicitly be regulated in a new Article 3a determining international jurisdiction over insolvency-related actions. This new provision should thereby apply irrespective of whether the action is related to main, secondary or territorial proceedings.
2. *A vis attractiva concursus* within the meaning of Article 3a new version is justified, on one hand, in case its purpose is to improve the efficiency and to accelerate the administration of cross-border insolvency proceedings and provided it does not infringe predominant general jurisdictional interests. On the other hand, the respective action should serve an insolvency-specific procedural purpose, i.e. it should aim at protecting the rights of the general body of creditors by adjusting rules and principles of general civil law or other areas of substantive law or by compensating insolvency-conditioned detriments. A corresponding formulation should be adopted as new sentence 3 in recital 6 of the EIR.⁷⁵³ Additionally, the passage “*In accordance with the principle of proportionality this Regulation should be confined to provisions*” in recital 6 sentence 1 should be replaced with: “*This Regulation should encompass provisions on the jurisdiction*” [...].
3. Article 3a new version should provide for an exclusive jurisdiction of the courts of the Member State in which insolvency proceedings are initiated. Exceptionally, in case of the accumulation of related claims the liquidator should be entitled to file the insolvency-derived action optionally before the courts of the Member State within the territory of which the defendant is domiciled, if and to the extent to which said courts have jurisdiction over the connected claim in civil and commercial matters under the provisions

⁷⁵³ It seems not to be advisable, however, to enumerate individual insolvency-related actions within the recitals of the EIR.

of the Regulation No 44/2001. The same should apply if the liquidator files an insolvency-related counterclaim before a foreign *forum*.

4. Therefore, the following formulation is recommended for the new Article 3a EIR:

Article 3a

Jurisdiction over insolvency-related actions

- (1) The courts of the Member State, within the territory of which insolvency proceedings have been opened in accordance with Article 3, shall have exclusive jurisdiction over an action which derives directly from the insolvency proceedings and is closely linked with them.*
- (2) Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the liquidator may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled, provided that these courts have jurisdiction pursuant to the rules of the Regulation No 44/2001.*
- (3) For the purpose of this Article, actions are deemed to be related if they are so closely connected that it is expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

5 Groups of Companies

5.1 The Problem

5.2 General

5.2.1 Status Quo: No Specific Provisions in the EIR

The legislator of the EIR decided not to include specific provisions dealing with group of companies issues.⁷⁵⁴ As will be shown below, this, however, does not mean that the EIR does not have specific legal consequences in insolvency scenarios involving groups of companies.⁷⁵⁵ The fact that the EIR does not contain express provisions on group of companies issues was heavily criticised by a number of authors.⁷⁵⁶ As a matter of fact, the coordination of group insolvencies causes significant problems in practice and is, therefore, of course a matter worth taking into consideration with respect to the reform of the EIR.

5.2.1.1 The Need for Legislation

This is especially true for cases where group companies conduct a more or less integrated business, that is to say that one business is conducted by a number of companies which have divided the different tasks among themselves. A typical (but of course not the only) example would be a scenario where a parent company is manufacturing goods while subsidiary companies in different countries are responsible for the distribution of these goods.⁷⁵⁷ As long as no insolvency proceedings have been opened, the fact that different legal entities cooperate in such situations is often rather

⁷⁵⁴ See *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), note 180.

⁷⁵⁵ See below in this chapter.

⁷⁵⁶ See e.g. *Hirte*, ECFR 2008, 213 (214); see also *Paulus*, *RabelsZ* 70 (2006), 458 (459); *Paulus*, *ZIP* 2005, 1948 (1950); *Mevorach*, 15 *Norton Journal of Bankruptcy Law and Practice* (October 2006), 5 Art. 1.; *Stadler*, *International Jurisdiction under the Regulation 1346/2000/EC on Insolvency Proceedings*, in: *Stürner/Kawano* (ed.), *Cross Border Insolvency, Intellectual Property Litigation, Arbitration and Ordre Public* (2011), 13 (25).

⁷⁵⁷ See, e.g., the *Rover* case, *High Court of Justice Birmingham*, 30.3.2006, *NZI* 2006, 416, annotated by Mankowski.

irrelevant for the actual reality of the business. In many cases, such subsidiary companies have a similar function as an establishment, and the management of the subsidiary company is identical with the management of the parent company or handled by one of the executives of the parent company. All this happens on the basis of the relevant corporate law, i.e. the organisational framework of company law provides for the coordination of the group by ensuring the dominant influence of the parent company over the subsidiary company.

As soon as insolvency proceedings are opened against a subsidiary company, this organisational framework of company law does not function any longer, as insolvency law normally dramatically reduces the influence of both the shareholder and the management in the company, as the liquidator takes over the business. In such a situation, the liquidator of the subsidiary company is under an obligation to follow the rules of the relevant insolvency law, which can result in a situation that is detrimental to the functioning of the business as a whole. For example, the parent company (or in the case of an insolvency of the parent company, its liquidator) is interested in staying in the market where the subsidiary company is distributing the goods produced by the parent company, while the liquidator of the subsidiary company might be inclined to get rid of the stock and to shut down the subsidiary company as soon as possible in order to obtain proceeds in the interest of the creditors of the subsidiary company within a reasonable period of time. Such scenarios are an obvious impediment to effective liquidation or recovery of the business as a whole or for simply keeping the entire business going with a perspective of a sale of the business as a whole at a later stage. Such problems can, of course, also occur within one national system, but they are even more dramatic when it comes to transnational cases where the coordination of different insolvencies is always a difficult task. Therefore, the group of companies issue is part of the overall coordination issue discussed above.

5.2.1.2 Groups of Companies Come in All Shapes and Sizes

However, while it is easy to demand a solution from the European legislator in this context on a very general level, the actual creation of such a solution has to face obvious problems both from a factual and from a legal perspective:

The example of the parent company producing goods and the subsidiary company distributing them in a specific country must not create the impression that all potential cases are as obvious as this one; on the contrary, groups of companies come in all shapes and sizes. A fully integrated business with wholly-owned subsidiary companies is only one example of the relevant groups. In many cases, however, not all companies involved are operative companies because quite often holding or intermediary holding companies play a significant role. In particular, but not only in such cases, the corporate structure will not necessarily reflect the business reality because the holding company does not always have the function of a “head office” for the entire group; quite often, such holding companies are mere investment vehicles or have been set up and located in specific jurisdictions for, e.g., tax or regulatory reasons.

In addition, it has to be taken into account that not all companies involved necessarily have their COMI in a Member State. This is less complicated where only one of a number of subsidiary companies is situated in a non-Member State; however, a situation where parent, holding or intermediary holding companies have their COMI in a non-Member State can create very complicated coordination scenarios and situations which cannot be handled by European law. Such scenarios are quite frequent in practice, as many companies in Member States have a parent company, e.g., in Asia, the US, Switzerland or certain “offshore” locations outside the EU.

Moreover, not all companies involved necessarily have to be insolvent. In this context, all kinds of scenarios are conceivable and do occur in practice: There are cases where actually all group companies become insolvent, there are cases where only the subsidiary companies are insolvent, and there are also cases where only the parent company or an intermediary company is insolvent – at least for the time being. In many practical cases the insolvency of one group company results in consequential insolvencies of other group companies only after a significant period of time.

In addition, not all groups of companies simply consist of wholly-owned subsidiary companies. This happens even where there is only one ultimate shareholder, but causes specific problems with respect to the coordination of

insolvency proceedings where different shareholders are involved on different levels of the group of companies. For example, in the *Eurotunnel* case⁷⁵⁸, proceedings against French and English companies were opened by French courts in France on the basis of a group COMI approach although the group had two actual holding companies, one of them registered in France, the other in the UK. It is hard to see how, in such a situation, a group COMI can simply be located in one of the two Member States involved.

Finally, all these and other factors may become relevant (and actually do become relevant in practice) at the same time. In such situations, it is obvious that the lesson one might have learnt from the simple case outlined above (i.e. the wholly-owned subsidiary distribution company) cannot simply be applied to such scenarios.

5.2.1.3 Respect Company Law

There are also important legal factors that need to be taken into account in this context and that might make “simple, but perfect solutions” impossible here.

Even within their national insolvency systems, not all Member States have developed approaches to group of companies issues. Moreover, the solutions differ widely from one country to another. While, for example, French law allows to some extent the extension of the parent company’s insolvency proceedings to a subsidiary company⁷⁵⁹; German law, for example, is based on a strict separation of the relevant legal entities and it is even disputed whether, within Germany, one liquidator may administrate both the parent and

⁷⁵⁸ See *Tribunal de Commerce de Paris*, 2.8.2006, INSOL EIR-case register Nr. 142 (Mailly); see also *Pannen*, European Insolvency Regulation, Appendix to Art 3 para 11.

⁷⁵⁹ Article L. 641-1 of French Code de commerce (Commercial Code) refers to Article L. 621-2 of the same Code which, in the version resulting from Law No 2005-845 of 26 July 2005 on the protection of undertakings provides: ‘The competent court will be the Tribunal de commerce (Commercial Court) if the debtor is a trader or he is registered with the craftsmen’s register. The *Tribunal de grande instance* (High Court) shall be competent in other cases. One or more other persons may be joined to opened proceedings where their property is intermixed with that of the debtor or where the legal entity is a sham. The court that has opened the initial proceedings shall remain competent for this purpose.’ See for the inadmissibility of such an extension of insolvency proceedings to another company irrespective of Art. 31 EIR ECJ., *Rastelli v Hidoux* 15.12.2011, (C-191/10).

the subsidiary company because of potential conflicts of interest.⁷⁶⁰ (In *Rastelli*, the ECJ expressly pointed out that the possibility to join another legal entity to insolvency proceedings without considering where the centre of an entity's main interests is situated “*would constitute a circumvention of the system established by the Regulation*”.⁷⁶¹)

For this reason, there is absolutely no general consensus among the Member States on what is the “best practice” with respect to group of companies insolvencies. Therefore, there is also no generally accepted national solution which could serve as a model for European legislation.

Above all, the relation between international insolvency law and the applicable corporate law needs to be taken into account in this respect: In particular, but not only, the rules on liability for debts provided for under the national company laws are actually provisions designed for insolvencies, as such liabilities almost only ever become relevant when one of the companies involved becomes insolvent. In this respect, there are not only enormous differences between the different national company law systems, but also significant differences between the rules relating to different types of companies within the national systems. In some cases, the relevant corporate law provides for the full liability of the parent company for the subsidiary company's debts; in other cases, there is a strict separation between the debts of the subsidiary company and the debts of the parent company; and there are many different rules in very specific situations where a “piercing of the corporate veil” may apply with the result that, as an exception, the parent company becomes liable for the subsidiary company's debts.

Such rules specifically designed for insolvency scenarios must not be overruled by a more or less parallel structure of (international) insolvency law ignoring these rules, especially, but not only, as these rules are the actual basis for legitimate expectations of the creditors of the companies involved. International insolvency law must not create a “voodoo corporate law” by

⁷⁶⁰ See Haas, in: Gottwald (ed.), *Insolvenzrechtshandbuch*, (4th ed. 2010), § 95 para. 2; Ehricke, in: Arbeitskreis für Insolvenzwesen Köln e.V. (ed.) *Kölner Schrift zur Insolvenzordnung*, (3rd ed. 2009), Chapter 32 para. 36-42; see, however, Graeber, NZI 2007, 265 et seqq.; Paulus, ZIP 2005, 1948 (1951); Verhoeven, *Die Konzerninsolvenz* (2011), 260 et seqq.; see also Laukemann, *Die Unabhängigkeit des Insolvenzverwalters* (2010), 191 et seqq., 376 et seqq.

⁷⁶¹ See *Rastelli* at para. 28.

providing for a primitive “one business, one estate” solution. It might be suggestive at first sight to believe that complicated group of companies issues can be resolved by a substantive consolidation creating one group of “group creditors” being entitled to payment from the proceeds of the “group estate”⁷⁶², but this would simply ignore the multifaceted and intricate provisions of national company law which were developed over a long period of time in order to provide for well-balanced and fair solutions in the individual cases. In this context, the *ECJ* correctly held that European insolvency law must respect the existence of different legal entities under the laws of the Member States.⁷⁶³

All this is made even more complicated because the scope of the *lex fori concursus* is subject to disputes and legal uncertainty in many relevant situations; the delineation between the *lex fori concursus* under Article 4 EIR and the rules of applicable insolvency-related corporate law is very often a highly difficult task. A typical example would be the German “*Eigenkapitalersatzrecht*”, where it was heavily disputed whether it belongs to insolvency law or to corporate law.⁷⁶⁴ Note that an extension of the scope of the *lex fori concursus* (Article 4 EIR) in matters relating to company law would be an obvious choice in order to improve the coordination of group of companies insolvencies in Europe. Note also, however, that such a task would go far beyond both the scope of this report and the present review of the EIR. In particular, it would require intensive research into the company laws of the Member States as such a strengthening of a dominant role of the *lex fori concursus* with respect to company law issues would basically result in a change of the rules on international company law and would significantly alter the relevant company law consequences of insolvency. Although all this

⁷⁶² See Moss/Paulus, *Insolvency Intelligence* 1 (2006) 1 et seqq. These authors suggest a substantive consolidation only for *situations in which a separation of assets within a group of companies would be unrealistic and difficult*; see also Bufford, *IILR* 2012, 341 et seqq.; see also “Insol-Draft”, Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al], p. 91; National Report Spain (Q 12).

⁷⁶³ See *ECJ*, 2.5.2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813, para. 30 and Opinion of Advocate General Jacobs, 27.9.2005, C-341/04, para. 117; *ECJ*, 15.12.2011, C-191/10 *Rastelli v Hidoux*, para. 25.

⁷⁶⁴ Haas, *NZI* 2001, 1 et seqq.; Bork, *ZGR* 2007, 250 et seqq.; Gottwald/Kolmann, in: Gottwald (ed.) *Insolvenzrechtshandbuch*, (4th ed. 2010), § 132, para. 100.

relates to international insolvencies, this aspect should be discussed in the broader context of European company law.

Therefore, the reform of the EIR should not at all aim at a “substantive consolidation” with respect to groups of companies. In particular, the discussions at UNCITRAL clearly showed that such a “substantive consolidation” cannot at all be a general solution for such group issues.⁷⁶⁵ However, in the course of these UNCITRAL discussions it was argued that such a “substantive consolidation” could be a solution in specific cases where the assets of the group companies have been intermixed to a high degree. I believe that the opposite is true: In such situations, normally claims based on the violation of the company law applicable to the subsidiary company (e.g. on the basis of the allegation that such subsidiary company was stripped of its equity) and claims based on these detrimental acts play an important role. This does not at all indicate that the existence of separate legal entities should be ignored in such situations. Note that this approach is also in line with the findings of the *ECJ* in the *Rastelli* case⁷⁶⁶ where the *ECJ* held in para 39 that “*the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State*”. Moreover, it is generally accepted that the cooperation between the main and the secondary proceedings required under the EIR cannot result in a substantive consolidation of the estates involved.⁷⁶⁷

⁷⁶⁵ See United Nations Commission on International Trade Law, Working Group V (Insolvency Law), Thirty-eighth session, New York, 19-23 April 2010: UNCITRAL Legislative Guide on Insolvency Law, Part three, Treatment of enterprise groups in insolvency, para. 106, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V10/509/43/PDF/V1050943.pdf?OpenElement>.

⁷⁶⁶ See *Rastelli v Hidoux*, 15.12.2011, (C-191/10), EWIR 2012, 87, annotated by Paulus.

⁷⁶⁷ See *High Court of Justice, High Court of Justice, Chancery Division, Companies Court*, 18.1.2011, Case No. 11695/2009, *Ross David Connock and Patrick Michael Boyden (as the joint liquidators in England and Wales of Alitalia Linee Aeree Italiane S.p.A.) ./. Professor Avv Augusto Fantozzi*, [2011] EWHC 15 (Ch).

5.3 Ways to Improve Coordination

5.3.1 General

There are different possible ways to improve the coordination of transnational insolvency proceedings of groups of companies. On the one hand, one might draw upon the model of the coordination between main and secondary proceedings with the proceedings of the parent company being the “main proceedings” and the proceedings of the subsidiary company the “secondary proceedings”. On the other hand, one might also think of amending the rules of jurisdiction by adopting a “group COMI approach”. Both solutions are no alternatives, but could also be taken cumulatively.

5.3.2 Coordination between Insolvency Proceedings against Group Companies

5.3.2.1 General

Many situations resulting from group of companies insolvency scenarios are similar to the relation between the main and secondary proceedings under the EIR. As already outlined above, quite often subsidiary companies actually have a function which is similar to the one of an establishment. Moreover, the tools developed for the coordination between main and secondary proceedings might also be efficient for the coordination of proceedings within a hierarchy of group companies.⁷⁶⁸ As a matter of fact, practice has already adopted this approach in some cases where main proceedings against the subsidiary company were opened at the COMI of the parent company while secondary proceedings were subsequently opened at the registered office of the subsidiary company, as the situation in the state of the registered office of the subsidiary companies met the requirements of an establishment.⁷⁶⁹ I will deal with this in the context of the “group COMI” approach below.

⁷⁶⁸ See e.g. *Tollenaar*, IILR 2011, 252 et seqq.; see, however, below in this chapter.

⁷⁶⁹ See for example: *Local Court (Amtsgericht) Köln*, 23.1.2004, NZI 2004, 151; *Local Court (AG) Düsseldorf*, 12.3.2004, ZIP 2004, 623; *Tribunale di Milano*, 18.3.2004, *Criss Cross Communication Italy S.r.l.*, Eir-database, No. 7; *Local Court (AG) Düsseldorf*, 7.4.2004, *ISA Deutschland GmbH*, ZIP 2004, 866; *Local Court (AG) Mönchengladbach*, 27.4.2004, ZIP 2004, 1064, annotated by Bähr/Riedemann; *District Court (Landesgericht) Innsbruck*, 11.5.2004, ZIP

In this context, one must differentiate between the “soft” measures of improving cooperation and coordination between the main and secondary proceedings (in particular such as Article 31 EIR)⁷⁷⁰ and the specific powers of the main liquidator of the secondary proceedings even in cases where the creditors of the secondary proceedings or the liquidator of the secondary proceedings does not agree with the main liquidator (in particular such as Articles 33 and 34 EIR).

5.3.2.2 “Soft” Coordination

There is no reason not to improve the communication⁷⁷¹ and the more or less voluntary coordination and cooperation between the liquidators and the courts

2004, 1721, annotated by Bähr/Riedemann; District Court (Landesgericht) Klagenfurt, 2.7.2004, Zenith Maschinenfabrik Austria, EWIR 2005, 217 annotated by Beutler/Debus; Tribunal d'arrondissement de et à Luxembourg, deuxième chambre, 27.5.2005, Probotec Ltd., Insol Europe Database, Abstract No. 88; Komárom-Esztergom Megyei Bíróság (First Instance Court Esztergom), 5.6.2005, Insol Europe Database, Abstract No 35; Commercial Court (Handelsgericht) Wien, 20.7.2005, Collins & Aikman Products GmbH, www.edikte.justiz.gv.at; Commercial Court (Handelsgericht) Wien, 13.4.2006, EMTEC Magnetics ECE GmbH, www.edikte.justiz.gv.at; Tallinn District Court, 14.6.2006, OÜ SigMar Invest ./ Rapla Invest AB, Insol Europe Database, Abstract No. 62; Local Court (Amtsgericht) München, 5.2.2007, BenQ Mobile Holding B.V., ZIP 2007, 495; Nejvyšší soud České republiky, 31.1.2008, Václav Fischer ./ D.I. s.r.o., www.nsoud.cz; Tribunal d'arrondissement de et à Luxembourg, deuxième chambre, 28.3.2008, Immo Leu Real Estate SA ./ PIN Group AG, Insol Europe Database, Abstract No. 45; District Court (LG) Hannover, 10.4.2008, NZI 2008, 631 (this being criticised by Vallender, ZIP 2008, 2375); First instance court - Fővárosi Bíróság, Budapest, 17.9.2008, Insol Europe Database, Abstract No. 56 (Csöke); Curtea de Apel Oradea (Rumänien), 4.6.2009, Insol-Europe Database Abstract No. 172; District Court (LG) Salzburg, 25.8.2009, non ferrum Metallpulver Gesellschaft mbH, www.edikte.justiz.gv.at; District Court (LG) Salzburg, 25.8.2009, non ferrum Metallpulver Gesellschaft mbH & Co KG, www.edikte.justiz.gv.at; High Court of Justice, Chancery Division, 9.5.2012, Office Metro Ltd (formerly Regus Ltd), [2012] EWHC 1191 (Ch).

⁷⁷⁰ Another measure for administrative coordination within groups of companies could be the abovementioned appointment of one liquidator to administrate both the parent and the subsidiary company, see for such a suggestion: European Parliament, REPORT with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Committee on Legal Affairs (so called “Lehne Report”), part III, para. 1.C.; similar suggestions were made by several National Reporters and interview partners, see National Report Cyprus (Q 12); Finland (Q 12); The Netherlands (Q 12); Slovakia (Q 12); Slovenia (Q 12, provided that it is mandatory to appoint a local co-liquidator anyway). Finland (Q 12) additionally suggested to apply the Finish system of the Bankruptcy Ombudsman who supervises the insolvency proceedings also to group of companies scenarios. The National Report Germany (Q 12) instead refers to suggestions to appoint a neutral “coordinating administrator” or even the establishment of special courts with the competence to open, conduct and close insolvency proceedings over multinational groups of companies. For the introduction of a similar model of cooperation currently incorporated in the EIR for main and secondary proceedings see National Report The Netherlands (Q 12).

⁷⁷¹ First of all a duty to communicate / exchange information within group insolvencies is suggested, see Vallens, Revue des procédures collectives, May/June 2010, 25 et seqq. para. 18; National Report Czech Republic (Q 12); Greece (Q 12); Poland (Q 12). Many practitioners

involved in any group of companies scenario. Introducing such duties would be a valuable tool for the improvement of coordination within groups of companies in insolvency irrespective of the specific structure of the group. *I, therefore, strongly recommend the enactment of such provisions.*

5.3.2.3 Who Could Take the Lead?

The situation, however, is much more difficult with respect to provisions such as Article 33 and 34 EIR. Of course, a dominant role e.g. of the liquidator of the parent company could in particular improve the chances of corporate recovery with respect to the group as a whole here significantly. However, one also needs to take into account that the situation here is different from the relation between the main and the secondary proceedings under the EIR in a few very important aspects:

An establishment is not an independent legal entity and, therefore, there are no actual “establishment creditors”, but only creditors of one company who might have a legitimate interest in the opening of proceedings in the establishment state, only because, from a mere factual perspective, they did business “with the establishment”. Therefore, it is a decision of international insolvency law to split the insolvency of one company into two or more proceedings; accordingly, international insolvency law can also reduce the effects of such a splitting of proceedings by introducing rules providing for a dominant role of the main liquidator or by even doing away with secondary proceedings.⁷⁷² It is obvious that even a solution providing for “main” proceedings only at the COMI of a company with universal effects with respect to all establishments of such company would not at all interfere with the underlying corporate law structures.

The situation is significantly different when it comes to groups of companies, as the existence of two or more proceedings is not a choice made by international insolvency law here, but is caused by the underlying corporate law structure, which cannot simply be altered by decisions based only on the

suggest to limit the procedural coordination to administrative aspects, see e.g. National Report Greece (Q 12); Poland (Q 12); United Kingdom (Q 12).

⁷⁷² See, however, *Hirte*, ZInsO 2011, 1788, who suggests to explicitly prohibit the opening of “secondary proceedings” (against the subsidiary) in cases of group insolvencies.

objective of making international insolvency more efficient.⁷⁷³ In particular, the existence of two or more legal entities will normally be the basis for legitimate expectations of the creditors involved that they are entitled to enforcement and insolvency measures against the specific legal entity which is their debtor and that the proceeds from the realisation of the assets of such entity in proceedings relating to this entity will be used in order to discharge such creditors. Therefore, the choices made by international insolvency law cannot simply ignore this underlying structure provided for by the applicable company law. This is also reflected in the *ECJ* decisions *Eurofood*⁷⁷⁴ and *Rastelli*⁷⁷⁵, where the *ECJ* clearly stated that in the system established by the EIR each debtor constituting a distinct legal entity is subject to its own jurisdiction.⁷⁷⁶

This is especially true with Article 34 EIR. Measures to end the proceedings of subsidiary companies such as the ones addressed in this provision primarily affect the creditors of the subsidiary company only. Of course, proceeds of such a proceeding which are not required to fully satisfy the claims of the relevant company's creditors might subsequently be transferred to the liquidator of the parent company as they are part of such company's equity to which the parent company is entitled to after the full discharge of the creditors' claims. However, it is easy to see that the situation here is different from a scenario involving only one company, as neither the parent company nor its creditor is a creditor of the subsidiary company that would be entitled to equal treatment with the subsidiary company's creditors. Therefore, measures ending the subsidiary company's insolvency proceedings, such as a composition arrangement etc., should ultimately be up to the creditors of the subsidiary company to decide upon. As already outlined above, it is desirable to provide for rules on the coordination and cooperation and the sharing of

⁷⁷³ A number of national reports stated that the model of main and secondary proceedings can not simply be declared applicable for group of company situations as well, see National Report Greece (Q 12); Malta (Q 12); Poland (Q 12); Slovenia (Q 12); Sweden (Q 12).

⁷⁷⁴ See *Eurofood*, 2.5.2006 (C-341/04), I-3813; see also O'Grady/Counihan, International Corporate Rescue 3 (2006), 215; Isaacs, International Corporate Rescue 3 (2006), 178 et seq.; Taylor, InCA No. 10 (III/2006), 25; Wessels, European Company Law 2006, 183; Bachner, ECFR 2006, 310; Baxter, Insol World 3rd Quarter 2006; Silverman/Seamon, New York Law Journal, 30.10.2006, 1 et seq.; Shandro, Freshfields Bruckhaus Deringer Briefing, May 2006, 1 et seq.; see also Pannen, European Insolvency Regulation, Appendix to Art 3 para. 10.

⁷⁷⁵ See *ECJ*, *Rastelli v Hidoux*, 15.12.2011, (C-191/10).

⁷⁷⁶ See *Eurofood* at para. 30; *Rastelli* at para. 25.

information in group scenarios in particular in order to improve the chances for corporate recovery; however, ultimately, such decisions should be left to the creditors of the subsidiary company.

The same is true for the idea of an extension of today's Article 33 EIR to the relation between a parent and a subsidiary company.⁷⁷⁷ Again, it is obvious that such influence of the parent company's liquidator in the proceedings relating to the subsidiary company would significantly improve the coordination. In particular, it could safeguard the functioning of the subsidiary company in the interest of the whole group in order to create chances for the restructuring of the group or the sale of the group's business as a whole. However, the requirement under Article 33(1) EIR ("not manifestly of no interest to creditors of the main proceedings") is not adequate here because, as already pointed out above, there are no actual "creditors of the main proceedings" here but only creditors of different legal entities. Therefore, a provision extending the measures under Article 33 EIR to group of companies situations could only be based on the requirement that such measures are in the interest of the overall group situation, taking into account the legitimate interests of the creditors of the subsidiary company. Then again, it is hard to see why creditors of a subsidiary company should be obliged to suffer losses in the interest of the group as a whole although this is not provided for under the applicable company law. Note that, in general, company law does not require subsidiary companies to contribute to the parent company's rescue from their equity, but protects creditors of subsidiary companies from funds being shifted to the parent company. It seems that, from time to time, the discussion on insolvencies of international groups of companies tends to forget this simple principle. Such dominant influence of the liquidator of a parent or other "leading" company in the insolvency proceedings against the subsidiary company would even go beyond the solutions existing within the national systems of a number of Member States today. In my opinion, it is very hard to predict the impact of such measures in practice. While the factual factors outlined above, i.e. a reference to a fully integrated business run on

⁷⁷⁷ See National Report Czech Republic (Q 12); National Report Estonia (Q 12). See also National Report Estonia (Q 12) with suggestions for a duty to cooperate, and in case of disagreement, the suggestion that the court in the "main" proceedings should have the final decision.

the group level might be necessary in order to make such coordination actually efficient, they might cause conflicts with the applicable corporate law under which the rules of liability for debts of the specific entities might not be based on a “fully integrated group business approach”. Nevertheless, I believe that it is worth making a first step to address these issues in the EIR and not simply provide for more or less voluntary communication and coordination based on “soft law” provisions.

Measures such as a stay of certain proceedings in part or as a whole or a proposal for a group rescue plan could of course dramatically improve the coordination of all proceedings involved and create a situation where measures such as the restructuring or sale of the group business as a whole can be achieved more easily. Nothing, however, indicates that the liquidator of a parent or other “leading” company should be entitled to make such decisions and impose them on the liquidators of the other group members or that this should only apply in specific hierarchies of companies.⁷⁷⁸ In contrast to the situation resulting from secondary proceedings in the sense of Article 27 et seq. EIR, there is no “natural” “main liquidator” here representing pre-existing overall interests of the creditors of one company as a whole as against the subordinate “local interests” represented by the secondary liquidator and protected by international insolvency law only.

⁷⁷⁸ Note that most of the legislative proposals use the definition of a parent company in the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts. According to this definition a parent company is (i) the company which has a majority of the shareholders’ or members’ voting rights in the other company; if no company meets such definition it is (ii) the company that has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other company and is at the same time a shareholder in or member of that other company, or (iii) the company that has the right to exercise a dominant influence over another company of which it is a shareholder or member, pursuant to a contract entered into with that other company or to a provision in its Memorandum or Articles of Association. See for such suggestion to be included into the Insolvency Regulation: “Insol-Draft”, Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]), p. 95, para.V.9; Group for International & European Studies of the Autonomais University of Barcelona, 28.4.2011, IILR 2011, 336 et seqq.; *Van Galen* (in oral discussions, mentioned by *Abeln/Abeln*, IILR 2011, 351 (354); *Hirte*, ZInsO 2011, 1788. Most of the legal scholars agree that there must be a different treatment of groups with higher or lower degrees of integration, see *Bufford*, Columbia Journal of European Law 12 (2006), 429 et seqq.; *Mevorach*, Insolvency within Multinational Enterprise Groups (2009), 327 et seqq. Some legal scholars also suggest just a certain percentage of shares detained in the subsidiary (about 50%) and the fact that decisions regarding the subsidiary were effectively made by the other company (see National Report France [Q 12] referring to *Vallens*.)

5.3.2.4 A Market Economy Oriented Approach to Group of Companies Insolvencies

I consider it pointless to search for a formula to identify the relevant hierarchies and, accordingly, the “leading proceedings” here.⁷⁷⁹ Rather, *all relevant liquidators should be entitled to request measures such as a stay in the sense of Article 33 EIR or propose a composition arrangement in the sense of Article 34 EIR in case they can show that such measures are in the best interest of all companies and, accordingly, all creditors involved. Therefore, it should simply be the liquidator taking the initiative and offering the best solution who should have the lead as a consequence*; it is highly unlikely anyway that this will be done by the liquidator of a small subsidiary company. In this *market economy oriented approach to group of companies insolvencies*, private initiative prevails and the best solutions will succeed. There is absolutely no need for an etatistic model, so to speak, where a court based on whatever more or less formalistic criteria has to decide who shall be the leading liquidator. Rather, all liquidators involved should be part of a non-hierarchical network where the best solutions prevail.

Therefore, the EIR should give all liquidators involved the right to apply for measures in the sense of Article 33 EIR in all other proceedings; the court should only order such measures in case they are in the mutual interest of all proceedings involved. Moreover, every liquidator should be entitled to propose measures in the sense of Article 34 EIR and, again, the best solution shall prevail.

I believe that – in connection with providing for communication, cooperation and voluntary coordination rules – this might be a reasonable first step the

⁷⁷⁹ It has also been suggested in the discussion on the reform of the EIR that the coordination of the proceedings could be organised based on a priority rule, i.e. that the proceedings which were opened first should be the “leading” proceedings. This solution has, of course, the advantage that it is easy to decide which company should take the lead under such a rule; however, the problem with this solution would be that it is simply utterly wrong to provide for a priority of the proceedings first opened in such a situation – this could lead to a scenario where a subsidiary company which was only a tool for the business run by the ultimate (operative) parent company would take the lead in such cases simply because the proceedings over the subsidiary company were opened first. Such a solution would ignore both the structure of the underlying business and the relevant corporate law structure and is an invitation for forum shopping and abuse. I strongly advise against adopting such a solution.

outcomes of which could be evaluated and could serve as a stepping stone for future reforms of the EIR.

5.3.3 From “Head Office” to “Group COMI”?

5.3.3.1 The Head Office Approach

It has also been suggested to use the jurisdictional requirements for the opening of insolvency proceedings as a tool of coordination with respect to groups of companies.⁷⁸⁰ This idea results from the practical experience with what was called the “*head office*” or “*mind of management*” approach, which resulted in a massive strengthening of the coordination of group insolvencies and, in particular, of the chances for the restructuring of the group as a whole.

Very soon after the EIR came into force, practice developed a way of coordinating insolvencies of groups of companies in a way which was not expressly provided for under the EIR. This approach, which was first adopted by English courts and subsequently also applied by courts of different Member States on the European continent, was labelled as “*head office theory*” or “*mind of management theory*”. Of course, the approach of different courts was not identical here in every respect. The same is true for the facts of the cases where this approach was applied. There is, however, no need to discuss all relevant intricacies in this report. In general, this approach was based on the idea that the COMI of a subsidiary company is located at the COMI of its parent company in case the management of the subsidiary company is actually executed on the level of the parent company either by executives of the parent company or by a legal structure referring all (or the majority) of the decisions of the subsidiary company to the management of the parent company by giving direct orders to the executives of the subsidiary company. In addition, sometimes other factors, such as the financing of the

⁷⁸⁰ See *McCormack*, Legal Studies 30 (March 2010), 126 et seqq.; *Bufford*, IILR 2012, 341 et seqq.; *Taylor*, IILR 2011, 242 (245); *Vallens*, Revue des procédures collectives, May/June 2010, 25 et seqq.; *Moss/Paulus*, Insolvency Intelligence No. 1 (2006) 1 et seqq; *Moss*, IILR 2011, 237 (238); “*Insol-Draft*”, Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al], p. 29; National Report Austria (Q 12); Belgium (Q 12); Estonia (Q 12); France (Q 12); Hungary (Q 12); Poland (Q 12); United Kingdom (Q 12). See, however, National Report Slovenia (Q 12), which strongly opposes the idea of centralisation of jurisdiction according to a head office functions doctrine because local creditors should be protected.

subsidiary company, were considered in this respect. On this basis, the main insolvency against the subsidiary company was opened at the COMI of the parent company where also the main proceedings against the parent company were opened.⁷⁸¹ As a consequence, both the main proceedings against the parent company and the main proceedings against all or at least some of the subsidiary companies involved were opened in the Member State and were governed by the same provisions, and in some of the cases the same liquidator was appointed in all parallel proceedings.⁷⁸² In some cases, this resulted in the opening of secondary proceedings at the actual registered office of the subsidiary company.⁷⁸³ This approach did not only result in the opening of insolvency proceedings against subsidiary companies at the ultimate parent company's COMI, but also sometimes at the COMI of intermediate holding companies.⁷⁸⁴

This practice turned out to be a very successful approach to the coordination of insolvencies of groups of companies. By concentrating all main proceedings involved in the Member State where the decisions relating to the group business were actually taken before the opening of the proceedings, the liquidator or the liquidators appointed were in a position to take the "driver's seat" of the group and prepare and take all important decisions

⁷⁸¹ Note, moreover, that in some cases courts of the Member States even went so far as to locate the COMI of a holding company in the Member State of the subsidiary based on the argument that the holding company's only actual activity was being a shareholder at the COMI of the subsidiary company. See, e.g., *Scania and Blekinge Court of Appeal Malmö (Sweden)*, 3.2.2005, extract from *Morgell*, IILR 2012, 58; *First instance court - Tribunale di Isernia*, 10.4.2009, II Fallimento e le altre procedure concorsuali, 2010, 59.

⁷⁸² See, e.g., *High Court of Justice Leeds*, 16.5.2003, [2003] BCC 562; *High Court of Justice*, 20.5.2003, INSOL EIR-case register Nr. 178; *AG München*, 4.5.2004, ZIP 2004, 962; *Local Court (AG) Offenburg*, 2.8.2004, NZI 2004, 673; *High Court of Justice Birmingham, Chancery Division*, 18.4.2005, "MG Rover I" [2005] EWHC 874 (Ch); see also *Pannen*, European Insolvency Regulation, Appendix to Art 3 para. 16; *High Court of Justice Birmingham*, 30.3.2006, NZI 2006, 416, annotated by Mankowski; *Cour de cassation, 27.6.2006 Procurator General (France) v SAS Isa Daisytek*, [2006] B.C.C. 841; *Tribunal de Commerce Nanterre*, 15.2.2006, EWIR 2006, 207, annotated by Penzlin; see also *Shandro*, 25-May American Bankruptcy Institute Journal (2006) 30 et seqq; *Tribunal de grand instance Lure*, 29.3.2006, INSOL EIR-case register Nr. 82, see also *Pannen*, European Insolvency Regulation, Appendix B to Art 3 No 91; *First instance court - Fővárosi Bíróság, Budapest*, 17.9.2008, INSOL EIR-case register Nr. 56 (Csöke); *Tribunal de Commerce de Beaune*, 16.7.2008, INSOL EIR-case register Nr. 146; *First instance court - Juzgado de lo Mercantil núm.*, 4.5.2009, INSOL EIR-case register Nr. 49; the facts underlying the ECJ case Eurofood (C-341/04) are also an example of this head office approach.

⁷⁸³ See, e.g., *First instance court - Fővárosi Bíróság, Budapest*, 17.9.2008, INSOL EIR-case register Nr. 56; *LG Innsbruck*, 11.5.2004, ZIK 2004/137, 107.

⁷⁸⁴ See, e.g., *Cour de cassation, 27.6.2006, Procurator General (France) v SAS Isa Daisytek*, [2006] B.C.C. 841.

relating to the liquidation or the restructuring of the group at the actual place where such important decisions were normally taken within the group. Moreover, the concentration of all proceedings in one Member State (or even in the hands of one liquidator) resulted in a significant decrease of complexity and significantly reduced the risk of uncoordinated and therefore detrimental parallel liquidation or restructuring activities in different Member States.

It was obvious, however, that there were also conflicting interests of creditors in the state of the registered office of the subsidiary company aiming at the opening of main proceedings at such registered office of the respective subsidiary company. Such interests can be based on different considerations. In some cases, creditors or other stakeholders involved (such as public bodies) simply do not feel comfortable with the idea that a foreign liquidator is in charge of an insolvent company's fate registered their territory. Foreign insolvency law which might reduce the influence of the creditors and/or give broader powers to the liquidator or the debtor may be considered as a threat to the interests of the creditors domiciled in a another jurisdiction. In particular, the goal of effectively liquidating or restructuring the group's business as a whole might be in actual economic conflict with the interest of local creditors who (rightly or wrongly) believe that an isolated and uncoordinated liquidation of the assets of the subsidiary in the respective country is more promising for them. Therefore, it was to be expected that this issue would be referred to the *ECJ* very soon. Unfortunately, this did not happen in one of the typical cases where the head office approach was obviously improving the coordination of all insolvencies involved and reflected a legitimate interest in an optimal liquidation or restructuring of the group business as a whole, but in the Eurofood case, which was not typical for these cases at all.⁷⁸⁵

⁷⁸⁵ See *Eurofood* 2.5.2006 (C-341/04), I-3813; see also *O'Grady/Counihan*, International Corporate Rescue 3 (2006), 215; *Isaacs*, International Corporate Rescue 3 (2006), 178 et seq.; *Taylor*, InCA No. 10 (III/2006), 25; *Wessels*, European Company Law 2006, 183; *Bachner*, ECFR 2006, 310; *Baxter*, Insol World 3rd Quarter 2006; *Silverman/Seamon*, New York Law Journal, 30.10.2006, S 1 et seqq; *Sandy Shandro*, Freshfields Bruckhaus Deringer Briefing, May 2006, 1 et seqq; see also *Pannen*, European Insolvency Regulation, Appendix to Art 3 para. 10.

5.3.3.2 Eurofood: Hard Cases Make Bad Law

In the course of the Parmalat insolvency, insolvencies against a number of subsidiary companies of the Parmalat group in countries all over Europe were opened at the group's head office in Parma, Italy. One of these companies was Eurofood, an Irish company, which was a mere financing vehicle specifically designed for the Irish capital market and having the only purpose of placing certain bonds on this market. Moreover, the facts that were the basis for the Irish Supreme Court's reference to the *ECJ* differed significantly from the facts that were the basis for the opening of the Italian proceedings ascertained by the Italian court. Although the head office theory was finally irrelevant for the decision of the case as the *ECJ* found that the Irish main proceedings against Eurofood were opened prior to the Italian proceedings against the same company, this decision was a serious setback for the practice developed on the basis of the head office approach.

With respect to the notion of COMI, the Eurofood decision of the *ECJ*⁷⁸⁶ is a typical example of the old saying that hard cases make bad law. In *Eurofood*, the *ECJ* strongly emphasised the aspect that the presumption under Article 3 (1) EIR can only be rebutted if factors which are both objective and ascertainable by third parties create an actual situation which is different from that which locating the COMI at the registered office is deemed to reflect. In particular, the *ECJ* pointed out that "where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation".⁷⁸⁷ Above all, it was worrying that the *ECJ* pointed out (only) one example where the presumption under Article 3 (1) EIR

⁷⁸⁶ See *Eurofood*, 2.5.2006 (C-341/04), I-3813; see also O'Grady/Counihan, International Corporate Rescue 3 (2006), 215; Isaacs, International Corporate Rescue 3 (2006), 178 f.; Taylor, InCA No. 10 (III/2006), 25; Wessels, European Company Law 2006, 183; Bachner, ECFR 2006, 310; Baxter, Insol World 3rd Quarter 2006; Silverman/Seamon, New York Law Journal, 30.10.2006, S 1 et seqq.; Sandy Shandro, Freshfields Bruckhaus Deringer Briefing, May 2006, 1 et seqq; see also Pannen, European Insolvency Regulation, Appendix to Art 3 para 10.

⁷⁸⁷ See *Eurofood*, at para. 36.

could be rebutted by addressing a “letterbox” company⁷⁸⁸ not carrying out any business in the territory of the Member State in which its registered office is situated”.⁷⁸⁹ This created the impression that the *ECJ* might follow a very narrow interpretation of Article 3 (1) EIR applying very formalistic standards and allowing the rebuttal of the presumption only in highly extraordinary cases.

5.3.3.3 Interedil: The Return of Pragmatism

The narrow and formalistic approach of Eurofood, however, was put into perspective or even abandoned by the *ECJ* very soon after: The *ECJ*’s decision in the case *Interedil*⁷⁹⁰ clearly indicates that the *ECJ* does not want to follow the Eurofood approach with respect to Article 3 (1) EIR in future cases. Rather, the *ECJ* pointed out that, while the fact that company assets or contracts for the financial exploitation of those assets point at a Member State other than the one of the registered office is not sufficient to rebut the presumption under Article 3 (1) EIR, “a comprehensive assessment of all the relevant factors” can make “it possible to establish, in a manner that is ascertainable by third parties, that the company’s actual centre of management and supervision and of the management of its interests is located in that other”– sc. other than the state of the registered office – “Member State”.⁷⁹¹

In this context, the *ECJ* stated that a debtor company’s main centre of interest must be determined by attaching greater importance to the place of the company’s central administration, and that, therefore, where a company’s central administration is not at the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could result in a rebuttal of the presumption under

⁷⁸⁸ See for an example of such a “letterbox company-case” *German Supreme Court (BGH)*, 21.6.2007, NZI 2008, 121; *Local Court (AG) Hamburg*, 14.5.2003, NZI 2003, 442, annotated by Mock/Schildt.

⁷⁸⁹ See *Eurofood* at para. 35.

⁷⁹⁰ See *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* 20.10.2011 (C-396/09); Moss, *Insolvency International* 24 (2011) 126; Biermeyer, *Maastricht Journal of European and Comparative Law* 2011, 581 et seqq; Kokott 10.3.2011, ZInsO 2011, 962.

⁷⁹¹ See *Interedil* at paras 53 and 59.

Article 3 (1) EIR in case said comprehensive assessment of all relevant factors indicates that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.⁷⁹²

5.3.3.4 Safeguarding the Interedil Approach: One Step in the Right Direction

It is obvious that, therefore, Interedil created an opportunity to develop a practice moving at least to a certain degree towards a group COMI approach. Note, however, that this decision does not expressly exclude that there could be cases where the management of a company is actually situated in a Member State other than the state of the registered office, but the presumption under Article 3 (1) EIR cannot be rebutted on this basis. Moreover, as both Eurofood and Interedil refer to factors ascertainable by third parties and the factual situation before the opening of the insolvency proceedings, one might believe that these decisions simply refer to the management of the day-to-day business of such companies and not the actual head office functions which become relevant when it comes to the liquidation or restructuring of such company.

On the basis of these two decisions, one might be of the opinion that Interedil is a sufficient basis to develop a flexible approach taking into account group COMI considerations in order to improve the coordination of groups of companies insolvencies; one could also argue, however, that even the Interedil wording is not sufficient and, therefore, Art 3(1) EIR should be amended or clarified by an amendment of today's recital 13.

As already mentioned above, courts of different Member States have opened insolvency proceedings over a subsidiary company at the COMI of the parent company on the basis of the assumption that the presumption under Article 3 (1) EIR can be rebutted in cases where there is a dominant influence of the parent company over the subsidiary company's business. Most (but not all⁷⁹³)

⁷⁹² See *Interedil* at para 59.

⁷⁹³ See *High Court of Justice*, 20.6.2008, *Lennox Holdings PLC vs. European Supplies Logistics Ltd., European Supplies SL, Milenio Foods*, BeckRS 2009, 27240; See *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another*, 20.10.2011 (C-396/09); *Moss*, Insolvency

of the relevant case law, however, results from the “pre-Eurofood-era” although the *ECJ* clearly adopted a less formalistic and more “head office oriented” approach in *Interedil*. From today’s point of view, it is, however, not completely clear whether the COMI concept under Article 3 (1) EIR is in line with this approach and whether it is flexible enough to serve as a basis for such a pragmatic handling of group of companies cases in the future. Moreover, the discussion on forum shopping under Article 3 (1) EIR is obviously problematic with respect to the coordination of insolvencies of groups of companies, as emphasising the aspect that the COMI factors should be ascertainable for third parties or even introducing additional prerequisites for the rebuttal of the presumption under Article 3 (1) EIR might result in a formalistic approach not sufficiently allowing to take into account the realities of groups of companies.

Therefore, in any event, the legislator *should not to introduce changes that would result in a dropping behind the Interedil approach*. Moreover, it is worth discussing *whether Article 3 (1) EIR could be amended in a way that shows that such “head office” considerations can actually be taken into account in group of companies situations*. It should also be possible to rebut the presumption under Article 3(1) EIR in cases where the subsidiary company’s management at the registered office of the subsidiary company actually ran the day-to-day business of the subsidiary company, but it was clear that important decisions would always be made on the level of the parent company and where the parent company was in a position to “take over the steering wheel” by giving specific orders to the management of the subsidiary company. After all, liquidation and restructuring of a company are the very opposites of a “day-to-day business” and, accordingly, one might argue that such measures should be decided where they would be decided outside insolvency proceedings, i.e. on the group level. *Therefore, I suggest to either include such an amendment of the wording of Article 3(1) EIR or, as an alternative, the inclusion of such a wording in one of the recitals of the EIR (e.g., in today’s recital 13, which is the basis for the interpretation of Art 3(1) EIR by the ECJ already today)*. Such wording could be derived from the *ECJ*

International 24 (2011) 126; *Biermeyer*, Maastricht Journal of European and Comparative Law 2011, 581 et seqq; *Kokott* 10.3.2011, ZInsO 2011, 962.

decision in the Interdil case, for example in the following fashion: “A debtor company’s main centre of interest must be determined by attaching great importance to the place of the company’s central administration on the basis of a comprehensive assessment of all relevant factors taking into account the company’s actual centre of management and supervision and the management of its interests.”

6 Applicable Law

6.1 Article 4 EIR: Applicability of the law of the State of the opening of the proceedings

6.1.1 The general principle

Article 4 EIR, by its legal nature, is a choice of law provision.⁷⁹⁴ It is the source of the general rule as to the applicable law in insolvency proceedings, which is also restated in Recital 23: Unless there is a rule to the contrary, the law of the Member State of the opening of the proceedings is applicable as *lex concursus*. Within its scope of application, it takes precedence over other rules of private international law and is applicable with regard to primary as well as to secondary proceedings. Furthermore, Recital 23 affirms that this *lex concursus* “determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned.” In particular, it is meant to govern “all the conditions for the opening, conduct and closure of the insolvency proceedings.”

These principles are in line with general principles of private international law: It is characteristic of insolvency law that it has procedural as well as substantive aspects. With regard to procedure, it is a world-wide principle that courts apply their own procedural law so that Article 4, with regard to its procedural effects, can be seen as a derivative of this common procedural conflicts rule. With regard to its substantive rules, the effects of insolvency proceedings can be compared to those of mandatory rules in the sense of Article 9 Rome I-Regulation: For the purposes of an orderly collective resolution of the insolvency situation (reorganization, liquidation etc.), insolvency law intrudes into the legal relationship between debtor and creditors in order to bring about certain mandatory adjustments of their substantive rights and duties. This results in the application of the law of the forum (*lex fori*) as well: The applicability of the law of the forum (of the opening of the insolvency proceedings) is the standard conflicts rule used in

⁷⁹⁴ Cf. ECJ, 5 July 2012, C-527/10, para. 36 – *ERSTE Bank Hungary./Magyar Állam*.

order to implement a certain important regulatory policy of the forum state and to bring about the intended mandatory legal effects of forum law in an international setting. In other words: The reference to the law of the State of opening of the proceedings (in standard jurisdictional language: the law of the *forum*) is, again as a general rule and of course with exceptions⁷⁹⁵, the logical legal answer to the substantive questions raised in international insolvency proceedings. Furthermore, this reference to the law of the forum closely links Article 4 EIR to Article 3 EIR because, as always in case of a *lex fori* rule, the rules on jurisdiction indirectly determine the applicable law. As a combined effect of Article 3 and 4 EIR, it can be stated that the law of the COMI applies with regard to both substance and procedure of the insolvency. Again, this is completely appropriate. With regard to the particular insolvency related interests of the parties, it may be said that the reference to the COMI is meant to bring about sufficient predictability of the applicable law so that both debtor and creditor can calculate their respective legal risks.⁷⁹⁶ However, the circumstance that jurisdiction “entails” the determination of the applicable law under Article 4 EIR has a certain repercussion on the definition of the COMI under Article 3 EIR. Because the definition of the COMI indirectly determines the applicable law, it is essential that the COMI is sufficiently foreseeable.⁷⁹⁷ By contrast, the rule in Article 4(1) EIR is perfectly adequate and predictable. Therefore, it is by no means surprising that, in the case law of the *ECJ*, the applicability of the law of the forum is accepted as an undoubted and appropriate conflicts rule.⁷⁹⁸ There is also no indication in the national reports that any changes as to this general rule would be necessary or desirable. Some national reports explicitly state that there is general satisfaction with the concept of Article 4 or that its general application does not raise any or any serious problems⁷⁹⁹; some go even further by expressing the same in relation

⁷⁹⁵ In this respect, e.g. *ECJ*, 17 January 2006, C-1/04, para. 8 – *Straubitz-Schreiber*.

⁷⁹⁶ Opinion AG Kokott, 10 March 2011, C-396/09, para. 46 – *Interedil*.

⁷⁹⁷ AG Kokott, 10 March 2011, C-396/09, para. 57 – *Interedil*.

⁷⁹⁸ That is not explicitly said but can be taken from *ECJ*, 17 March 2005, C-294/02, para. 69 – *Commission./AMI Semiconductor Belgium*; see also *ECJ*, 21 January 2010, C-444/07, para. 25 – *MG Probud Gdynia* and *ECJ*, 2 May 2006, C-341/04, para. 33 – *Eurofood*: jurisdiction “entails” the determination of the applicable law.

⁷⁹⁹ Belgium Report, Q 13; French Report, Q. 13.

to the provisions on applicable law in general (Articles 4-15 EIR).⁸⁰⁰ Others reflect similar positions without saying so directly.⁸⁰¹ Consequentially, it seems fair to say that the national reports do not express any need for any amendments with regard to the general rule of Article 4(1) EIR.

To be sure, it is not doubtful that exceptions to the general rule providing for the applicability of the forum law as *lex concursus* are necessary. The “seat” or “center of gravity” of a certain legal relationship or certain aspects thereof may be located or concentrated in another legal system. In some situations, it is also a question of legal certainty and predictability to apply a law other than the *lex concursus* to a certain legal relationship or question.⁸⁰² However, these exceptions must not be interpreted as an indication that the general rule needs to be changed or amended. On the contrary, their limited scope underlines that the general rule in Article 4(1) EIR is perfectly appropriate.

6.1.2 Qualification

6.1.2.1 General aspects

As far as there is case law and legal writing with regard to Article 4 EIR, but also with regard to Articles 5-15 EIR, a clear focus is put on questions of delineation of the scope of Article 4 EIR in relation to other areas of law or, expressed in traditional private international law terminology, problems of qualification or characterization.

Inter alia, the following issues are addressed in the national reports:

Whereas substantive provisions can be applied on the basis of Article 4 EIR, proceedings may be commenced only if there is jurisdiction as provided for by Article 3 EIR. In this context, the Dutch Report explains that, under Dutch law, the insolvency of a partnership, by operation of law, automatically entails the insolvency of its partners. It was discussed in the Netherlands whether this rule can be applied towards natural persons (partners) whose COMI is

⁸⁰⁰ German Report, Q 13; Greek Report, Q. 13; Hungarian Report Q 13; Luxemburg Report, Q. 13; Maltese Report, Q 13; Romanian Report Q 13.

⁸⁰¹ Bulgarian Report Q. 13; Cyprus Report, Q. 13; Slovakian Report, Q 13, and Spanish Report, Q 13 (mentioning only problems relating to Article 5 EIR); probably also the Italian Report, Q 13 (not giving any answer to this question). The problems addressed by the Slovenian Report do not relate to Article 4 EIR either.

⁸⁰² ECJ, 5 July 2012, C-527/09, para. 39 – *ERSTE Bank Hungary./Magyar Állam*.

located outside the Netherlands.⁸⁰³ A similar problem arose in the case underlying the *Rastelli* decision of the *ECJ*⁸⁰⁴ with regard to a French rule that other persons may be “joined to opened insolvency proceedings” on the basis that their “property is intermixed with that of the debtor or where their legal entity is a sham”. The *Rastelli* decision illustrates that jurisdiction over a certain debtor always depends on the COMI-requirement in Article 3(1) EIR and that any extension of an open proceeding or the opening of new proceedings cannot be based on Article 4 EIR.⁸⁰⁵

The French Report⁸⁰⁶ addresses issues such as the delineation of the EIR from conflict rules concerning company law with regard to the question of whether the liquidation of a company entails its dissolution or the delineation of the EIR from contract law with regard to the question of whether a contract is “current” in the sense of Article 4(2)(e) EIR. Other typical problems of delineation relate to the treatment of property rights, the scope of labor law or the law of the state of registration.

Whereas these problems, insofar as they are of relevancy to this general report, will be discussed in their specific context, a broader remark needs to be added with regard to the issue of qualification: Some of these questions may indeed be difficult to solve; however, their general nature is not different from or more serious than other questions that typically arise when it comes to the interpretation of statutory provisions.⁸⁰⁷ Answering such questions is part of the responsibilities of the national court systems or, if necessary, of the *ECJ*, as demonstrated in the *Rastelli* case for example.⁸⁰⁸ Consequently and quite correctly, the Dutch Report explicitly states that these questions should not be regarded as “problems”.⁸⁰⁹ The need for further clarifications was also clearly implied by Article 4(2) EIR, which gives examples for issues covered

⁸⁰³ Dutch Report, Q 13, referring to *Hoge Raad*, 22 December 2009, LJN BK 3574 – *Van Kester./FFP*.

⁸⁰⁴ *ECJ*, 15 December 2011, C-191/10 – *Rastelli Davide./Hidoux*.

⁸⁰⁵ Cf. Dutch report, Q 13.

⁸⁰⁶ French Report, Q 13.

⁸⁰⁷ E.g. publications addressing the delineation of insolvency law and core areas of private law (contracts, torts, property) do not give rise to the conclusion that these issues are more than in any other area of law, see for example Lüer, in: Uhlenbruck, Article 4 EulnsVO, para. 15-17.

⁸⁰⁸ See footnote 804 *supra*.

⁸⁰⁹ Dutch Report, Q. 13.

by the *lex concursus*, because it is rather obvious that the list of Article 4(2) EIR is not exhaustive with regard to matters governed by the law of the state of the opening insolvency proceedings.⁸¹⁰

Not surprisingly, there is no general call for resolving all of these issues, e.g. by enlarging the list of definitions or clarifications in Article 4(2) EIR, in the national reports.

6.1.2.2 Scope in relation to company law

Several national reports mention questions arising with regard to the delineation of the EIR from questions of company law with regard to areas such as back payment of investment capital or liability for insufficient investment capital, delicts against creditors or directors' liability, e.g. in cases of delayed filing for insolvency.⁸¹¹ In this respect, the national reports reveal a certain variety of rules, some characterized as company law rules and others characterized as rules of insolvency law. To a certain extent, it seems, there is still an ongoing discussion in the respective national laws.⁸¹² From a European perspective, the relevance of this issue is, to a large extent, owed to the present state of private international law in these areas. Two main aspects are relevant:

Firstly, the choice of law rules for insolvency issues are harmonized in Europe by the EIR; there is no comparable instrument with regard to international company law (some harmonization is brought about by the *ECJ* case law relating to the free movement of companies though).⁸¹³ Therefore, the characterization determines whether European (harmonized) or national conflicts laws apply. Because the European conflicts rules, as provided for by Articles 4-15 EIR, take precedence over any conflicts rule embodied in national company law, it is itself a question of European law, i.e. the EIR, whether or not its rules apply.

⁸¹⁰ *ECJ*, 21 January 2010, C-444/07, para. 25 – *MG Probud Gdynia*.

⁸¹¹ Austrian Report, Q 14; Dutch Report, Q. 14; German Report, Q. 14; Spanish Report, Q 14; Questionnaire of Veronika Sajadova, lawyer with a Swedish bank.

⁸¹² E.G. *Lüer*, in: Uhlenbruck, Article 4 EulnsVO, para. 14.

⁸¹³ *ECJ*, 9 March 1999, C-212/97 – *Centros*; *ECJ*, 30 Sept. 2003, C-167/01 – *Inspire Art*; *ECJ*, 12 July 2012, C-378/10 – *Vale*.

Secondly and more importantly, the qualification indirectly determines whether the parties can (indirectly) choose the applicable law. With regard to company law, the *ECJ* case law requires that a company, which moves the place of its main administration from one Member State to another, must be recognized by the law of the target state as long as the Member State of incorporation considers this company to be an existing legal entity. The parties can therefore indirectly choose the company law applicable to their company by choosing the Member State of incorporation. Whereas this has always been possible where national conflicts laws provided for a reference to the law of incorporation, this development is quite remarkable with regard to legal systems, which traditionally followed the so-called “seat theory” (referring to the laws of the seat of the company’s central administration, headquarters etc.).

The situation is different with regard to insolvency law. The (main) proceedings have to take place in the *forum* of the COMI, which will then – without any choice for the parties – apply its own law. To be sure, the parties are free to choose their COMI as well; but in order to do so, they have to actually move their activities there. By contrast, in the field of company law, mere registration in a certain jurisdiction may be sufficient to apply this jurisdiction’s company law rules.

As a consequence, it is fair to say that there is considerably more freedom for choosing the applicable company law than for choosing the applicable substantial insolvency law. Therefore, in this context, the qualification indirectly determines the leeway for choosing the applicable law. Given the significance of the question of qualification, it is by no means surprising that there is a vivid discussion as to the appropriate qualification of provisions of national law in this respect. Given the state of these controversies in several Member States, however, it is surprising that no extensive case law of the *ECJ* is available in this respect. As has been stated above, the delineation of the EIR from company law is a question of interpreting the EIR. Developing a European definition or European criteria for distinguishing company from insolvency law is therefore not only highly desirable, but also required by the EIR. If such cases were brought before the *ECJ*, the Court would certainly be able to develop criteria for this purpose – although these criteria would have

to be applied with regard to the specific content and purpose of national insolvency and company law as interpreted by national courts. It may be that Member State courts have been too reluctant so far in their references to the *ECJ*. Whereas a reliable *ECJ* case law on these questions could develop on a step-by-step basis, any legislation would require intensive preparatory comparative legal analysis, which would clearly go beyond the scope of this report and its time-limits. The latter is all the more true insofar as such legislation would not necessarily have to be included in the EIR; for example, harmonization of substantive law could be an alternative.

On the basis of these considerations, the General Reporter's conclusion is that the time is not yet ripe for the inclusion of specific provisions on the delineation of insolvency law in relation to company law in the EIR. The development of the controversies mentioned in the national reports and *ECJ* case law will have to be monitored closely so that legislative action could be taken at a later moment if necessary.

6.1.3 Other questions relating to general concepts of private international law

In this context, two aspects are mentioned in some of the national reports:

First, it seems that there is a clear tendency in the Member States to determine the content of foreign laws according to the same rules as in other cases where foreign law needs to be determined.⁸¹⁴

Second, concerning public policy, it should be noted that the EIR does not include an express public policy reservation with regard to the recognition of proceedings or with regard to the application of foreign law under Articles 4-15 EIR. Nonetheless, most national reports – as far as they address this issue – take the position that there is an implied public policy provision in the EIR.⁸¹⁵ The question of whether such a public policy reservation is impliedly included in the EIR will have to be determined eventually by the *ECJ*. Although there is no express public policy reservation in the choice of law

⁸¹⁴ German Report, Q. 17; Latvian report, Q. 17; Spanish report, Q. 17; UK Report, Q. 17.

⁸¹⁵ German Report, Q 17; Greek Report, Q 17 (under exceptional circumstances); Maltese Report, Q. 17; Romanian Report, Q 17 (difficult to decide whether it applies); Slovenian Report, Q. 17.

provisions of the EIR (Articles 4-15), a good argument can be made that the Regulation impliedly recognizes such a public policy reservation.

- With regard to the recognition of proceedings and decisions in other Member States, there is an express public policy reservation in Article 26 EIR.
- This express provision extends to both procedural and substantive aspects of public policy.⁸¹⁶
- Other instruments concerning the substantive choice of law include an express public policy reservation; one can conclude that it is a general principle of EU law to recognize such a reservation with regard to substantive choice of law instruments.
- *A maiore ad minus*: With regard to the recognition of judgments from other Member States, the inclusion of a public policy reservation is no longer the general standard in EU instruments; some instruments provide for a public policy clause; others do not. By contrast, as has already been stated in the preceding indent, all instruments on substantive choice of law include such a reservation. Compared to procedural instruments, EU substantive conflicts law is therefore generally more open to a public policy reservation. Since the EIR includes a public policy reservation in its procedural part, it would be all the more appropriate to also apply a public policy reservation in the area of substantive choice of law.
- It may be necessary to apply the public policy reservation in rare cases. However, given the rather reluctant position of the *ECJ* in this respect⁸¹⁷ it is, to say the least, not certain whether the court will read a public policy reservation into the EIR without, apart from Article 26 EIR, having an express basis for this. However, as of now and in the absence of significant *ECJ* case law⁸¹⁸, any legislative action would probably be premature. It seems preferable to carefully observe the future

⁸¹⁶ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 206.

⁸¹⁷ *ECJ*, 28 March 2000 C-7/98, (2000) ECR I-1935 – *Krombach./Bamberski*.

⁸¹⁸ For a survey cf. *Burkhard Hess/Thomas Pfeiffer*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, 2011, esp. p. 39 http://www.europarl.europa.eu/RegData/etudes/etudes/juri/2011/453189/IPOL-JURI_ET%282011%29453189%28PAR01%29_EN.pdf, 17 September 2012.

development of the public policy reservation in EU law in general and the *ECJ* case law on the EIR in particular and only take legislative action if that should turn out to really be necessary.

6.1.4 Specific issues

It is characteristic of Article 4(2)b EIR that many of its provisions do not stand alone, but rather must be interpreted in conjunction with those provisions of the Regulation, which e.g. provide particular rules for certain issues such as the one relating to rights in rem of third persons (Article 5) or on reservation of title (Article 7). The effect of Article 4(2) EIR is thus limited by these provisions; for example, the *ECJ* has ruled that Article 4(2)(b) does not block an individual action of a seller based on reservation of title against the purchaser.⁸¹⁹ With regard to the organization of these provisions, however, there is no indication in the national reports that the way in which the provisions on the applicable law are organized is overly complicated or raises any particular difficulties.

6.1.4.1 Determination of the debtor (Article 4(2)(a))

No relevant problems have been addressed in the National Reports. There is no need for any amendment of this provision.

6.1.4.2 Determination of the assets belonging to the estate (Article 4(2)(b))

There is only a small amount of case law relating to this provision, e.g.:

The Austrian Reporter refers to a case decided by the Austrian Oberster Gerichtshof discussing whether seizure limits, meant to protect the debtor against a disproportional seizure of assets, fall into the scope of the *lex concursus*.⁸²⁰

⁸¹⁹ E.g. *ECJ*, 10 September 2009, C-292/08 – *German Graphics Graphische Maschinen./van der Schee*.

⁸²⁰ Austrian Report, Q 13, referring to *Oberster Gerichtshof*, 25.10.2011 – 9 Ob 42/11h, RdW 2012/112.

There is no indication that this question gives rise to any need for a clarification with regard to this provision.⁸²¹ An amendment to this provision is not necessary.

6.1.4.3 Powers of the debtor and the liquidator (Article 4(2)(c))

No relevant problems have been addressed in the National Reports. The General reporter shares this view. There is no need for any amendment of this provision.

6.1.4.4 Conditions for set-off (Article 4(2)(d))

This provision will be discussed by *Andreas Piekenbrock* in the Context of Article 6 EIR.

6.1.4.5 Effects of insolvency proceedings on current contracts (Article 4(2)(e))

Some national reports mention questions, which arose or may arise with regard to the interplay between Article 4(2)(e) EIR on one hand and contract law on the other.

The French report points to a discussion about the problem that one may have to refer to national contract law in order to determine whether a contract is “current”.⁸²² With regard to executory contracts, the Czech Report addresses the problem that there is an ongoing controversy in Czech law as to whether Article 4(2)(e) EIR provides for a retroactive unwinding of these contracts in certain situations, which might bring about a complicated interplay of Article 4, Czech insolvency law and a foreign *lex contractus*.⁸²³

A general appraisal of these problems has to take into account, again, that it is rather typical for choice of law problems to result in an interplay or overlap of different areas of law. Not surprisingly, this is also the case with regard to the Insolvency Regulation on one hand and contract law (including its PIL

⁸²¹ For an analysis cf. Austrian Report, Q 13, arguing that Article 4(2)(b) IR applies, and the German report, Q 14.

⁸²² French Report, Q 13.

⁸²³ Czech Report, Q 13.

rules, i.e. the Rome I Regulation) on the other.⁸²⁴ The discussion about the concept of “current” contracts mentioned in the French report is a good example for this. Under the general principle that an autonomous interpretation of European instruments is preferable, unless a provision is meant to protect specific concepts of national laws (e.g. with regard to “rights in rem”)⁸²⁵, the criteria under which a contract is deemed to be “current” have to be defined autonomously on a European level. It is then, of course, up to the applicable contract law to state the effects of the relevant contract in order to determine whether it is current in the sense of Article 4(2)(e) EIR. Problems such as the interpretation of the term “current” are an unavoidable consequence of the circumstance that there are interfaces between insolvency law on one hand and other areas of law on the other. They do not indicate any inappropriateness or lack of clarity with regard to the relevant conflicts rule.

In summary, the General Reporter does not see any need for an amendment of Article 4(2)(e) EIR.

6.1.4.6 Effects of the insolvency proceedings on individual proceedings not pending (Article 4(2)(f))

The rule that the *lex concursus* determines the effect of the insolvency proceedings on individual proceedings is not only necessary in order to safeguard the principle of an orderly reorganization or liquidation and an equal treatment of creditors.⁸²⁶ It is also in line with Articles 16 and 17 EIR, which provide for the recognition of the insolvency proceedings in other Member States.⁸²⁷

Article 4(2)(f) EIR does not raise particular problems since, as stated quite correctly by the *ECJ*, “it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency

⁸²⁴ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 117.

⁸²⁵ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 43.

⁸²⁶ *ECJ*, C-294/02, *Commission./AMI Semiconductor Belgium*, Opinion of AG Kokott, 23 September 2004, para. 84.

⁸²⁷ *ECJ*, 17 March 2005, C-294/02, para. 69 – *Commission./AMI Semiconductor Belgium*.

proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible in most Member States”.⁸²⁸

With regard to the proposal to add a clause to the effect that the provision also covers enforcement proceedings⁸²⁹, it may be said that, according to the national reports, in particular in their comments relating to Article 15 EIR, it is not really doubtful that these are already covered so that no amendment is necessary in this respect.

Concerning the proposal to explicitly include arbitration into this provision⁸³⁰, it should be noted that such a change would probably cause serious discussions with regard to an application of Article 4(2)(e) EIR to arbitration agreements.⁸³¹ Since it is rather doubtful whether the latter provision should indeed apply to arbitration agreements both *de lege lata*⁸³² and *de lege ferenda*, such a change would probably bring about an unnecessarily complex controversy with regard to arbitration. At this moment, it is probably the best policy not to make any changes of the EIR in this respect.

Therefore, the general conclusion with regard to Article 4(2)(f) EIR is that there is no need for any changes of this provision.

6.1.4.7 Treatment of claims against estate and debtor (Article 4(2)(g))

No relevant problems have been addressed in the National Reports. The General reporter shares this view. There is no need for any amendment of this provision.

6.1.4.8 Lodging, verification and admission of claims (Article 4(2)(h))

There is no evidence of serious problems with this provision: With regard to relevant national law, the Czech Report mentions that Czech law provides for a rather short delay of 30-60 days commencing with the issuance of the

⁸²⁸ ECJ, 17 March 2005, C-294/02, para. 69 – *Commission./AMI Semiconductor Belgium*.

⁸²⁹ Proposals by INSOL-Europe, p. 48 et seq.

⁸³⁰ Proposals by INSOL-Europe, p. 48 et seq.

⁸³¹ Cf. Austrian Report, Q. 25; *Thomas Pfeiffer*, in: *Festschrift für Jobst Wellensiek* (2011), 821-832, at 824-827.

⁸³² See ECJ, 17 March 2005, C-294/02, Slg. 2005, I-2175 – *Kommission ./AMI Semiconductor Belgium BVBA*, para. 67, applying the procedural rules of the forum and not the *lex concursus*; see also *Pfeiffer* (footnote 831).

insolvency order, after which any claims are time-barred. Whereas this particularity may indicate some need for a minimum harmonization of insolvency laws, it does not indicate that the Conflicts rule in Article 4(2)(h) EIR is inappropriate. Consequentially, the General Reporters do not see any need for an amendment to this provision.

6.1.4.9 Distribution, ranking and set-off Article 4(2)(i)

Questions of set-off are addressed in the context of Article 6 EIR. No relevant problems have been addressed in the National Reports with regard to other issues. The General Reporters shares the view that there are no serious problems with regard to this provision. Consequently, there is no need for any amendment to Article 4(2)(i) EIR.

6.1.4.10 Conditions for and the effects of closure of insolvency proceedings (Article 4(2)(j))

This provision does not give rise to any noticeable problems. The Austrian Report mentions the statement of one practitioner reporting of problems relating to the recognition of a discharge of the debtor under Austrian law in other Member States. Whereas the Austrian Report underlines the usefulness of the European Insolvency Register in this context, there is no indication for any need of a change with regard to Article 4(2)(j) EIR.

6.1.4.11 Creditors' rights after the closure of insolvency proceedings (Article 4(2)(k))

No relevant problems have been addressed in the National Reports. The General reporter shares this view. There is no need for any amendment of this provision.

6.1.4.12 Costs and expenses (Article 4(2)(l))

No relevant problems have been addressed in the National Reports. The General Reporter shares this view. There is no need for any amendment of this provision.

6.1.4.13 Voidness, voidability or unenforceability of legal acts detrimental (Article 4(2)(m))

Article 4(2)(m) is further qualified by Article 13⁸³³. These provisions are discussed jointly *infra*.

6.1.4.14 Applicability in primary and secondary proceedings

With regard to primary and secondary proceedings, the effect of Article 4 is that different laws apply in different proceedings relating to the same debtor (Article 28). Questions arising from this situation are discussed in the context of secondary proceedings. However, it seems to be worth mentioning that no national reporter has raised any doubts as to the appropriateness of this effect of Article 4. Again, that is not surprising, since, in many instances, the assets of a person are located in different jurisdictions so that different substantive laws may apply. As long as the national insolvency laws are not completely harmonized, it is unavoidable that different laws apply if the existence of secondary proceedings is seen as a necessary element in order to ensure a fair treatment and for creditors from different jurisdiction to protect their legitimate expectations.

⁸³³ ECJ, case C-339/07, *Seagon./Deko Marty*, Opinion of AG Colomer, 16 October 2008, para. 13.

6.2 Article 5 EIR: Third parties' *rights in rem*

6.2.1 The underlying policy

The first exception to the general rule on the conflict of laws laid down in Article 4 EIR addresses the rights of creditors and third parties *in rem* on any assets belonging to the debtor, tangible or intangible, moveable or immoveable. Insofar as these assets are located in a Member State⁸³⁴ other than the State of the opening of proceedings (Member State A), the *rights in rem* shall not be affected by the opening of (main)⁸³⁵ insolvency proceedings. To understand the underlying policy of Article 5 (1) EIR, it seems helpful to recall the *Virgós/Schmit*-Report on Article 5 (1) of the failed 1995 European Convention on Insolvency Proceedings (hereinafter referred to as “the Convention”) which the European legislator has adopted word-for-word in 2000.⁸³⁶

According to the Report, “*the fundamental policy pursued is to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee. Rights in rem can only properly fulfil their function insofar as they are not more affected by the opening of insolvency proceedings in other Contracting States than they would be by the opening of national insolvency proceedings.*”⁸³⁷

In addition, EIR recital 25 reads as follows:

“*There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex*

⁸³⁴ Article 5 (1) EIR does not apply to assets situated in Third States (including Denmark). Cf. *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 94.

⁸³⁵ Due to Article 3 (2) part 2 EIR, the abovementioned prerequisites of Article 5 (1) EIR cannot be met in any territorial insolvency proceedings.

⁸³⁶ *Virgós* himself has pointed out that the Report on the European Insolvency Convention is of significant importance for the understanding of the Regulation. Cf. Council of the European Union (ed.), Civil Law, 2004, 93 no. 4, available under http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/CL_EN_WEB.pdf (last verification on 20 November 2012).

⁸³⁷ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 97.

situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.”

6.2.2 The main issues

6.2.2.1 How to achieve the policy goals?

The main and most crucial issue of Article 5 EIR is the question of which means should be implemented in order to achieve the policy goals. For the evaluation of the provision in question, it is interesting to learn from the Report that the draughters of the Convention have already considered different ways to meet the policy goals, although they are not discussed in detail, and that the main reason for the choice finally made was only the simplification of insolvency administration.⁸³⁸ The Report does not explicitly state which choice the Convention has made. However, it states that *rights in rem* are not fully protected, since the liquidator can file for the opening of secondary proceedings if the debtor has an establishment in the Member State in which the assets are situated (Member State B).⁸³⁹ The same mechanism is laid down in EIR recital 25. Therefore, the effects on *rights in rem* under the insolvency law of Member State B, such as restrictions of foreclosure, are not triggered by the opening of the main proceedings in Member State A, but rather only by the opening of the secondary proceedings in Member State B.

If Article 5 (1) EIR was a choice of law rule, the opening of the main proceedings in Member State A would automatically have the effects on *rights in rem* for which the insolvency law of Member State B provides. Therefore, the original meaning of the provision in question is not to adapt the effects from the jurisdiction of the Member State A to the jurisdiction of the Member State B (choice of law rule), but instead to restrict these effects to assets

⁸³⁸ Ibid.

⁸³⁹ Ibid.

situated in the territory of Member State A. It is therefore a substantive rule restricting the effects of the opening of insolvency procedures on *rights in rem* to assets located in the territory of Member State A in derogation of the general concept of Article 17 EIR, which shall be referred to as the “substantive restriction rule” in the following. Despite the use of the term “*Sonderanknüpfung*” in the German and “*rattachement particulier*” in the French text of EIR recital 25, which are typically used for choice of law rules, the current understanding of Article 5 EIR is supported by the wording of the provision itself and in particular by the use of the term “*shall not affect*”, which differs widely from the typical wording of a choice of law rule such as Articles 8, 10 and 11 EIR, which use the terms “*shall be governed ... by the law of*” and “*shall be determined by the law of*”.

6.2.2.2 Scope of application

A second issue discussed regarding Article 5 EIR is the scope of application which has to be distinguished from Article 4 (1) EIR and, in particular, from Article 4 (2) (i) EIR. This question arises for example if the asset charged with the *right in rem* is alienated. Generally speaking, the applicable law on *rights in rem* must govern the distribution of the proceeds, since the very nature of collaterals is to grant a privilege in the distribution process. This understanding of Article 5 EIR is supported by EIR recital 25 referring only to “*the surplus on sale of the asset covered by rights in rem*” which must be paid to the liquidator in the main proceedings. Therefore, the distribution of the proceeds must be governed by the *lex situs*.

Nevertheless, things get more complicated if the liquidator has negligently violated the *right in rem* selling the asset to a *bona fide* purchaser. For instance, under German insolvency law, the creditor would have a right to separate satisfaction upon the claim against the purchaser and, if the purchase price had already been paid to the liquidator, upon the money to the extent to which such consideration continues to exist in a specifiable manner among the insolvency estate (s. 48 InsO). If this prerequisite is not met, the creditor would have a claim for damages against the liquidator (s. 60 InsO) together with a claim incumbent upon the estate (s. 55 (1) InsO). From our point of view, under these circumstances, the *lex situs* should only apply to the right to separate satisfaction upon the consideration whereas the *lex concursus* governs the damage claim including the question whether or not the claim for damages is treated like a claim incumbent upon the estate. Although this solution is far from certain under the present wording of

Article 5 EIR, we do not recommend any amendments as to the scope of application, since we face ordinary problems in the construction of a statute which can be left to court decisions.

6.2.2.3 Localisation of intangible assets

A third issue in the context of Article 5 EIR is the question as to which criteria the localisation of intangible assets can be determined. As far as claims are concerned, Article 2 (g) EIR provides for an explicit rule stating that these are situated in the Member State within the territory of which the third party required to meet the claim has his COMI. Beyond that, the Regulation does not provide for any criteria as to the localisation of intangible assets.

Since, pursuant to Article 12 EIR, Community patents or trademarks cannot be included in secondary proceedings, those rights can fully benefit from the protection provided by Article 5 EIR if they are located in another Member State than the State of the opening of proceedings. The interplay between Article 5 EIR and Article 12 EIR will be treated in detail in the section dealing with Article 12.

6.2.2.4 Adjustment, reduction or discharge of the secured claim

The Estonian National Report raises the issue of whether claims secured by *rights in rem* can be adjusted in reorganisation proceedings.⁸⁴⁰ As far as accessory securities are concerned, it is questionable whether an adjustment, a reduction or even the discharge of the secured claim “*affects*” the accessory *right in rem* and is therefore prohibited by Article 5 EIR.

6.2.3 ECJ case-law

There is only one recent decision of the *ECJ* concerning Article 5 EIR. In the *ERSTE Bank Hungary Nyrt* case (C-527/10), the Court ruled that Article 5 (1) EIR is applicable if insolvency proceedings are opened in an old Member State (Austria) before the accession of the new Member State (Hungary) and, on the day of accession, the debtor’s assets charged with *rights in rem* were situated in that new Member State. Furthermore, the current understanding of Article 5 (1) EIR may be put into question by paragraph 42 of the decision and point 36 of the Advocate General’s Opinion. Advocate General *Ján Mazák* held that the “*rule set out in Article 5 (1) constitutes a conflict-of-laws rule in the form of an exception to the general*

⁸⁴⁰ Estonian National Report answer to Q 13.

principle, laid down in Article 4 (1) of the Regulation, that the law of the Member State in which the insolvency proceedings were opened is to apply.”⁸⁴¹ Accordingly, the ECJ held that “Article 5 (1) EIR must be understood as a provision which, derogating from the rule of the law of the State of the opening of proceedings, allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right in rem of a creditor or a third party over certain assets belonging to the debtor.”⁸⁴²

The wording of the opinion and the decision may be construed in a manner stating that Article 5 (1) EIR further allows the *insolvency law* of Member State B to be applied along with effects such as restrictions of the enforcement of *rights in rem* by creditors or third parties. If this understanding were to be correct, Article 5 (1) EIR would not be a substantive restriction rule, but a typical choice of law rule. However, with regard to the current understanding, it seems very unlikely that the ECJ, after having ruled in the *German Graphics* case that the equivalent provision on the reservation of title in Article 7 EIR, which also uses the term “*shall not affect*”, “*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*”⁸⁴³, wants to lead the *rights in rem* issue in Article 5 EIR in a completely new direction.

Furthermore, the Advocate General only wanted to point out that Article 5 (1) EIR “*does not deal with the conflict between courts which is liable to arise as a result of the insolvency proceedings*”⁸⁴⁴ and, therefore, proposed the lack of jurisdiction to answer the question referred to the Court.⁸⁴⁵ Within the context of the Opinion, the term “*conflict-of-laws rule*” seems to be used in opposition to “*conflict-of-courts rule*”⁸⁴⁶ rather than in opposition to “*substantive law rule*”. Therefore, it seems very doubtful that any conclusion could be drawn out of this strange case as to the understanding of Article 5 EIR.

⁸⁴¹ ECJ, case C-527/10, *ERSTE Bank Hungary Nyrt*, Opinion of AG Mazák, point 36.

⁸⁴² ECJ, case C-527/10, *ERSTE Bank Hungary Nyrt*, para. 42.

⁸⁴³ Cf. ECJ, case C-292/08, 10 September 2009, *German Graphics*, ECR 2009 I-8421 para. 35.

⁸⁴⁴ ECJ, case C-527/10, *ERSTE Bank Hungary Nyrt*, Opinion of AG Mazák, point 36.

⁸⁴⁵ ECJ, case C-527/10, *ERSTE Bank Hungary Nyrt*, Opinion of AG Mazák, point 48.

⁸⁴⁶ In the original French version of the Opinion, the Advocate General uses the terms “*conflit des juridictions*” and “*conflit de lois*”.

6.2.4 Implementation by the Member States

The implementation of Article 5 EIR has led to very little judicial case-law. However, this should not be understood in a manner stating that Article 5 EIR is flawless. The National Reports illustrate that the overwhelming majority of legal scholars treats Article 5 EIR as a substantive restriction rule.⁸⁴⁷ There therefore remains little reason for court litigation.

6.2.4.1 Practical problems reported

6.2.4.1.1 Basic understanding of Article 5 EIR

In practice there seem to be two ways of dealing with the territorial restriction of the effects of the opening of main insolvency proceedings. On one hand, a French practitioner reported a case as described in the *Virgós/Schmit*-Report: A German preliminary insolvency administrator (*vorläufiger Insolvenzverwalter*) appointed during the opening procedures (*Insolvenzeröffnungsverfahren*) immediately filed for the opening of secondary proceedings in France in order to prevent the enforcement of *rights in rem* on assets situated in France. This led to trouble for the French court because it had to fix the date of the cessation of payments (*cessation des payments*) although the German proceedings had not yet been opened and, therefore, the court had not even verified the debtor's insolvency.

On the other hand, the National Reporter for France and Luxembourg mentioned the famous *Cœur de Défense* case, which at first glance was an Article 3 (1) EIR issue raising the question as to whether the COMI of the holding company *Dame Luxembourg* was at the place of the registered office in Luxembourg or in Paris. The notes on the case, however, show that the COMI question was, in essence, an Article 5 (1) EIR issue, since insolvency proceedings in Luxembourg could not have affected the pledge on the shares of the Paris based company *Hold* whereas the French safeguard proceedings (*procédure de sauvegarde*) could stay the enforcement of the pledge.⁸⁴⁸

⁸⁴⁷ That is the prevailing opinion in 17 Member States: Austria (this interpretation is, however, highly disputed among legal scholars); Belgium, Cyprus, Finland, France (official interpretation of the French government, see Circulaire du 15 décembre 2006 relative au Règlement n° 1346/2000, para. 3.3.1.2), Germany, Greece, Ireland, Latvia, probably Luxembourg (there is no legal doctrine about the issue; however, it is likely that Luxembourgian scholars would follow the French interpretation), Netherlands, Poland, Romania, Slovenia, Spain, Sweden, UK. Article 5 EIR only seems to be understood as a choice of law rule in Hungary. In four Member States, the issue has not been resolved yet: Czech Republic, Estonia, Lithuania, Malta. Four National Reports did not answer to the question: Bulgaria, Italy, Portugal, Slovakia.

⁸⁴⁸ Cf. *Dammann/de Gernay*, Bulletin Joly Sociétés 2012, 329, 334 et seq.

Furthermore, the Lithuanian National Report pointed out problems in insolvency proceedings concerning natural persons in neighbouring Latvia with assets situated in Lithuania.⁸⁴⁹ As far as consumer cases are concerned, the opening of secondary proceedings is impossible because Article 3 (2) EIR requires an establishment within the meaning of Article 2 (h) EIR, which a consumer, *per definitionem* carrying out no economic activity, cannot have. As far as entrepreneur cases are concerned, the opening of secondary proceedings is impossible, since the Lithuanian national insolvency law, which is applicable to determine against which debtors insolvency proceedings may be brought on account of their capacity (Article 4 (2) (a) EIR), does not provide for any insolvency proceedings against natural persons.⁸⁵⁰ The same could happen with regard to Italy where small businesses are not subject to insolvency proceedings.⁸⁵¹

The Slovak National Report mentions a case⁸⁵² in which a Slovak bank provided financing for some Slovak SPVs. The ownership interests of the German holding company in a Slovak subsidiary were pledged to the Slovak bank as security. Later, insolvency proceedings over the German holding company were opened in Germany (*Insolvenzeröffnungsverfahren*) and the enforcement of pledges was prohibited by the opening decision. The question was whether the prohibition of pledge enforcement stated by the German court applied to the aforementioned pledge over the ownership interests in the Slovak bank.

Finally, the Dutch National Reporter said that holders of *rights in rem* ask for a higher compensation for the use of the assets situated in another Member State. As the liquidator could only file for even more expensive secondary proceedings, he will usually accept the deal. Furthermore, he reported a case of a German couple subject to consumer insolvency proceedings in Germany which owned real estate in the Netherlands charged with a mortgage in favour of a Dutch bank. Once again, the opening of secondary proceedings in the Netherlands was impossible due to the lack of an establishment of the debtor *per definitionem*. The substantive restriction rule therefore led to the puzzling result that the German insolvency administrator could not sell the

⁸⁴⁹ Cf. Lithuanian National Report answer to Q 13, Problem 1; see also Latvian National Report answer to Q 16 referring to insolvency proceedings of *Gytis Januska* (court case no. C36054411, unreported) and *Beatrice Januskiene* (court case no. C36054511, unreported).

⁸⁵⁰ Only as of March 2013, Lithuanian insolvency law will provide for insolvency proceedings against natural persons.

⁸⁵¹ Cf. Article 1 (2) legge fallimentare.

⁸⁵² Cf. Slovak National Report answer to Q 13.

real estate discharged of the mortgage without an agreement with the bank, although he could have done so under both German and Dutch insolvency law. In particular, this hard case will be addressed in more detail when considering the different options, suggests reconsideration of the choice taken by the draughters of the Convention and adopted in the Regulation – a choice not taken to meet the underlying policy goals as well as possible, but rather to facilitate insolvency administration. However, before we can turn to the discussion of the different options, we need to take into account to what extent *rights in rem* can be affected by the different national insolvency laws of the Member State.

Some National Reports point out that there are uncertainties as to the legal consequences of the basic understanding of Article 5 EIR, for example with regard to the enforcement and realisation of *rights in rem* falling into the scope of Article 5 EIR. The Estonian National Report indicates that EIR recital 25 only states that “*the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.*” However, the Regulation does not state whether the liquidator has to be informed of the sale and who has to pay the surplus to the liquidator.⁸⁵³ The Slovak National Report⁸⁵⁴ complains that EIR recital 25 is misleading with regard to the question of whether secured creditors may enforce their *rights in rem* on their own, or whether solely the insolvency practitioner is able to do so. One sentence in EIR recital 25 stipulates that creditors should be able to apply their right for separate settlement within the insolvency proceedings; however, the last sentence indicates that creditors are entitled to sell the secured assets outside the insolvency proceeding. In the absence of any Slovak case law on that issue, one Slovak interview partner held that only the insolvency practitioner was entitled to sell secured assets.⁸⁵⁵

6.2.4.1.2 Localisation of intangible assets

Generally speaking, the localisation of intangible assets has only caused minor problems in practice. Most of the National Reporters have not encountered any practical issues in this regard. However, the localisation of intellectual property rights such as trademarks, patents and licenses has led to difficulties in practice.⁸⁵⁶ In addition, several National Reporters raise an

⁸⁵³ Cf. Estonian National Report answer to Q 13.

⁸⁵⁴ Cf. Slovak National Report answer to Q 1.

⁸⁵⁵ Cf. Slovak National Report answer to Q 13.

⁸⁵⁶ See especially the German and the Dutch National Reports answers to Q 18.

issue concerning bank accounts held with a local branch of a foreign bank. The question is whether these accounts are situated in the Member State of the bank's branch or in the Member State in which the bank has its central office and its COMI (Article 2 (g) EIR).⁸⁵⁷

This localisation problem is mainly an issue regarding Articles 3 (2), 27 EIR. Let's presume, for example, that the debtor, a German company, had an establishment in France for which he has opened a bank account at a local branch of a German bank. If secondary (liquidation) proceedings were opened in France to ensure the instant payment of the employees under the applicable French law,⁸⁵⁸ the liquidator (*liquidateur*) would not have the money to do so if the bank account was localised in Germany.

The localisation problem is also an issue regarding Article 5 EIR. Let's presume for example that the debtor, a German company, deposits money on a bank account at a local branch of a French bank and assigns the credit to a third party as collateral. If this credit were situated in France, Article 5 EIR would protect the *right in rem* from any effect of the opening of the main proceedings and, namely, the power of the German insolvency administrator to ask the bank for payment to the estate (s. 166 (2) InsO). As long as the debtor does not have an establishment in the Member State of the bank's main office (COMI) in France, the protection shield set up by Article 5 (1) EIR would be effective. Therefore, some National Reporters plead for a clarification of the issue in favour of the localisation of the bank account at the bank's branch in charge of the account.⁸⁵⁹

Furthermore, the allocation of company shares (in private companies) causes problems. The Austrian Report suggests distinguishing between securitized and non-securitized shares. The first category should be situated in the Member State in which the security is located, whereas non-securitized shares should be situated at the company's COMI. The Slovenian Report wonders whether company shares fall under any category of Article 2 (g) EIR and whether Article 2 (g) EIR provides for an exhaustive list.

Finally, the Portuguese National Report points out that the characterisation of financial instruments deposited with financial intermediaries as intangible assets under Article 5 (1) EIR caused problems in practice.

⁸⁵⁷ See National Reports for: France, Greece, Malta, Netherlands, Slovenia, answers to Q 18.

⁸⁵⁸ Cf. Article 28 EIR and Articles L 625-8, 641-4 c.com.

⁸⁵⁹ See Dutch and Slovenian National Reports answers to Q 18.

6.2.4.1.3 Adjustment, reduction or discharge of the secured claim

The Estonian National Report mentions a Finish-Estonian case⁸⁶⁰ in which reorganisation proceedings over a company were opened in Finland. The debtor company had pledged shares of Estonian companies as financial collateral as well as an ordinary share pledge to an Estonian creditor. Furthermore, the debtor company owned real estate in Estonia which was also pledged to the Estonian creditor. During the reorganisation proceedings in Finland, the Estonian creditor's claim, secured by the aforementioned *rights in rem*, was adjusted. It was now unclear whether the Estonian creditor could nevertheless initiate enforcement proceedings in Estonia and whether he needed the consent of the Finish administrator to realise the assets situated in Estonia.

6.2.4.1.4 Other case-law

Finally, some National Reports mention court decisions in which the interpretation and application of Article 5 EIR did not cause any serious problems.

In one decision, the *Belgian Court of Appeal of Antwerp*⁸⁶¹ held that the *lex rei sitae* governed the question of whether the execution of a creditor's security interest (*gage commercial*) was permitted during the debtor's insolvency proceedings opened in France pursuant to Article 5 (2) (a) EIR.

In another case⁸⁶², the same court had to settle the question of whether the right to seize a ship is considered to be a *right in rem* according to Article 5 EIR. The court stated that this issue is left to the determination of the courts of each Member State. According to the Belgian court, a right is to be considered a *right in rem* if the right is directly connected to the good in question and this right has *erga omnes* effect. Article 1469 Code Judiciaire gives the creditor a preferential right to seize a ship and the court held that this right was directly connected to the good in question. However, the court left to the lower court the ultimate decision as to whether the right to seize a ship located in Antwerp is also considered to have *erga omnes* effect.

⁸⁶⁰ Estonian National Report answer to Q 13.

⁸⁶¹ *Court of Appeal Antwerp*, 23 August 2004, TBBR 2006, 558.

⁸⁶² *Court of Appeal Antwerp*, 4 March 2009, *B.V. K.-W. v. GmbH C.S. & Co. KG*, RW 2009-10, 882.

The Maltese National Report mentions a decision in which the application of Article 5 EIR caused no problems, but the court applied Article 5 EIR explicitly.⁸⁶³

In an Austrian case, a German creditor seized a claim (as a provisional and/or protective measure) in Germany. Insolvency proceedings were then opened in Austria. The Austrian courts handled the creditor's lien as a right to separate satisfaction according to s. 50 InsO without referring to conflict-of-law rules at all.⁸⁶⁴

6.2.4.2 The national legal context on *rights in rem*

In fact, the liquidator's rights on secured assets vary substantially among the national insolvency laws of the different Member States. For the scope of this General Report, we can only give a short overview of the powers granted to the liquidator and the restrictions of the rights of the creditors. For further details, we refer to Question 21 in the National Reports.

6.2.4.2.1 Sale of secured assets by the insolvency practitioner

Under most national insolvency laws, the insolvency practitioner is, in principle, allowed to sell assets underlying *rights in rem*.⁸⁶⁵ Following the sale, the secured creditor will receive preferential payment out of the proceeds.⁸⁶⁶ Previously, the proceeds are often reduced by the costs of the sale.⁸⁶⁷ In France, the amount necessary to satisfy the secured creditor(s) must be deposited on a special account at the *Caisse des dépôts et consignations* until the end of insolvency proceedings.⁸⁶⁸ However, many of the aforementioned national insolvency legislations impose restrictions on the

⁸⁶³ Civil Court, 30 December 2011, *Av Louis Cassar Pullicino vs MV Beluga Sydney*, Cit. Nru. 1136/2011 (unreported).

⁸⁶⁴ Austrian Supreme Court, 26 August 2009, ÖBA 2010, 133, annotated by König, JBI 2010, 193, and by L. Fuchs, *ecolex* 2010/49, 153.

⁸⁶⁵ Belgium (Article 75 Loi sur les Faillites); Bulgaria (Articles 717n and 719 Commercial Code); Czech Republic (s. 246 and ss. 283-295 Insolvency Act); Estonia; France; Germany (ss. 165, 166 InsO); Greece; Italy; Lithuania (Article 33 (3) Enterprise Bankruptcy Law); Luxembourg; Malta (Articles 238 (2) and 288 (1) (b) Companies Act); Poland; Romania; Slovakia; Slovenia; UK.

⁸⁶⁶ Bulgaria (Article 717n Bulgarian Commercial Code); Czech Republic; Germany (s. 170 (1) InsO); Greece; Lithuania (Article 34 Enterprise Bankruptcy Law); Poland (Article 336 BRL); Romania; Slovenia; UK.

⁸⁶⁷ Czech Republic: 4-5 % of the proceeds at maximum; Germany: 9 %; Lithuania; Poland: 10 % of the proceeds at maximum; UK: reduction takes place only in the case of a floating charge, the proceeds are not reduced if a fixed charge is concerned, Insolvency Act 1986 Schedule B1, para. 70.

⁸⁶⁸ Cf. Article L 622-8 c.com.

administrator's general right to sell secured assets. In some countries, the insolvency practitioner is obliged to inform the secured creditor about his intention to sell the secured asset and the intended manner of sale.⁸⁶⁹ In Estonia and Germany⁸⁷⁰, the secured creditor may then suggest a more profitable opportunity to sell the asset which the insolvency practitioner has to carry out. Under Belgian insolvency law, secured creditors can request that the court prohibits the sale if such a sale manifestly harms the rights and interests of the creditor in question.⁸⁷¹ In the Belgian judicial reorganisation by way of transfer of the enterprise under judicial supervision, the *mandataire de justice* may sell secured assets; however, the secured creditor(s) must be heard. Secured creditors can then request the court to impose upon the *mandataire* not to sell the asset under a particular minimum price.⁸⁷² In Slovenia, the insolvency practitioner may sell assets subject to a right of separation if the deadline to lodge claims of separation has expired.⁸⁷³ According to Czech insolvency law, the secured creditor may issue instructions regarding the administration and sale of a secured asset.⁸⁷⁴ Under French and Luxembourgian insolvency law, the sale of (not necessarily secured) assets must always be approved by the court.⁸⁷⁵ In Malta, the sale of all movable or immovable assets is controlled by the court. In the UK, the insolvency practitioner cannot sell an asset subject to a fixed charge without the consent of either the chargeholder or the court, whereby no consent is necessary if a floating charge is concerned.⁸⁷⁶

By contrast, in some jurisdictions, *rights in rem* are generally not affected by the opening of insolvency proceedings and the insolvency practitioner is therefore, in principle, not allowed to sell secured assets.⁸⁷⁷ However, under strict conditions, a few exceptions are made: In Finland, the court may force

⁸⁶⁹ Bulgaria: duty to inform the secured creditor only as far as immovable assets are concerned (Article 717n Commercial Code); Estonia; Germany; Lithuania (Article 33 (3) Enterprise Bankruptcy Law).

⁸⁷⁰ Cf. s. 168 (2) InsO.

⁸⁷¹ Cf. Article 75 Loi sur les Faillites.

⁸⁷² Cf. Article 63 LCE.

⁸⁷³ Article 299 Slovenian Insolvency Act.

⁸⁷⁴ S. 293 Czech Insolvency Act. Some case-law held that additionally the sale must be approved by the creditors committee as well as by the court. In addition, cases, in which a group of creditors had to issue a joint sale instruction, cause problems in practice.

⁸⁷⁵ France: Article L 622-7 c.com.; Luxembourg: Article 477 c.com. If a pledge is concerned, the insolvency practitioner additionally has to pay the secured creditor, Article 543 c.com.

⁸⁷⁶ Insolvency Act 1986 Schedule B1, para. 71.

⁸⁷⁷ Generally speaking this is true for Austria, Finland and the Netherlands (Article 57 (1) Faillissementswet) and seems to us to be also the case in Cyprus, Romania and Spain.

the sale of the secured asset under strict conditions. Under Austrian and Dutch law, the insolvency practitioner may cancel a lien by paying the secured debt.⁸⁷⁸ According to Dutch insolvency law, the court may order a stay of a maximum of 4 months (*afkoelingsperiode*), during which secured creditors are prevented from enforcing their securities.⁸⁷⁹ In Austria, the insolvency practitioner may request a stay of enforcement proceedings and realise the asset through single-handed sale if a secured creditor has already foreclosed the collateral.⁸⁸⁰ In the Netherlands, the insolvency practitioner may set a reasonable deadline of foreclosure to the secured creditor(s).⁸⁸¹ If the secured creditor does not foreclose the collateral within this period, the insolvency practitioner may sell the asset. The secured creditor will then get preferential payment out of the proceeds. In Dutch legal practice, agreements on a sale of secured assets by the insolvency practitioner are very frequent between the insolvency practitioner and secured creditors.

6.2.4.2.2 Stay of enforcement proceedings by secured creditors

Some national insolvency legislations provide for an automatic stay which prevents secured creditors from enforcing their securities⁸⁸², whereas under a lot of legislations, there is no automatic stay.⁸⁸³ In Finland, there is no stay at all, not even upon request. In the UK, certain categories of unregistered company charges cannot be enforced against an insolvency practitioner.⁸⁸⁴ Finally, in some jurisdictions, a temporary stay is granted on request.⁸⁸⁵ Under Polish insolvency law, claims secured by *rights in rem* are not covered

⁸⁷⁸ Austria: in case of a pledge, s. 120 (1) IO; Netherlands: the payment is possible as long as the secured creditor has not foreclosed the collateral, Article 58 (2) Faillissementswet.

⁸⁷⁹ Article 63a Faillissementswet. The provision is not clear on the question of whether the insolvency practitioner may use (up) or sell secured assets during this period. According to legal doctrine, this is the case.

⁸⁸⁰ Cf. s. 120a (1) IO.

⁸⁸¹ Article 58 (1) Faillissementswet.

⁸⁸² Czech Republic: the automatic stay begins with the publication of the insolvency petition in the online insolvency register and is not limited in time, s. 109 Czech Insolvency Act; Latvia: automatic stay during two months from the day following the proclamation of insolvency proceedings of a legal person, Article 63 (1) Latvian Insolvency Law.

⁸⁸³ Austria, Finland and the Netherlands (Article 57 (1) Faillissementswet).

⁸⁸⁴ S. 874 Companies Act.

⁸⁸⁵ Austria: if an asset is necessary to continue the debtor's business, the insolvency practitioner may use the asset for half a year if this suspension does not cause severe disadvantages to the secured creditor in question, s. 11 (2) IO; during this period, secured creditors are prevented from claiming their rights of segregation or of preferential satisfaction; Germany: during opening proceedings, see s. 21 (2) n. 3 and 5 InsO and s. 30d (4) ZVG, during insolvency proceedings see s. 30d (1) ZVG; Netherlands: so called "*afkoelingsperiode*" of 4 months at maximum, Article 63a Faillissementswet.

by the reorganisation arrangement⁸⁸⁶ and therefore do not fall under the automatic stay of enforcement proceedings. A temporary stay of three months at maximum can be requested if the asset is indispensable for the debtor's business activity.⁸⁸⁷ According to Czech insolvency law, secured creditors form a separate class for voting the reorganisation plan. The court may overrule the dissenting vote of a secured creditor under certain conditions.

6.2.5 Discussion

As pointed out before, the Convention and the Regulation have opted for the restriction rule, not because it seemed to be the most adequate solution to meet the general policy but since it was the easiest solution for the insolvency administration. Therefore, after almost 20 years following the end of the negotiations on the Convention, the report provided for in Article 46 EIR is the appropriate occasion to reconsider the different choices.

6.2.5.1 The first issue: How to achieve the policy goals?

6.2.5.1.1 *The three options*

In fact, the legislator can choose between three possible solutions.

6.2.5.1.1.1 *Substantive restriction rule*

The first solution is to leave Article 5 EIR unchanged, thereby keeping the substantive restriction rule in force. The effect would be that the opening of insolvency proceedings in one Member State (Member State A) would continue to have no effect on the creditors' or third parties' *rights in rem* on the debtor's collaterals situated in other Member States (Member State B) unless secondary proceedings would be opened in the latter Member State.

6.2.5.1.1.2 *Choice of law rule*

The second choice is to adopt a "choice of law rule" such as Articles 8 and 10 EIR. *INSOL Europe* has voted in favour of this solution and proposed the following amendment of Article 5 EIR:

"The effects of insolvency proceedings on the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets [...] belonging to the debtor which are situated within the territory of

⁸⁸⁶ Cf. Article 273 (2) BRL.

⁸⁸⁷ Cf. Article 141 BRL.

*another Member State at the time of the opening of proceedings shall be governed solely by the law of the Member State within which the assets are situated.*⁸⁸⁸

6.2.5.1.1.3 Opposition rule

The third choice is to adopt an “opposition rule” such as Article 13 EIR. This would mean on one hand that the assets in all Member States are subject to the restrictions of foreclosure by creditors and third parties and to the powers granted to the insolvency organs (liquidator, courts, debtor in possession etc.) under the insolvency law of the State of the opening of proceedings. On the other hand, the protected creditors and third parties can plead for the application of the *lex situs*, arguing that the legal consequences of the opening of insolvency proceedings on their *rights in rem* provided for by the insolvency law of Member State A are not provided for by the insolvency law of Member State B.

6.2.5.1.2 Case studies

The effects of the three different options shall be illustrated by some case studies involving German, Austrian, French and Dutch insolvency law, taking into account the case reported by the Dutch National Reporter.

6.2.5.1.2.1 Case 1

The debtor, a retail company based in Germany, assigns its claims against its German and Austrian clients to a German creditor as collateral and informs the clients of the transaction. Insolvency proceedings are opened in Germany.

Under European law, the assignment of all claims is governed by German civil law (Articles 4 (1) (a), 14 (2) (3) Rome I-Reg.), whereas the claims are situated in Germany and Austria respectively in accordance with the third parties' COMI (Article 2 (g) EIR). Under German civil law, the clients generally would have to pay to the creditor (s. 362 BGB). However, under German insolvency law, the insolvency administrator has the exclusive right to have the claims met (s. 166 (2) InsO), whereas Austrian insolvency law does not affect the rights of the protected creditor to have the claims met and to receive preferential satisfaction (ss. 10 (3), 11 (1) IO). In this event, the

⁸⁸⁸ Van Galen et al.: Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012), 10.

substantive restriction rule and the choice of law rule come to the conclusion that the German clients have to pay the German insolvency administrator, whereas the Austrian clients have to pay to the creditor. In contrast, according to the opposition rule, the German insolvency administrator is entitled to the settlement of all claims met. The creditor and the Austrian clients may oppose Austrian law if they consider it to be more favourable to protect their security interests.

6.2.5.1.2.2 Case 2

The debtor, a retail company based in Austria, assigns its claims against its Austrian and German clients to an Austrian creditor as collateral and informs the clients thereof. Insolvency proceedings are opened in Austria.

In this variation of the first case, in which the assignment of all claims is governed by Austrian civil law (Articles 4 (1) (a), 14 (2) (3) Rome I-Reg.), generally speaking, the clients would still have to pay to the creditor (s. 1396 ABGB). According to the substantive restriction rule and the opposition rule, this result would be reached for all claims even after the opening of Austrian insolvency proceedings: All clients would have to pay the creditor. According to the choice of law rule, only the Austrian clients would have to pay the creditor, whereas the German clients would have to pay the Austrian insolvency administrator. Therefore, the choice of law rules grants powers to the insolvency administrator such as the enforcement of claims assigned to a creditor not provided for in the insolvency law of the State of the opening of proceedings. By this means, the balance of power between the different organs of the administration of the debtor's estate can be troubled.

6.2.5.1.2.3 Case 3

The debtor, a manufacturer company based in Germany, transfers its property on tangibles situated in its factories in Germany and France to a German creditor. Insolvency proceedings are opened in Germany.

Under German civil law, the transfer of title, known as *Sicherungsübereignung*, is valid without any further formalities (ss. 929, 930 BGB). The creditor can therefore legally dispose of the assets according to the conditions laid down in the securities contract with the debtor. After the opening of insolvency proceedings, only the insolvency administrator can dispose of assets in his possession transferred as a security to a creditor (ss. 166 (1), 51 n. 1 InsO). In French law, the transfer of title known as the

propriété cédée à titre de garantie requires registration within one month (Articles 2372-1, 2019 c.c.). As in Germany, the creditor can dispose of the assets (Article 2372-2 (1) c.c.). As far as insolvency law is concerned, the situation is slightly more complicated. On one hand, if rescue proceedings, known as *procédure de sauvegarde*, are opened, the supervisory judge (*juge-commissaire*) can authorise the debtor to fulfil the protected claim in order to reverse the transfer of title if the reversion is justified by the continuation of the business (Article L 622-7 (II) c.com.). On the other hand, the provision in question does not apply in liquidation proceedings, known as *liquidation judiciaire* (Article L 641-3 c.com.), which are opened to end the debtor's activities (Article L 640-1 c.com.).

In this case, all three options lead to different results. According to the substantive restriction rule, the German insolvency administrator can only dispose of the assets in Germany, whereas the creditor can dispose of the assets in France. The opening of secondary proceedings could not enhance the powers of the "insolvency administration side" (understood to be all organs at large in contrast to the creditors and third parties), because up to now secondary proceedings would have to be liquidation proceedings (Article 3 (3), 2 (c), 27 EIR) and for France only *liquidation judiciaire* is listed in Annex B.⁸⁸⁹

According to the choice of law rule, the German insolvency administrator can dispose of the assets in Germany. As far as the assets in France are concerned, we face two problems. The first problem is that the German *Insolvenzverfahren* can lead both to rescue and to liquidation. It is therefore unclear whether we have to apply French rescue or liquidation law on the assets situated in France. This adaptation problem could be overcome by giving the German insolvency administrator a choice of which regime he wants to have applied. The second adaptation problem is rooted in the different architecture of insolvency administration both concerning the organs and the balance of powers. French rescue law provides for the tribunal⁸⁹⁰ opening the proceedings (Article L 621-1 c.com.), for the supervisory judge (Article 621-4 (1), 621-9 c.com.), a representative of the employees, known as *représentant des salariés* (Article 621-4 (2) c.com.), and for at least one court nominee, known as *mandataire judiciaire* (Articles 621-4 (3), 622-20 c.com.) as well as for one administrator, known as *administrateur judiciaire*

⁸⁸⁹ Since this provision will be changed, at least this problem can be overcome.

⁸⁹⁰ The competence is attributed the *tribunal de commerce* or to the *tribunal de grande instance* (Article L 621-2 c.com.).

(Articles 621-4 (1), 622-1 c.com.). Finally, the directors of the debtor company remain in office and manage the enterprise (Article 622-1 c.com.). The German *Insolvenzverfahren* only provides for the insolvency court, the creditors' committee and either the insolvency administrator (s. 80 InsO) or the debtor in possession and the custodian, known as *Sachwalter* (s. 270 InsO). If the German insolvency administrator or the debtor in possession wanted to fulfil the protected claim in order to reverse the transfer of title, there would be no supervisory judge to ask permission to do so. It does not comply with the balance of powers in Germany to seek permission from the German insolvency court. Therefore, the German insolvency administrator or the debtor respectively should decide on the transaction autonomously.

According to the opposition rule, the German insolvency administrator could dispose of all assets. As far as the assets in France are concerned, the creditors and third parties could oppose that, under French rescue law, he has to be paid in advance, since French insolvency law does not provide for a power of the "insolvency administration side" to dispose of the asset unless this prerequisite is met. In contrast, creditors and third parties could not oppose that French law prescribes the authorisation of the supervisory judge and that the authorisation could only be granted if the reversion is justified by the continuation of business. Such restriction of the opposable *lex situs* is perfectly in line with the underlying policy, since the creditors and third parties entitled to the *rights in rem* had to consider in advance that these prerequisites could be met in the future. In other words, secured creditors and third parties cannot oppose that the legal elements of the provision affecting their *rights in rem* under the *lex situs* have not been met, but rather only that the legal consequences cannot occur under the *lex situs*. However, it is inevitable that the secured creditor or the third party would request the opening of secondary proceedings if the debtor has an establishment in France to also invoke the legal elements of French insolvency law.⁸⁹¹

The distinction between the legal elements and the legal consequences of provisions providing for effects on *rights in rem* must be drawn with regard to the underlying policy of the opposition rule. For example, the advance payment of the secured creditor could be a prerequisite to recover the assets as well as part of the legal consequence of the authorisation. As in the case

⁸⁹¹ If Article 27 EIR was amended as proposed by *van Galen* et al.: Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012), 77, it seems very doubtful whether the interest of the secured creditor could justify the opening of secondary proceedings.

of transfer of title, the secured creditor under French law does not run the risk of losing his title unless he receives advance payments. The advance payment must be considered part of the legal consequences.

6.2.5.1.2.4 Case 4

The debtor, a manufacturer company based in France, transfers its property on tangibles situated in its factories in France and Germany to a French creditor. Rescue proceedings are opened in France.

In this variation of the third case, all three options come to the result that, in principal, the creditor could dispose of the assets situated in France and that the supervisory judge could authorise the debtor (in possession) to fulfil the protected claim in order to reverse the transfer of title. As far as the assets situated in Germany are concerned, the substantive restriction rule would allow the creditor to dispose of the assets, whereas the debtor could not do so unless he reaches an agreement with the creditor. According to the choice of law rule, only the debtor could dispose of the assets in Germany without court authorisation. According to the opposition rule, the supervisory judge could authorise the debtor to fulfil the protected claim in order to reverse the transfer of title on all the assets in France and Germany. As German law is less favourable to the creditors, it cannot be opposed.

6.2.5.1.2.5 Case 5

The debtor, a German consumer, owns real estate in the Netherlands charged with a mortgage in favour of a Dutch creditor. Consumer insolvency proceedings are opened in Germany.

Under German insolvency law, the trustee (*Treuhänder*), as he is called in consumer cases (s. 313 InsO), could request the compulsory auction of the real estate (s. 165 InsO) which would lead to the transfer of the title discharged of the mortgage even if the proceeds did not meet the secured claim.⁸⁹² Under Dutch insolvency law, the liquidator (*curator*) could set a time limit for the creditor (*hypothekhouder*) to foreclose the mortgage. If the creditor fails to do so, he loses the mortgage and only keeps a claim incumbent upon the estate subordinated to the costs of the insolvency proceedings. The liquidator may sell the real estate either by public auction or

⁸⁹² For further details cf. ss. 174a, 10 (4), 44, 52 (1) ZVG.

by freehand sale with the permission of the supervisory judge (*rechter-commissaris*).⁸⁹³

In this case, the substantive restriction rule is a trap, since the German main proceedings cannot achieve their goal as long as the Dutch bank does not agree with the discharge and there is no person interested in the acquisition of the estate charged with a mortgage. Such a solution is obviously undesirable, as both jurisdictions involved provide for a remedy to overcome the dissent of the secured creditor.

According to the choice of law rule, the German trustee, as substitute of the Dutch liquidator, could set the time limit for the creditor to foreclose the mortgage. As far as the secured creditor can apply to the supervisory judge to lengthen the time period, and the trustee to sell the real estate by freehand sale, it would be the German court that would decide on the requests. If the Dutch creditor did not foreclose the mortgage within the time limit, the German trustee would be entitled to sell the real estate either by public auction or by freehand sale with the permission of the German court. We then face the issue of whether Dutch law also governs the distribution of the proceeds from the realisation of the asset as part of the applicable law on *rights in rem* or whether the general rule of Article 4 (2) (i) EIR applies. As pointed out above, the applicable law on *rights in rem* must govern the distribution of the proceeds. Therefore, the claim of the Dutch credit on the proceeds would be subordinated to the costs of the whole insolvency proceedings according to the Dutch insolvency law.⁸⁹⁴ Adapted to the German insolvency law on distribution of the debtor's estates, the claim on the proceeds would be a debt incumbent upon the estate (s. 55 InsO).

According to the opposition rule, German insolvency law would apply. However, it needed to be adapted, as it would lead to the application of an execution procedure on real estate in the Netherlands necessarily governed by the *lex situs*. By means of adaptation, the trustee could sell the real estate either by public auction or by freehand sale with the permission of the German court. The creditor could object that he has to be given a fair and reasonable time limit to foreclose the mortgage, since the Dutch insolvency law leaves the right to do so unaffected and does not provide for the immediate power of the liquidator to sell the real asset discharged of the mortgage. However, the distribution of the proceeds would be governed by

⁸⁹³ For further details cf. Articles 58, 101, 176, 182 Faillissementswet.

⁸⁹⁴ Cf. Article 182 Faillissementswet.

German law, which only subordinates the protected creditor to the costs of the realisation of the asset.⁸⁹⁵

6.2.5.1.2.6 Case 6

The last case to be addressed here has been briefly mentioned during the Heidelberg Conference: The so-called “Double Luxco Structure”, which has been set up in the Bidco LBO transaction to “*allow lenders to enforce the LuxCo 1 Share Pledge, notwithstanding the fact that Bidco is subject to a hostile safeguard*”.⁸⁹⁶ The idea of the structure is to have (at least) two holding companies based in Luxembourg, the grandmother company, Luxco 2 SARL, and the daughter, Luxco 1 SA, which holds the shares of the French granddaughter (Bidco SAS). Luxco 2 pledges its shares on Luxco 1, while Luxco 1 pledges its shares on the Bidco SAS in France. Even if the COMI of all three companies were considered to be in France, Article 5 EIR “*should allow (even where LuxCo 1 is subject to a hostile safeguard), the LuxCo 1 Share Pledge to be unaffected by the French insolvency proceedings to the extent those shares are effectively located outside of France. The double LuxCo structure seeks to achieve this result by requiring the LuxCo 1 share register be held in escrow in Luxembourg.*”⁸⁹⁷

The expectations of the lenders are perfectly met as long as Article 5 EIR is understood to be a substantive restriction rule. If secondary proceedings were opened against LuxCo 1 in Luxembourg, holding that there was an establishment, the *rights in rem* situated in Luxembourg could be affected, albeit only in accordance with Luxembourg law, which does not provide for a stay on the execution of the pledge. Furthermore, Luxembourg law leaves the attribution to exercise the right to vote attached to the pledged shares to party agreement.⁸⁹⁸ This example clearly demonstrates that the protection the lenders seek is essentially not provided by the substantive restriction rule as a protection shield against any effects of insolvency proceedings, since the opening of secondary proceedings in the Member State in which the assets are situated has always to be taken in consideration. The protection is rather

⁸⁹⁵ Cf. s. 109 ZVG.

⁸⁹⁶ Cf. *White & Case*, Insight: Bank Finance, August 2010, 1, download: www.whitecase.com/alerts-09072010 (last verification on 20 November 2012).

⁸⁹⁷ Ibid., p. 2.

⁸⁹⁸ Cf. Article 9 Financial Collateral Arrangements Act 2005 (*loi sur les contrats de garantie financière*).

provided by the substantive *lex situs* governing the pledge.⁸⁹⁹ Therefore, the legal situation of the lenders would not change at all if a conflict of law rule was adopted. In substance, it would not either be affected by an opposition rule. Only in the event that the foreign liquidator was to invoke the effects of the *lex concursus* would the lenders have to counter the *lex situs*.

6.2.5.1.3 Evaluation of the three options

In order to evaluate the three options, we have to distinguish four hypotheses: In the first hypothesis implemented in Case 1, the insolvency law of Member State A provides for effects of the insolvency proceedings or powers of the “insolvency administration side” not provided for by the insolvency law of Member State B. According to the substantive restriction rule and the choice of law rule, the *rights in rem* on assets situated in the Member State B are not affected by proceedings in the Member State A in any manner. According to the opposition rule, the *rights in rem* are protected by opposing the lack of effects or powers according to the insolvency law of Member State B.

In the second hypothesis implemented in Case 3, the insolvency law of Member State A provides for effects of the insolvency proceedings or powers of the “insolvency administration side” which go beyond the effects provided for in the insolvency law of Member State B. Once again, the substantive restriction rule would leave the *rights in rem* on assets situated in the Member State B unaffected and, by going beyond what the underlying policy requires, it would be an unjustified hyperprivilege of the protected creditors and third parties.

In contrast, both the choice of law rule and the opposition rule would exactly meet the goal that the holders of *rights in rem* “are not more affected by the opening of insolvency proceedings in other Contracting States than they would be by the opening of national insolvency proceedings.”⁹⁰⁰ The only difference would be that the choice of law rule having overcome the severe adaptation problems would come to this result *ex lege*, whereas, according to the opposition rule, the creditors and third parties would have to oppose the local law.

In the third hypothesis, implemented in Cases 2 and 4, the insolvency law of Member State A does not provide for effects of the insolvency proceedings or

⁸⁹⁹ According to *Lattard/Fayot*, ALJB Bulletin Droit et Banque 2012, n° 49, 31, 34 et seq. The realisation of the security in Luxembourg is affected by neither the proceedings in Luxembourg nor abroad.

⁹⁰⁰ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 97.

powers of the liquidator provided for by the insolvency law of Member State B. Both the substantive restriction rule and the opposition rule come to the conclusion that *rights in rem* are not affected by proceedings in the Member State A, whereas, according to the choice of law rule, the opening of main insolvency proceedings produces effects on assets situated in Member States B, although the insolvency law of Member State A does not want to affect *rights in rem*. Therefore, in this hypothesis, the opposition rule protects the creditors' expectation of the application of the *lex situs* as far as necessary, whereas the choice of law rules goes beyond the inevitable.

In the fourth hypothesis, implemented in Case 5, the insolvency law of Member State A provides for an execution procedure not available for assets situated in Member State B. This hypothesis is of no significance under the substantive restriction rule, since the *rights in rem* are not affected anyway. The choice of law rule leads to the application on the *lex situs* requiring adaption. The opposition rule also needs to be adapted to the local execution procedural law.

With regard to these hypotheses, the opposition rule seems to be the most adequate solution, because it complies with the general rules of Article 4 (1) and Article 17 EIR as far as possible and protects the creditors' expectation of the application of the *lex situs* to the extent necessary. From our point of view, the possible objections do not put this solution into question. The first objection might be that the opposition rule faces qualification problems. For example, with regard to s. 166 (1) InsO, one needs to distinguish a right which entitles to separate settlement, known as *Absonderung*, from a right which entitles to segregation known as *Aussonderung* (s. 47 InsO). Therefore, the application of s. 166 (1) InsO to *rights in rem* underlying a foreign regime can be more difficult than to assets located in Germany. However, such ordinary qualification problems are common in the field of conflict of laws. On the other hand, the opposition rule avoids difficult adaptation problems, as described in Case 3.

The second objection might be that the opposition rule imposes the burden to oppose the *lex situs* on the creditors. With regard to the underlying policy, however, this burden seems acceptable as long as the holders of the *rights in rem* can oppose the local law in the courts of the Member State in which the assets in question are situated, since these courts are aware of the local law and could easily and quickly grant injunctions. Therefore, we have to answer the question of whether or not the courts of this Member State have jurisdiction to decide such claims. With regard to the decision of the ECJ in

the *German Graphics* Case, the Regulation (EC) No. 44/2001 (Brussels I Regulation) would apply to that question.⁹⁰¹ As far as provisional measures are concerned, Article 31 Brussels I Regulation provides for the application of the national rules on jurisdiction. Furthermore, jurisdiction to decide real estate cases on the merits could be based on Article 22 (1) Brussels I Regulation. However, there is no specific provision on special or exclusive jurisdiction of the courts of a Member State in which movables are situated. If the opposition rule were to be adopted, a jurisdiction clause could be added. As the territorial scope of application of the Brussels I Regulation and the Insolvency Regulation differs as far as Denmark is concerned, it seems more appropriate to add the insolvency clause in the Insolvency Regulation.

The third objection might be that the application of the opposition rule to *rights in rem* on immoveable property is inconsistent with the choice of law rule on contractual rights to acquire or make use of immoveable property in Article 11 EIR. For example, a *right in rem* to the beneficial use of immoveable property would be governed by the insolvency law of the state of the opening of proceedings, whereas the contractual right to make use of the same property is governed by the law of the Member State in which the estate is situated. From our point of view, this distinction seems tolerable. One might consider the application of the *lex situs* to all questions related to immoveables, a consideration supported by the adaptation problems shown in Case 5. However, this would need further consideration.

6.2.5.2 Discussion of the other issues

6.2.5.2.1 Allocation of intangible assets

From our point of view, the decision about the localisation of intellectual property rights and shares can be left to the courts. As far as bank accounts held with branches of foreign banks are concerned, the issue should be resolved in accordance with the Commissions' *Proposal for a Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters*.⁹⁰² Pursuant to Article 4 (6) (a) of the aforementioned proposal, the "*Member State where the*

⁹⁰¹ Cf. *ECJ*, case C-292/08, 10 September 2009, *German Graphics*, ECR 2009 I-8421, paras 21 et seq. In this decision, the *ECJ* has decided that the exception provided for in Article 1 (2) (b) Regulation (EC) No. 44/2001 does not apply to an action brought by a seller based on a reservation of title against a purchaser who is insolvent. Consequently, the same must be true for claims based on *rights in rem* as referred to by Article 5 EIR.

⁹⁰² COM(2011) 445 final.

bank account is located” for a bank account containing cash means the Member State indicated in the account’s IBAN. That assures that bank accounts held by the debtor in a Member State in which he has an establishment can be included into secondary proceedings opened in this Member State in accordance with Articles 3 (2), 27 EIR.

Once the policy decision on the allocation of bank accounts has been taken, the question arises how to implement the decision within the wording of the EIR. On the one hand, from the General Reporter’s point of view, a future Regulation on a European Account Preservation Order will be *lex specialis* vis-à-vis the EIR as far as the allocation of bank accounts containing cash is concerned. Therefore, the implementation of a reservation in favour of the (future) Regulation on a European Account Preservation Order into the EIR would be sufficient. The reservation does not necessarily have to be implemented into Article 2 (g) EIR itself, but rather can also be included in a recital. This solution prevents the EIR from becoming outdated too easily once the Regulation on a European Account Preservation Order is amended. On the other hand a particular provision on bank accounts can be inserted into the list of definitions provided for in Article 2 (g) EIR. This second solution might facilitate the application of the EIR avoiding the reference to another legal instrument.

6.2.5.2.2 Adjustment, reduction or discharge of the secured claim

The question as to whether a claim secured by *rights in rem* falling into the scope of Article 5 EIR can be adjusted or discharged by a reorganisation plan is a common topic in legal doctrine. A large number of – notably German and Austrian – legal scholars state that Article 5 (1) EIR does not protect secured creditors against a reduction or even the discharge of the secured claim during insolvency proceedings, e.g. by payment of the secured claim, by means of avoidance or by court decision.⁹⁰³ Some of these authors explicitly say that Article 5 (1) EIR does not hinder an adjustment of a secured claim

⁹⁰³ *Haubold*, in: Gebauer/Wiedmann (eds.), *Zivilrecht unter europäischem Einfluss* (2010), chapter 32, para. 120; *Mäsch*, in: Rauscher (ed.), *EuZPR/EuIPR* (2010), Article 5 EuInsVO, para. 24; *Ingelmann*, in: Pannen (ed.), *European Insolvency Regulation* (2007), Article 5 EIR, para. 28; *Bach*, in: Ahrens/Gehrlein/Ringstmeier (eds.), *Fachanwaltskommentar Insolvenzrecht* (2012), Annex I, Article 5 EuInsVO, para. 36; *Kindler*, in: MünchKomm-BGB, vol. 11 (2010), Article 5 EuInsVO, para. 25; *Kindler*, in: Kindler/Nachmann (eds.), *Handbuch Insolvenzrecht in Europa* (2010), § 4 para. 25; *Paulus*, *Europäische Insolvenzverordnung - Kommentar*, Article 5, para. 18; *Herchen*, *Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995* (2000), 103, 109 et seq; *Flessner*, in: *Festschrift für Ulrich Drobnis* (1998), 277, 285; *Flessner*, *IPRax* 1997, 1, 8; *Duursma-Kepplinger*, in: *Duursma-Kepplinger/Duursma/Chalupsky* (eds.), *Europäische Insolvenzverordnung* (2002), Article 5, para. 37.

through a reorganisation plan and advise secured creditors to realise their securities as soon as possible.⁹⁰⁴

They argue that Article 5 EIR solely protects *rights in rem* against restrictions resulting from the “*opening of insolvency proceedings*”. Article 5 EIR does not expressly exclude a restriction of the accessory *right in rem* during insolvency proceedings.⁹⁰⁵ Furthermore, the Regulation distinguishes the recognition of the “*judgement opening insolvency proceedings*” (Articles 16, 17 EIR) from the recognition of “*judgements [...] which concern the course and closure of insolvency proceedings*” (Article 25 EIR). A reorganisation plan is not recognised pursuant to Article 16 EIR, but rather falls into the scope of Article 25 EIR. It therefore does not result from the “*opening of insolvency proceedings*”, expression used by Article 5 (1) EIR as well as by Articles 16 and 17 EIR.⁹⁰⁶ Furthermore, Article 5 EIR only protects the existence of the *right in rem* itself, and not the existence of the secured claim.⁹⁰⁷

Consequently, the only remedy against an adjustment of a secured claim would be Article 26 EIR, according to which the recognition of the reorganisation plan may be refused. Those authors point out that secured creditors’ participatory rights in a reorganisation plan are part of public policy.⁹⁰⁸

Another group of legal scholars finds that *rights in rem* falling into the scope of Article 5 EIR shall not be affected by reorganisation plans.⁹⁰⁹ The admissibility

⁹⁰⁴ *Ingelmann*, in: Pannen (ed.), European Insolvency Regulation (2007), Article 5 EIR, para. 28; *Kindler*, in: Münchener Kommentar zum BGB, vol. 11, (2010), Article 5 EulnsVO, para. 25; *Kindler*, in: Kindler/Nachmann (eds.), Handbuch Insolvenzrecht in Europa, München 2010, § 4 para. 25; *Paulus*, Europäische Insolvenzverordnung - Kommentar, Article 5, para. 18; *Flessner*, IPRax 1997, 1, 8; *Duursma-Kepplinger*, in: Duursma-Kepplinger/Duursma/Chalupsky (eds.), Europäische Insolvenzverordnung (2002), Article 5, paras 37 et seq.

⁹⁰⁵ *Bach*, in: Ahrens/Gehrlein/Ringstmeier (eds.), Fachanwaltskommentar Insolvenzrecht (2012), Annex I, Article 5 EulnsVO, para. 36; *Herchen*, Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995 (2000), 102, 109 et seq; contra: *Plappert*, Dingliche Sicherungsrechte in der Insolvenz (2008), 290, who states that the judicial decision confirming a reorganisation plan results at least indirectly from the judgement opening insolvency proceedings.

⁹⁰⁶ *Herchen*, Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995 (2000), 94 et seq.

⁹⁰⁷ *Bach*, in: Ahrens/Gehrlein/Ringstmeier (eds.), Fachanwaltskommentar Insolvenzrecht (2012), Annex I, Article 5 EulnsVO, para. 36.

⁹⁰⁸ *Herchen*, Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.1995 (2000), 104 et seq, 110 et seq.

⁹⁰⁹ *Isaacs/Toube/Segal/Marshall*, in: Moss/Fletcher/Isaacs (eds.), European Insolvency Regulation (2nd ed. 2009), para. 6.138; *Veder*, Cross-Border Insolvency Proceedings and Security Rights (2004), 353 (exception as to creditors who voted in favour of the plan); *Schmitz*, Dingliche Mobiliarsicherheiten im internationalen Insolvenzrecht, (2011), 113 et seq; *Smart*, (2006) 15 Int. Insolv. Rev. 17, 33 et seq.

of the secured claim's adjustment or discharge in reorganisation plans would "strike at the very heart of the protection given by Article 5."⁹¹⁰ It would be inconsistent to deduce from Article 5 EIR the secured creditors' protection against a moratorium, but not against the discharge of a secured claim.⁹¹¹ Furthermore, the secured creditor's responsibility to participate in reorganisation proceedings is already an "*affection*" of the creditor's *right in rem*.⁹¹² Finally, in view of the widely differing substantive laws of the Member States⁹¹³, the drafters of the Convention opted for a "*simple*" solution.⁹¹⁴ If *rights in rem* on assets situated in another Member State than the opening State could be affected by a reorganisation plan in the opening State, it would be necessary to determine whether the respective *right in rem* entitled to segregation or to preferential satisfaction. As this determination would have to take place under the *lex rei situs*, this would highly complicate the proceedings and therefore contradict the drafters' policy goals.⁹¹⁵

Even if the objective of this Report is not to resolve doctrinal disputes, the latter approach seems more persuasive to us. It complies with the policy underlying Article 5 EIR to protect creditors' *rights in rem* and to facilitate the proceedings as well as with its current understanding as a substantive restriction rule. The statements of the members of the commission drafting the European Convention on Insolvency Proceedings confirm this understanding.⁹¹⁶ In contrast, the mainly German and Austrian approach seems to be rooted in the critical point of view as to the current understanding of Article 5 (1) EIR – a point of view perfectly reasonable *de lege ferenda*, yet hard to defend *de lege lata*.

If Article 5 EIR were transformed into a choice of law rule, a separate reorganisation plan under the *lex rei sitae* would be necessary with regard to the assets subject to *rights in rem* and situated in another Member State than the opening State. This would result *de facto* in secondary proceedings under

⁹¹⁰ Smart, (2006) 15 Int. Insolv. Rev. 17, 33.

⁹¹¹ Smart, (2006) 15 Int. Insolv. Rev. 17, 33 et seq.

⁹¹² Schmitz, Dingliche Mobiliarsicherheiten im internationalen Insolvenzrecht (2011), 112.

⁹¹³ EIR recital 11.

⁹¹⁴ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 97.

⁹¹⁵ Schmitz, Dingliche Mobiliarsicherheiten im internationalen Insolvenzrecht (2011), 112 et seq.

⁹¹⁶ Balz, 70 Am. Bankr. L.J. 485, 509 (1996): "As a consequence, the holder of a security interest in foreign situated collateral may proceed as if there were no insolvency of the debtor. The secured party may, for example, sell collateral or foreclose a mortgage under the conditions set out by the general law of the situs. These creditors are not affected by a stay issued in connection with foreign insolvency proceedings, and they may not be impaired by a plan."; Virgós/Garcimartín, The European Insolvency Regulation – law and practice (2004), paras 163 and 384.

the law of another Member State, although the opening of secondary proceedings requires the existence of an establishment in the respective Member State. Furthermore, it requires the admissibility of reorganisation procedures in secondary procedures.

If Article 5 EIR is transformed into an opposition rule, as recommended in this Report, claims secured by *rights in rem* can generally be adjusted or discharged by reorganisation proceedings under the *lex fori concursus*. The secured creditor may then invoke that such an adjustment or discharge is not admitted by the insolvency (reorganisation) law of the Member State in which the secured asset is situated. In this respect, one must distinguish between two different hypotheses. Let's assume that the secured creditor has a claim of 10,000, which is secured by a pledge on an asset worth 5,000 € and situated in Germany. Main (reorganisation) proceedings are opened in another Member State. In the first hypothesis, the reorganisation plan grants a claim of 7,000 € to the secured creditor to be paid in the future. In the second hypothesis, his claim is cut down to 4,000 €. If the secured creditor has been outvoted by his class during the vote of the plan under the *lex fori concursus* he may invoke legal remedies which the *lex rei sitae* (here: German law) grants him. According to German insolvency law, the court has to refuse the confirmation of the plan if the person filing the request is likely to be placed at a disadvantage by the plan compared with his situation without a plan (s. 251 InsO). The secured creditor may invoke this remedy in the second case where the plan disadvantageously grants him less than his security. In the first case, however, no opposition can be made, because the plan grants him a higher amount than his original security and therefore does not place him at a disadvantage.

6.2.6 Recommendations

The recommendations of this report are the following:

1. Article 4 (2) (n) EIR is added, reading as follows:

“the effects of insolvency proceedings on *rights in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of any Member State at the time of the opening of proceedings;”

2. Article 5 (1) EIR is amended as follows:

“Article 4 (2) (n) shall not apply insofar as a creditor or a third party provides proof that:

(a) the secured assets have been situated within the territory of another Member State than the State of the opening of proceedings at the time of the opening of proceedings, and

(b) the substantial effects of insolvency proceedings on *rights in rem* provided for under the law of the State of the opening of proceedings do not comply with the insolvency law of the Member State within the territory of which the assets were situated at the time of the opening of proceedings.”

3. Article 5 (2) EIR is amended as follows:

“The courts of the Member State, within the territory of which the assets were situated at the time of the opening of proceedings, have special jurisdiction for claims based on paragraph 1.”

4. Paragraphs 2 to 4 of Article 5 EIR become paragraphs 3 to 5 respectively.

5. A new recital is introduced providing that the provisions of the (future) *Regulation on a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters* on the localisation of bank accounts are *leges speciales* to the provisions of the EIR.

6.3 Article 6 EIR: Set-off

6.3.1 The underlying policy

Article 6 EIR provides for the second exception to the general rule of Article 4 (2) (d) EIR, according to which the law of the opening State determines the conditions under which set-off may be invoked. When the law of the opening State prohibits set-off, Article 6 EIR nevertheless entitles a creditor to set-off if he can do so under the law applicable to the insolvent debtor's claim. In the event of a debtor's insolvency, the creditor's right to set-off works as a security. EIR recital 26 and the *Virgós/Schmit*-Report therefore attribute a guarantee function to set-off.⁹¹⁷ The purpose of Article 6 EIR is to protect the securities on which a creditor could rely at the time of acquiring his claim.

6.3.2 The main issues

6.3.2.1 Third-State-cases

One of the issues of Article 6 EIR is the question of whether it also applies if the "*law applicable to the insolvent debtor's claim*" is the law of a Third State. In contrast to Articles 5, 7, 8, 9, 10, 11, 13 and 15 EIR, the wording of Article 6 EIR does not explicitly refer to "*the law of a Member State*". Therefore, it is questionable whether the Regulation requires a sole intra-EU effect and whether this omission therefore only happened by mistake, or if the Regulation may also cover Third-State-cases in this respect.

6.3.2.2 Applicability to netting agreements

Another issue is the question of whether Article 6 EIR currently applies or should apply in the future to netting agreements. UK banking respondents have raised concerns over ambiguities in this respect.⁹¹⁸ This issue may be raised, for example, in cases in which one non-financial undertaking is party to a close out netting agreement.⁹¹⁹ Notwithstanding and despite the *INSOL*

⁹¹⁷ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 110: "*In this way, set-off becomes, in substance, a sort of guarantee governed by a law on which the creditor concerned can rely at the moment of contracting or incurring the claim.*"

⁹¹⁸ Cf. UK National Report answer to Q 13.

⁹¹⁹ Such a hypothesis is foreseen in Article 1 (2) (e) of the Directive No. 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 43.

proposal to insert a new Article 6 (3) EIR⁹²⁰, we do not believe that the Regulation should be amended as far as netting agreements are concerned. The Regulation has taken notice of such agreements in EIR recital 27 leaving the issue to the 1998 Finality Directive⁹²¹ “*which should take precedence over the general rules in this Regulation.*” Today, Article 7 of the 2002 Financial Collateral Directive provides for the enforcement of close out netting agreements in insolvency case. Therefore, further amendments should not be addressed by the current reform projects of the EIR, but rather by specific legislation on the finance sector.⁹²² The only recommendation is to update EIR recital 27 including the Finality Directive.

6.3.3 Implementation of Article 6 by the Member States

With regard to the first issue mentioned above, most National Reports affirm that Article 6 EIR is applicable, regardless as to whether the “*law applicable to the insolvent debtor’s claim*” is the law of a Member State, or that of a Third State.⁹²³ Only five National Reports deny the applicability of Article 6 EIR in Third-State-cases.⁹²⁴ However, in a few Member States, the meaning of Article 6 EIR with regard to such cases still remains unclear.⁹²⁵ For further details, we refer to the answers to Question 19 of the National Reports.

6.3.3.1 Practical problems reported

Generally speaking, no significant problems concerning Article 6 EIR have occurred in practice.

⁹²⁰ Van Galen et al.: Revision of the European Insolvency Regulation, Proposals by INSOL Europe (2012), 55.

⁹²¹ Directive No. 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ L 166, 45.

⁹²² Cf. European Commission DG Internal Market and Services, Unit MARKT/G2, Info-letter on post-trading, Issue 3, July 2011, 12, http://ec.europa.eu/internal_market/financial-markets/docs/infoletter/2011_july_en.pdf (last verification on 20 November 2012).

⁹²³ Belgium (academia), Cyprus, France (academia), Germany, Hungary, Latvia, Lithuania, probably Luxembourg (there is no legal doctrine about the issue; however, it is likely that Luxembourgian scholars would follow the French interpretation), Malta, Romania, Slovakia, Slovenia.

⁹²⁴ Greece, Netherlands (National Reporter’s own opinion), Poland (National Reporter’s own opinion); Spain, Sweden (in the National Reporter’s view, Articles 6 and 14 EIR could possibly apply analogically if third states are concerned.).

⁹²⁵ Austria (divided opinions in academia); Czech Republic, Estonia, UK. Beyond that, the National Reports from Bulgaria, Finland, Ireland, Italy and Portugal did not answer to the question.

In one Spanish court decision, the *Commercial Court of Madrid* misapplied Article 6 EIR by stating that the “*law applicable to the insolvent debtor’s claim*” was the law governing the creditor’s claim against the insolvent debtor.⁹²⁶

In the UK, legal practitioners uttered concerns that Article 6 EIR lacks clarity, which makes it difficult for stakeholders to form stable commercial expectations.

6.3.3.2 The national legal framework on set-off

6.3.3.2.1 The different transactions covered by Article 6 EIR

Set-off provisions vary substantially among the different Member States. Whereas some national legislations provide for set-off by constitutive unilateral declaration and do not provide for a set-off *ex lege*⁹²⁷, in other Member States, set-offs take place *ipso iure* once the mutual claims arise or once insolvency proceedings have been opened.⁹²⁸ Sometimes, judicial set-off granted by the court is possible.⁹²⁹ The issue whether Article 6 EIR also applies to contractual set-off arrangements is disputed. A majority of Member States approves the applicability of Article 6 EIR to set-off agreements.⁹³⁰

6.3.3.2.2 Permission of set-off during reorganisation / insolvency proceedings

Pursuant to some national insolvency legislations, once insolvency proceedings are opened, set-offs are, in principle, prohibited.⁹³¹ Under said legislations, only a few exceptions to the general prohibition are made. In some countries, a set-off can be granted by the court if the respective claims

⁹²⁶ *Commercial Court of Madrid*, 9 February 2007, No. 7 (unreported).

⁹²⁷ Austria, Poland.

⁹²⁸ France, Luxembourg, Malta, Netherlands, Slovenia, UK.

⁹²⁹ France, Luxembourg, Slovenia (Article 262 Slovenian Insolvency Act, concerning contingent claims).

⁹³⁰ France, Luxembourg, Netherlands, UK; denying the applicability of Article 6 EIR to set-off agreements: Austria.

⁹³¹ France (notice however, that if the conditions of an automatic set-off are met prior to the opening of insolvency proceedings, the respective claims have already been extinguished by operation of law), Lithuania (Article 10 (7) item 3 Enterprise Bankruptcy Law), Luxembourg (Article 444 c.com.; *Trib. Arr. Lux.*, 3 January 1992, BCCI. Notice, however, that if the conditions of an automatic set-off are met prior to the opening of insolvency proceedings, the respective claims have already been extinguished by operation of law, see *Lux. Court of Appeal*, 2 March 1923, Pasicrisie Lux. 11, 134.), Malta.

are “related” (*créances connexes*).⁹³² In Lithuania, opposite homogeneous set-off is permitted if it is permitted by tax law provisions on overpayment.⁹³³

Under most national insolvency legislations, set-off is permitted if the prerequisites thereof were already fulfilled prior to the opening of reorganisation / insolvency proceedings, or rather if the mutual claims have existed at the time of the opening of reorganisation / insolvency proceedings.⁹³⁴ The corresponding Polish rule was applied by a Hungarian court in a Polish-Hungarian case.⁹³⁵ Since the claim against the insolvent debtor only arose after the opening of insolvency proceedings, the court did not permit the set-off. Some of the aforementioned legislations even allow a set-off when the mutual claims are not yet due at the opening of insolvency proceedings.⁹³⁶

In some Member States, the creditor’s claim against the insolvent debtor or the mutual claims must have raised three or six months or one year prior to the opening of insolvency proceedings.⁹³⁷ In Austria, set-off is also permitted if the creditor was obliged to acquire his claim against the insolvent debtor and if he was not or did not have to be aware of the illiquidity of the insolvent debtor.⁹³⁸ Furthermore, set-off is possible regarding claims which arise to a creditor after detrimental acts are challenged.⁹³⁹

In administration procedures under English insolvency law, set-off is only possible once a dividend has been declared.

Finnish insolvency law permits set-off if the counter receivable (the insolvent debtor’s claim) originated before the opening of insolvency proceedings and if the general prerequisites of a set-off are fulfilled.

⁹³² France (Article L 622-7 c.com.), Luxembourg (*Trib. Arr. Lux.*, 3 January 1992, BCCI).

⁹³³ Article 10 (7) (3) Lithuanian Enterprise Bankruptcy Law.

⁹³⁴ Belgium (Articles 1289 et seq. Belgian Civil Code), Bulgaria, Czech Republic (in Czech reorganisation proceedings, however, set-off is not permitted at all), Estonia, Germany (s. 94 InsO), Greece (Article 36 (1) Law no. 3588/2007), Hungary, (s. 38 (3) Bankruptcy Act), Italy (Article 56 legge fallimentare), Netherlands (Article 53 Faillissementswet), Poland (Articles 89, 93 BRL), Romania, Spain, Slovenia (Article 261 Insolvency Act provides for an automatic set-off by the time of the opening of insolvency proceedings), Sweden (Chapter 5, ss. 15-17 Bankruptcy Act).

⁹³⁵ *Court of Appeal Pécs*, 6 February 2008, case no. Gf.IV.30.272/2007/5 (unreported), see the Hungarian National Report answer to Q 22.

⁹³⁶ Bulgaria, Germany (s. 95 (1) InsO), Italy (Article 56 legge fallimentare), Poland, Slovenia (Article 261 (2) Insolvency Code), Sweden (Chapter 5, ss. 15-17 Bankruptcy Act).

⁹³⁷ Austria (s. 20 (2) IO), Latvia (Article 104 Insolvency Law (2010)); Italy (Article 56 legge fallimentare); Sweden (Chapter 5, ss. 15-17 Bankruptcy Act).

⁹³⁸ S. 20 (2) IO.

⁹³⁹ S. 20 (3) and s. 41 (2) IO.

Under Dutch insolvency law, the possibility of a set-off is expanded in comparison to the general rules of civil law: it is sufficient that the mutual claims result from acts performed prior to the opening of insolvency proceedings, even if they have not arisen before that time.⁹⁴⁰

Belgian law allows set-offs even between claims which both originated during judicial reorganisation / insolvency proceedings.⁹⁴¹

6.3.3.2.3 Restrictions to set-off during reorganisation / insolvency proceedings

In a number of Member States, set-offs are prohibited if the creditor did not acquire his claim against the insolvent debtor (by assignment) until the opening of insolvency proceedings.⁹⁴² In Austria, set-off is also forbidden if the creditor did not become a debtor of the insolvency estate until the opening of insolvency proceedings.⁹⁴³

Sometimes, set-off between a creditor's claim which originated before the opening of reorganisation / insolvency proceedings and a debtor's claim which originated during the insolvency proceedings is not allowed.⁹⁴⁴

Under a few insolvency legislations, set-off is not permitted if the creditor has acquired his claim against the insolvent debtor prior to the opening of insolvency proceedings, but if he was or had to be aware of the illiquidity of the insolvent debtor.⁹⁴⁵

Some prohibitions deal with transactions subject to voidability of detrimental acts: Austrian insolvency law forbids set-off against claims regarding the challenge of detrimental acts⁹⁴⁶, and under German insolvency law, set-off is

⁹⁴⁰ Article 53 Faillissementswet.

⁹⁴¹ Articles 1289 et seq. Belgian Civil Code.

⁹⁴² Austria (s. 20 (1) IO), Netherlands, Poland, Slovakia, Slovenia (Article 263 Insolvency Act), UK (administration: prohibition if the claim was acquired after the appointment of the administrator but before the declaration of a dividend).

⁹⁴³ S. 20 (1) IO.

⁹⁴⁴ Belgium (in case of a judicial reorganisation, set-off between those claims is permitted if the claims are related, Article 34 LCE; in case of *faillite* set-off is also prohibited in the reversed situation), Slovakia, Slovenia (Article 264 Insolvency Act).

⁹⁴⁵ Austria (s. 20 (1) IO), Netherlands (the prohibition also applies in cases in which a creditor has purchased a debt owed to the insolvent debtor from a third party), Poland (only as far as winding-up is concerned; the prohibition applies if the claim was acquired within one year before the opening of insolvency proceedings); Sweden (if the creditor acquired the claim against the insolvent debtor from third parties, Chapter 5, ss. 15-17 Bankruptcy Act).

⁹⁴⁶ S. 42 IO.

not permitted if the right to set-off has been acquired by an avoidable transaction.⁹⁴⁷

In Germany, some prohibitions deal with cases in which the requirement of reciprocity is met only after the opening of insolvency proceedings.⁹⁴⁸

In Slovakia, only creditors' claims lodged in the insolvency proceedings may be set off.

6.3.4 Recommendations

1. As we have seen, the question of whether Article 6 EIR also applies in Third-State-cases has so far been satisfactorily settled neither by case law nor by legal doctrine in the different Member States. However, this issue can easily arise before the courts of the Member States as far as creditors invoke set-off during recovery actions taken by the insolvency practitioner if the insolvent debtor's claim is governed by Swiss law, for example. To clarify the situation in accordance with Article 17 Rome I-Reg., we recommend taking an amendment of EIR recital 26 into consideration including the parenthesis "*(including the law of a Non-Member State)*" new after the words "*if it is possible under the law applicable to the claim of the insolvent debtor*".

2. As pointed out above, EIR recital 27 should be updated including the Directive 2002/47/EC.

⁹⁴⁷ S. 96 (1) n. 3 InsO.

⁹⁴⁸ S. 96 (1) n. 1, 2, 4 InsO. According to the *BGH*, a set-off which has already taken place prior to the opening of insolvency proceedings is void.

6.4 Article 7 EIR: Reservation of title

6.4.1 The underlying policy

The third exception to the general rule on the conflict of laws laid down in Article 4 EIR concerns the reservation of title. Although the reservation of title could be considered to be a *right in rem*, Article 7 (1) EIR contains a separate provision on the effects of the opening of insolvency proceedings against the purchaser which is based on the same policy as Article 5 EIR:⁹⁴⁹ The reservation of title shall not be affected by the insolvency proceedings opened in Member State A as long as the purchaser has delivered the goods in Member State B where they have remained until the opening decision. In addition, Article 7 (2) EIR contains a uniform substantive rule on the effects of the opening of insolvency proceedings against the seller providing for the protection of the buyer by the validation of the sales contract. Therefore “[i]f the purchaser continues to make payments, he shall acquire title at the end of the period set out in the contract.”⁹⁵⁰

6.4.2 The main issue

The main issue of Article 7 EIR is the same as of Article 5 EIR, whereas the protection of the buyer is not put into question by any National Report.

6.4.3 ECJ Case-law

Once again, there is only one decision of the ECJ concerning Article 7 (1) EIR, which is the abovementioned *German Graphics* Case. In this decision, the ECJ has described Article 7 (1) EIR obiter dictum as “a substantive rule intended to protect the seller with respect to assets which are situated outside the Member State of opening of insolvency proceedings”.⁹⁵¹ With regard to the rest, the decision deals with the recognition of decisions based on the reservation of title under the EIR and the Brussels I Regulation.

6.4.4 Implementation by the Member States

As far as the implementation of Article 7 (1) EIR is concerned, we can refer to the report on Article 5 EIR.

⁹⁴⁹ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 112: “The remarks made with regard to Article 5 apply here *mutatis mutandis*.”

⁹⁵⁰ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 114.

⁹⁵¹ Cf. ECJ, case C-292/08, 10 September 2009, *German Graphics*, ECR 2009 I-8421, para. 35.

The French National Report clearly points out that there is a practical need to clarify the basic understanding of Article 7 (1) EIR. In a recent case, the *Cour d'appel de Douai* held that reservation of title is, in principle, governed by the law of the State of the opening of proceedings and not by the law of the State in which the asset is situated.⁹⁵²

6.4.5 Discussion

To discuss the possible amendments of Article 7 (1) EIR, we also can refer to the report on Article 5 EIR. However, it seems helpful to illustrate the three options for a specific reservation of title case.

6.4.5.1 Case 1

The debtor, a manufacturer company based in Germany, purchases goods from a German supplier. The goods are delivered under reservation of title to the debtor's factories in Germany and Austria. The debtor requests the opening of insolvency proceedings in Germany.

In European law, Article 9 (1) of the 2011 Late Payment Directive⁹⁵³ provides "*in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods.*"

Accordingly, both German and Austrian civil law recognize the reservation of title agreed upon by the debtor and the supplier. However, according to German insolvency law, during the opening proceedings, the court may stay the foreclosure of the reservation clause if the assets are of significant importance for the continuation of the business (s. 21 (2) n. 5 InsO), whereas Austrian insolvency law does not contain a similar provision.

Under Article 7 (1) EIR as interpreted by the *ECJ* in the *German Graphics* Case the order of the German insolvency court could only affect the assets in Germany. The same is true if a choice of law rule was implemented. However, if Article 7 (1) EIR were substituted by an opposition rule as recommended for *rights in rem*, the court order would also affect the goods delivered to Austria. The German supplier could object in German and

⁹⁵² CA *Douai*, 14 September 2011, case no. 10/07681. See the French National Report answers to Q13 and Q16.

⁹⁵³ Directive No. 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combatting late payments in commercial transactions (recast), OJ L 48, 1.

Austrian courts that such a legal consequence was unknown to the Austrian *lex situs*.

6.4.5.2 Case 2

The debtor, a manufacturer company based in Austria, purchases goods from an Austrian supplier. The goods are delivered under reservation of title to the debtor's factories in Austria and Germany. The debtor requests the opening of insolvency proceedings in Austria.

In this variation of Case 1, according to the substantive restriction rule and the opposition rule, the supplier's right to foreclose the reservation of title cannot be affected in either Austria or in Germany. This solution seems persuasive, since the law applicable to the main proceedings does not provide for such effects. However, the choice of law rule would lead to the applicability of s. 21 (2) InsO. We would have to come to the conclusion that the Austrian insolvency court, in substitution of the German court, could grant a "freezing order" on the assets in Germany requiring the further application and adaptation of the provisions on the compensation payments due to the supplier. Once again, the choice of law rule goes beyond the inevitable and leads to difficult adaptation problems. We therefore recommend the introduction of an opposition rule.

6.4.6 Recommendations

The recommendations of this report are the following:

1. Article 4 (2) (o) EIR is added, which reads as follows:

"the effects of insolvency proceedings against the purchaser of an asset situated within the territory of any Member State at the time of the opening of proceedings on the seller's rights based on a reservation of title."

2. Article 7 (1) EIR is amended as follows:

"Article 4 (2) (o) shall not apply insofar as the seller provides proof that:

(a) the assets have been situated within the territory of another Member State than the State of the opening of proceedings at the time of the opening of proceedings, and

(b) the substantial effects of insolvency proceedings on rights based on a reservation of title provided for under the law of the State of the opening of

proceedings do not comply with the insolvency law of the Member State within the territory of which the assets were situated at the time of the opening of proceedings.”

3. Article 7 (2) EIR is amended as follows:

“The courts of the Member State, within the territory of which the assets were situated at the time of the opening of proceedings, have special jurisdiction for claims based on paragraph 1.”

4. Paragraph 2 and 3 become paragraphs 3 and 4 respectively.

6.5 Article 8 EIR: Contracts relating to immoveable property

6.5.1 Underlying policy

Article 8 EIR is based on the fact that insolvency law often has an impact on current contracts. In particular, in the event of mutual obligations pending fulfilment, in many jurisdictions, the liquidator is empowered to decide either on the performance or termination of contracts. According to the *Virgós/Schmit*-Report, the aim of Article 8 EIR is to protect the estate from the obligation to perform contracts which may be disadvantageous in these new circumstances.”⁹⁵⁴ Although the wording of the Report seems to suggest a unilateral aim to protect only the estate from the performance of disadvantageous contracts, it is settled that the provision also protects the other party to the contracts in question who might rely on the duty of the liquidator to perform the contract.

6.5.2 Discussion

The righteousness and effectiveness of Article 8 EIR is not put into question by any National Report. There is no case law of the *ECJ*. The Dutch National Reporter pointed out that the scope of application is uncertain with regard to the compensation for the other party. For example, under German insolvency law, the insolvency administrator can terminate a contract for the tenancy or lease of immoveables or premises concluded by the debtor as tenant or lessee within three months, irrespective of any agreed period of notice. The landlord may claim damages as a creditor of the insolvency proceedings for premature termination of such contract (s. 109 (1) InsO). The problem therefore arises as to whether this claim is fully governed by the *lex concursus* (Article 4 (1) EIR), or at least in part by the *lex situs*. For example, under German law, the landlord would have to face no privileged creditors such as employees and the tax authorities, whereas under the insolvency law of the State of the opening of proceedings, he might not receive any compensation due to the rank of his claim (Article 4 (2) (i) EIR). However, from our point of view, this problem is common in the field of conflict of laws and can be left to the jurisprudence.

The current choice of law is not put into question by the recommended amendment of Article 5 EIR. Today, we have to distinguish *rights in rem* from

⁹⁵⁴ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 116.

contractual rights to acquire or make use of immoveable property. The first cannot be affected at all; the latter can be affected only according to the *lex situs*. According to the opposition rule, the two types of rights would still be subject to different applicable laws. However, as discussed above, there seems to be no intolerable inconsistency. Otherwise, the qualification problem is business as usual.

6.5.3 Recommendation

Therefore, we come to the conclusion that the choice of law rule is appropriate to meet the underlying policy and recommend no amendments.

6.6 Article 9 EIR: Payment systems and financial markets

The national reports do not mention any specific problems with regard to this provision. INSOL-Europe has presented a proposal for a more precise wording of this provision.⁹⁵⁵ This may have some merit and bring about more clarity; however, the national reports do not suggest any urgent need for a change in this respect.

6.7 Article 10 EIR: Employment contracts

6.7.1 Employment law standards and insolvency

6.7.1.1 General aspects

With regard to national employment laws, there is still a broad variety of applicable standards in the Member States, in particular with regard to the dismissal of employees. One would therefore have expected that there is a large number of complaints in the national reports, stating that either the application of insolvency laws of other Member States endangers standards of national labor law, applicable under Article 10 EIR – or *vice-versa*, insolvency law does not work properly because of the applicability of the employment contract law of other Member State. However, such complaints were surprisingly rare in the national reports. Only the UK Report and the Belgian Report make a statement in this regard.⁹⁵⁶ In German law, there is some indication that mandatory rules⁹⁵⁷ or the public policy⁹⁵⁸ reservation may play a role in protecting national labor law standards against an “intrusion” by insolvency law; the Spanish Report suggests a harmonization of rules on dismissals in situations of insolvency.⁹⁵⁹ To some extent, these

⁹⁵⁵ INSOL-Europe proposal, p. 56 et seq.

⁹⁵⁶ Belgian Report, Q. 23; UK Report, Q. 23.

⁹⁵⁷ German Report, Q. 23.

⁹⁵⁸ *Bundesarbeitsgericht*, 27 February 2007, 3 AZR 618/06, BAGE 121, 309-320; for an analysis see *Burkhard Hess/Thomas Pfeiffer*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, 2011, p. 165, http://www.europarl.europa.eu/RegData/etudes/etudes/juri/2011/453189/IPOL-JURI_ET%282011%29453189%28PAR01%29_EN.pdf, 17 September 2012.

⁹⁵⁹ Spanish Report, Q. 23.

reservations were also reflected by the Heidelberg conference, although no particular measure or aspect was discussed there.

As a summary of these statements, one may say that the different labor law standards may, on one hand, indeed hinder an insolvency administrator from simply taking the same actions with regard to employees in all Member States. However, this situation is a mere consequence of the different social policies and standards in the Member States. It may very well be that a reorganization or liquidation of companies would be made easier if an administrator could take the same actions in relation to the employees in all Member States. However, there are significant counterarguments: Firstly, the complaints about the interplay between labor law and insolvency law, as demonstrated, have been limited. Furthermore, labor law is deeply rooted in specific national traditions so that any harmonization would be very difficult to achieve. At any rate, harmonizing national labor law – even if limited to insolvency situations – would go beyond a mere evaluation and adaption of the EIR.

Moreover, the application of the public policy exception will prevent any unacceptable circumvention of employees' rights in insolvency cases, as long as there will be no *ECJ* case law to contrary.

Therefore, as a final conclusion in this respect, the General Reporters do not see differences in national labor laws as a sufficient reason for proposing an amendment of Article 10 EIR.

6.7.1.2 Transfer of an undertaking

INSOL-Europe has submitted a proposal, under which the effects of transfer of an undertaking as referred to in Council Directive 2001/23 is governed by law of the Member State where the business was established prior to the transfer.⁹⁶⁰ Whereas there is no indication in the national reports with regard to the necessity of this rule, the General Reporter, based on extensive research with regard to Council Directive 2001/23, agrees to the content (not the wording) of this proposal. However, for reasons of systematic clarity, it is

⁹⁶⁰ INSOL-Europe proposals, p. 56 et seqs.

more advisable to either include such a rule into the Rome I-Regulation or into Directive 2001/23.

6.7.2 Issues of qualification

The National Reports address two aspects relating to qualification:

Whereas employment contracts in general are governed by the applicable employment contract law, the ranking of any claims of the employees falls into the scope of the *lex concursus*.⁹⁶¹

In the Netherlands, a dismissal of employees by an administrator requires the approval of the supervising court. As a consequence, there is a discussion as to whether this requirement has to be qualified as a question of employment law under Article 10 or whether it falls into the scope of the EIR so that the *lex concursus* applies.⁹⁶²

None of these discussions, however, gives rise to a recommendation of any amendments to the present version of Article 10 EIR.

6.7.3 Issues of assimilation (adaptation)

A more problematic issue may exist with regard to the technical coordination of insolvency law on one hand and employment law on the other in case that an administrator has to act under employment laws of a legal system other than the one of the *lex concursus*. According to the Dutch Report, it could be possible that an administrator has to comply with a notice period for dismissals for employees of two months whereas, under his insolvency law, only the claim for salaries for 4 weeks is deemed to be a legitimate expense of the insolvency proceedings. According to the Dutch Reporter, a clarification within the EIR may be helpful.

However, it should be also noted that such a discrepancy is not uncommon in cases in which the rules of one legal system apply to a certain category of legal questions (relating to insolvency law) and the rules of another system apply to the next category of legal questions (relating to employment contracts). In these cases, the general answer of private international law to

⁹⁶¹ Dutch-Report, Q. 13; French Report, Q. 13.

⁹⁶² Dutch-Report, Q. 13.

comparable problems is that they may be solved by applying the doctrine of adaptation or assimilation. Furthermore, it will not be possible for the EIR to resolve all possible discrepancies between national insolvency laws. Nonetheless, it is clear based on the cited National Reports and also based on the discussions with the National Reporters that the interplay between insolvency law and employment law is a sensitive issue. As of today, it seems that it is not yet completely clear whether there are questions that cannot or should not be clarified by the judiciary. The General Reporters therefore emphasize that the relevant issues need to be carefully monitored and legislative action may be taken if, as a result of further case law, an appropriate level of legal clarity cannot be achieved.

6.7.4 Coordination with guarantee institutions

Several national reports⁹⁶³ address the question of the interplay between insolvency law and guarantee institutions under Directive 2002/74 (or its predecessor instrument Directive 80/987).⁹⁶⁴ It should first be noted that it may be controversial whether Article 10 EIR is relevant in this context at all; more likely, guarantee institutions are a part of the national social security systems which are not within the scope of Article 10 EIR.⁹⁶⁵ The reported issues relate to the technical coordination between national insolvency law and foreign national laws for the implementation of this Directive. For example, the Austrian Report states: “The position of guarantee institutions hardly ever fits in the foreign insolvency system.”

This issue, however, is a specific problem with regard to these institutions. It is a consequence of the present guarantee system that national guarantee institutions apply their national law, which is a circumstance that can hardly be changed by amending the EIR. Apart from any adaptation or assimilation of national insolvency laws by the judiciary, a serious improvement as regards these issues would best be achieved by changes with regard to the national

⁹⁶³ Austrian Report, Q. 23; German Report, Q. 23; Polish report, Q. 23.

⁹⁶⁴ Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, Official Journal L 270 of 8 October 2002, p.10-13.

⁹⁶⁵ German Report, Q. 23.

substantive laws governing these institutions or with regard to national insolvency laws. A solution by the EIR may, however, be possible as well. It would require for example that substantive powers of the liquidator would be extended beyond the ones provided under the applicable insolvency law (Article 4(2)(c) EIR) so that the liquidator would have all powers necessary to make statements, filings or motions in relation to a foreign guarantee system established in a Member State in order to implement Directive 2002/74/EC.

Again, the General Reporter refrains from proposing any specific amendment to the EIR. Any legislative action in this respect would require a 27 x 27 analysis, i.e. an analysis of all national insolvency systems against the background of all national guarantee systems.

6.8 Article 11 EIR: Effects on rights subject to registration

6.8.1 Underlying policy

Whereas Article 5 EIR applies to *rights in rem* of creditors and third parties, Article 11 EIR applies to such rights of the debtor as long as they are in immoveable property, ships or aircrafts and subject to registration in a public register.⁹⁶⁶ According to the *Virgós/Schmit*-Report, the aim of Article 11 EIR, which has been included into the Convention on request of the German delegation, is to protect the general confidence in the contents and the consequences of the national systems for the registration of property under the same conditions, whether the insolvency proceedings are opened in the State of registration or in another Member State.⁹⁶⁷ To achieve this goal, Article 11 EIR provides for “a sort of cumulative application” of the *lex concursus* (Article 4 (1) EIR) and the *lex situs*.⁹⁶⁸ This effect can be observed, for example, in the case reported by the German National Report on the opening of bankruptcy proceedings in England (s. 278 IA 1986) against a debtor who had real estate in Germany.⁹⁶⁹ In that case, the powers of the trustee were governed by English law (Article 4 (2) (c) EIR).⁹⁷⁰ However, the entering of the opening of the proceedings⁹⁷¹ and their effects in the Land Register are governed by German law as *lex situs* (s. 32 (1) InsO).

6.8.2 Discussion

Article 11 EIR is not put into question by any National Report. In particular, the disadvantages of the provision foreseen in the Report⁹⁷² have not caused practical problems. There is no case law of the *ECJ*. The restriction of the scope of application to the law of a Member State is satisfactory, since the question as to whether and in what manner the opening of proceedings has to be entered in a register will only arise in the forum of the register. Since officials in Third States would apply their domestic choice-of-law provisions, a provision for the application of the law of Third States would not make sense.

⁹⁶⁶ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 131.

⁹⁶⁷ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 130.

⁹⁶⁸ *Ibid.*

⁹⁶⁹ German National Report answer to Q 20.

⁹⁷⁰ Cf. *BGH*, 3 February 2011, BGHZ 188, 177, para. 12.

⁹⁷¹ Cf. *BGH*, 3 February 2011, BGHZ 188, 177, para. 1.

⁹⁷² *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 130.

6.8.3 Recommendation

We have therefore come to the conclusion that Article 11 EIR should not be amended.

6.9 Article 12 EIR: Community Patents and Trade Marks

6.9.1 Scope and underlying policy

While its position within the EIR seems to indicate otherwise, Article 12 EIR is a substantive rule and not a conflict of law rule.⁹⁷³ The objectives pursued by Article 12 EIR are summarized in the Virgos/Schmit Report as follows:

“The Agreement relating to Community patents (1989 Luxembourg Agreement), Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trademark and Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights all create rights which cover the whole territory of the European Community. This Convention opens up the possibility of insolvency proceedings with universal effect (thus encompassing the whole Community territory) if the debtor’s centre of main interests is located in a Contracting State. However, the Patent Convention contained in the 1989 Luxembourg Agreement (Article 41), the 1993 Regulation on the Community trademark (Article 21), and the 1994 Regulation on Community plant variety rights (Article 25), contain a rule to the effect that a Community right derived therefrom may be included only in the first proceedings (regardless of whether these are main or territorial proceedings) opened in a Contracting State. This rule was logical insofar as common regulations on international insolvency proceedings were lacking. With this Convention it is logical to allocate those Community rights to the main proceedings. Article 12 of the Convention seeks to modify the rule established by the Patent Convention, the Regulation on the Community trademark and the Regulation on Community plant variety rights and to replace it with Article 12.”⁹⁷⁴

⁹⁷³ Virgós/Garcimartín, *The European Insolvency Regulation: Law and Practice*, para. 228; Wessels, *International Insolvency law* (3rd ed. 2012), para. 10715; Leonhardt/Smid/Zeuner, *Internationales Insolvenzrecht* (2012), Article 12 EuInsVO, para. 1; Reinhart, in: MünchKomm-InsO (2nd ed. 2008), Article 12 EuInsVO, para. 1 each with further references.

⁹⁷⁴ Virgós/Schmit, *Report on the Convention on Insolvency Proceedings* (1996), para. 133; see also Torremans, *Cross Border Insolvencies in EU* (2002), 186; Verougstraete, *Manuel de la continuité des entreprises et de la faillite* (2010), para. 5.5.1.22.

The 1989 Luxembourg Agreement relating to Community patents mentioned in that report has not become effective.⁹⁷⁵ The same fate is shared by the European Commission's Proposal for a Council Regulation on the Community patent.⁹⁷⁶ Nevertheless, in December 2010, another attempt to introduce a Community patent was initiated by twelve Member States, which advocated for this purpose the use of the enhanced cooperation. The negotiations are still ongoing. A Community patent, if ever realised, would, however, fall within the scope of Article 12 EIR.

By contrast, the Community trademark established by Council Regulation⁹⁷⁷ in 1993 and the Community plant variety rights⁹⁷⁸ continue to exist and are quite successful.⁹⁷⁹ They were joined in 2002/2003 by a Council Regulation on Community designs,⁹⁸⁰ which introduces a Community design. These rights are all covered by Article 12 EIR.

INSOL-Europe recommended the extension of Article 12 EIR to all intellectual property rights and to also include rights which are not Community rights into Article 12 EIR. Splitting up such rights over the jurisdiction would considerably impair their value and should therefore be prevented.⁹⁸¹ This proposal might be problematic in view of the intended purposes of secondary proceedings. A more flexible approach to avoid the impairment of valuable assets due to their distribution to different insolvency proceedings would be to strengthen the cooperation and coordination duties of the insolvency practitioners involved. There might also be scenarios in which the allocation of intellectual property rights to the main proceedings is not the only sensible solution. The General Reporter is therefore rather reluctant to recommend an extension of Article 12 EIR to all intellectual property rights.

⁹⁷⁵ Duursma-Kepplinger/Duursma/Chalupsky-*Duursma*, Europäische Insolvenzverordnung, Art. 12 EulnsVO, para. 2 et seq.

⁹⁷⁶ O.J. 2000/C 337 E/278.

⁹⁷⁷ Council Regulation (EC) 40/94 on the Community Trademarks [1994] OJ L11/1.

⁹⁷⁸ Council Regulation (EC) 2100/94 on Community Plant Variety Rights [1994] OJ L227/1.

⁹⁷⁹ See the annual report of OHIM under <http://oami.europa.eu/ows/rw/pages/OHM%20OHIMPublications/annualReport.en.do> and the annual report of the CPVO under <http://www.cpvo.europa.eu/main/en/home/documents-and-publications/annual-reports>.

⁹⁸⁰ Council Regulation (EC) No 6/2002 on Community designs (OJ EC No L 3 of 5.1.2002, p. 1).

⁹⁸¹ INSOL-Europe proposals, 59.

As a result of the evaluation of the National Reports, it can be concluded that Article 12 EIR is a provision that is rarely in the focus of court cases or academic discussion. Article 12 EIR was hardly ever mentioned in the National Reports. Case law in connection with the application of Article 12 EIR seems not to exist. However, there is some discussion concerning the relationship between Article 12 EIR and Article 5 EIR⁹⁸² as well as the relationship between Article 12 EIR and Article 3 IV lit. a EIR.

However, it might be premature to conclude from this finding that Article 12 EIR only has a very limited practical use, since it might also be an indication that Article 12 EIR functions rather smoothly in most cases and its application does not lead to any legal or factual problems. Moreover, with the introduction of a Community patent or a comparable right, the general setting might change in the near future and the practical importance of Article 12 EIR might then have to be reevaluated.

6.9.2 Article 12 EIR and Article 5 EIR

While in legal doctrine Article 12 EIR is sometimes seen as a rule dealing with the localisation of Community patents and trademarks and therefore as *lex specialis* to Article 2 g) EIR, another part of the doctrine interprets Article 12 EIR as a provision concerning only the allocation of assets between main and secondary proceedings and thus not making any statement as to the localisation of these rights for other purposes. According to this view, Article 12 modifies Artt. 3, 16, 17 EIR and is *lex specialis* to them.⁹⁸³ Of practical relevance is the different interpretation of Article 12 EIR with regard to Article 5 EIR. While the first interpretation leads to the result that Article 5 EIR can never be applied to rights that are due to Article 12 EIR always located in the state of the main proceeding, the second interpretation avoids this result and leaves Article 5 EIR untouched. The question is therefore whether rights in

⁹⁸² German Report, Q. 18.

⁹⁸³ *Huber*, in: Haß/Huber/Gruber/Heiderhoff (eds.), EU-Insolvenzverordnung (2005), Article 12 EulnsVO, para. 5; *Nerlich*, in: Nerlich/Römermann (eds.), Insolvenzordnung (2012), Article 12 EulnsVO, para. 3; *Huber*, in: Geimer/Schütze, Int. Rechtsverkehr, B Vor I 20 b, Article 12 EulnsVO, para. 5; *Reinhart*, in: MünchKomm-InsO (2nd ed. 2008), Article 12 EulnsVO, para. 10 et seq.; *Paulus*, Europäische Insolvenzverordnung, para. 4; *Kindler*, in: MünchKomm-BGB (5th ed. 2010), Article 12 EulnsVO, para. 10; *Mäsch*, in: Rauscher, EuZPR/EuIPR (2010), Article 12 EG-InsVO, para. 7; *Leonhardt/Smid/Zeuner*, Internationales Insolvenzrecht (2012), Article 12 EulnsVO, para. 4; *Wessels*, International Insolvency law (3rd ed. 2012), para. 10715.

rem of third parties on Community trademarks, designs, plant variety rights or a future Community patent should be subject to the protection granted by Article 5 EIR.

A positive response would also require an answer to the then evolving question as to how rights falling within the scope of Article 12 EIR can be localised for the purposes of Article 5 EIR. The supporters of this approach mostly rely on the provisions in the Council Regulations⁹⁸⁴ which, as Article 16 of the Council Regulation on Community Trademarks for example, provide that *“a community trade mark as an object of property shall be dealt with ... as a national trade mark registered in the Member State in which, according to the Register of Community trade marks: (a) the proprietor has his seat or his domicile... (b) where point (a) does not apply, the proprietor has an establishment...”*

Since it is a prerequisite of Article 5 EIR that the relevant assets are situated within the territory of another Member State at the time of the opening of proceedings, different results are only reached by the two views when the debtor's center of main interest is not his seat or domicile.

The decisive question as to why in particular Community trademarks, plant variety rights, designs or a future Community patent should be treated differently in regard to Article 5 EIR from all other tangible or intangible assets is left unanswered. Hence, a separate localisation of the rights covered by Article 12 EIR for the purposes of Article 5 EIR is the more convincing approach and a clarification of the EIR in this regard might be helpful.

6.9.3 Article 12 EIR and Article 3 IV lit a) EIR

The ECIR Report pointed to another problem in connection with Article 12 EIR.⁹⁸⁵ According to Article 3 IV lit. a EIR, territorial proceedings can be opened when a permanent obstacle in the law of the Member State in which the centre of the debtor's main interests is situated prevents the opening of

⁹⁸⁴ Huber, in: Haß/Huber/Gruber/Heiderhoff (eds.), EU-Insolvenzverordnung (2005), Article 12 EulnsVO, para. 5; Nerlich, in: Nerlich/Rörmann (eds.), Insolvenzordnung (2012), Article 12 EulnsVO, para. 3.

⁹⁸⁵ ECIR Report, Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings: A summary of responses to a survey issued by The Insolvency Service, 36.

main insolvency proceedings.⁹⁸⁶ In this event a strict interpretation of Article 12 EIR would lead to the unconvincing result that the assets covered by Article 12 EIR could not be dealt with in an insolvency proceeding at all.⁹⁸⁷

6.9.4 Recommendation

Although Article 12 EIR seems to be either of limited practical use or works satisfactorily in most of the cases and there is consequentially no urgent need for any amendments, some clarification may be helpful.

Since clear guidance can easily be established, it is suggested that the following sentence be appended:

“This does not apply to territorial proceedings opened under Article 3 IV lit a) or with regard to Article 5.”⁹⁸⁸

⁹⁸⁶ For example, as a natural person or as a body corporate organized under public law, the debtor lacks the capacity to be subject of an insolvency proceeding in the Member State of the debtor's COMI.

⁹⁸⁷ The situation is different when the debtor's COMI is located outside of a Member State. In this event, the EIR is not applicable and the localisation of the rights is therefore governed by the respective Regulation, see *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 134.

⁹⁸⁸ A possible alternative would be to introduce into Article 2 g) a new indent with the following wording: “-for the purposes of Article 5 assets mentioned in Article 12, in the Member State in which the proprietor has his seat or his domicile”.

6.10 Article 13 EIR: Avoidance, avoidability and voidness

6.10.1 General questions

Article 13 EIR further qualifies Article 4(2)(m) EIR.⁹⁸⁹ In the case law of the *ECJ*, Article 13 EIR has only played a role to the extent to which this provision may be considered as an argument for the position that avoidance actions fall into the scope of Article 1 EIR.⁹⁹⁰ Like other provisions of the EIR, its Article 13 raises certain qualification issues; e.g., the powers of the administrator need to be delineated from cases in which an avoidance action has to be filed in a court.⁹⁹¹ Other controversies relate to the question of whether the scope of Article 13 EIR only covers specific means or remedies relating to avoidance or voidness based on insolvency law⁹⁹², or whether it covers all cases of avoidance or voidness including those based on general private law, e.g. in case of illegality, immorality or mistake.⁹⁹³ However, these questions do not seem to give rise to any serious problems or to requests for a reform.

6.10.2 Need for an abolishment or limitation of article 13 EIR?

6.10.2.1 Legitimate expectations of the parties

More important issues relate to the rationale and the functioning of this provision. In this respect, the National Reports reflect the general state of the debate concerning Article 13 EIR:

Several National Reports emphasize that Article 13 EIR is necessary (and the best option) in order to protect legitimate expectations of the parties with regard to the legal regime applicable to their legal relationship.⁹⁹⁴ With regard to its effects, Article 13 EIR is considered to be successful in upholding

⁹⁸⁹ Opinion AG Colomer, 16 October 2008, C-339/07, para. 13 – *Seagon./Deko Marty*.

⁹⁹⁰ See the reference to Article 13 IR in the Opinion of AG Colomer, 16 October 2008, C-339/07, at para. 13 – *Seagon./Deko Marty*.

⁹⁹¹ Austrian Report, Q. 13.

⁹⁹² Italian Report Q. 24.

⁹⁹³ Austrian, Cyprus, Dutch, French, Greek, Lithuanian, Romanian and Spanish Reports, Q. 24. In Germany, the issue is controversial, German Report, Q. 24; UK Report, Q. 24, says, the right answer is unclear.

⁹⁹⁴ Belgium Report, Q. 24; Spanish Report, Q. 24. The Estonian, Latvian and Romanian Reports, Q. 24, state that no problems were experienced with Article 13 EIR.

creditor's legitimate interests.⁹⁹⁵ In general, it is therefore fair to say that Article 13 EIR indeed serves a legitimate purpose.

Concerning the legitimate expectations of the parties, it has been submitted by the critics of Article 13 EIR that, under Articles 3 and 4 EIR, the applicable insolvency law is determined by the COMI, which is also a foreseeable standard in itself so that it is not necessary to also refer to the *lex causae*.⁹⁹⁶ However, this position is not in line with general private international law experience with regard to contracts: One of the most important justifications for permitting choice of law agreements between the parties is that there is, firstly, an urgent and legitimate interest of the parties to have undoubted certainty with regard to the applicable contract law regime and that, secondly, statutory conflicts provisions always leave a certain degree of doubt as to the determination of the applicable law. In order to avoid these uncertainties, permitting a contractual choice of law is appropriate.⁹⁹⁷ Moreover, the debtor may legitimately change its COMI after a contract has been concluded.

Seen against the background of this discussion, the standard of predictability based on the COMI, even if improved in the course of a reform of Article 3 EIR, cannot adequately meet the needs of contract law as regards legal certainty.⁹⁹⁸ The same is the case in relation to possible grounds for avoidance or voidness if there was no additional safeguard providing for a reliable standard for grounds of avoidance.

6.10.2.2 Complexity of the provision?

Others complain about the complexity caused by Article 13 EIR and its requirement that an obligation can be avoided under the *lex concursus* as well as the *lex causae* in particular because it is more difficult for an administrator to determine the avoidability under a foreign *lex causae* in comparison to the applicable insolvency law.⁹⁹⁹ However, the argument of

⁹⁹⁵ E.g. UK Report, Q. 24.

⁹⁹⁶ Dutch Report Q. 24; however, practical problems have not been reported.

⁹⁹⁷ E.g. *Thomas Pfeiffer*, Handbuch der Handelsgeschäfte (1999), § 21, para. 4, p. 900.

⁹⁹⁸ Consequently, the Dutch Report, Q. 24, argues that there is a risk but that this risk should be considered to be bearable.

⁹⁹⁹ The UK Report, Q. 24, refers to statements of British barristers to that effect; the Austrian Report, Q. 24, mentions a statement of one administrator in that sense; according to the

complexity is only convincing to a very limited extent. Firstly, it should be noted that the position in favor of abolishment seems to be advocated mainly by those who desire an improvement of their legal position. To be sure, it would indeed be easier (and, in some cases, more fruitful) for administrators to pursue avoidance or claw-back claims if only the *lex concursus* applied and Article 13 EIR did not exist, since, under such a hypothesis, they would only have to consider one set of legal rules. In spite of these burdens, it may be said from a more neutral position that it is more complicated, but not uncommon, in international cases for more than one national law to have to be considered. In this respect, Article 13 EIR requires nothing more than what is rather usual in international cases, which is the need to take more than one law into account, i.e. all those laws closely related to a case. According to the General Reporter's practical experience based on a considerable number of expert reports in cross-border avoidance cases, considering a second legal regime does not raise insurmountable difficulties.¹⁰⁰⁰

6.10.2.3 Fraudulent manipulations?

Furthermore, it is argued that there is no sufficient safeguard against fraudulent manipulations of the law applicable under Article 13 EIR, since the parties may, for instance, include a choice of law clause in their contract and choose a law, which states requirements for avoidance actions that are difficult to meet.¹⁰⁰¹ It is of course correct that the parties would try to choose a law, which is favorable to their needs and interests. Yet, it is hardly realistic and is not in line with general experience from international contract law that this is motivated by the content of possible avoidance claims in case one party should become insolvent. That is in line with general practice under Article 3 Rome I Regulation: A contractual choice of law cannot be considered to be fraudulent or invalid just because it refers to a law that may impede avoidance claims.¹⁰⁰²

German Report, Q. 24, about 50% of the interview partners wish to have this provision abolished; however, opinions are split.

¹⁰⁰⁰ See also Slovenian Report, Q. 24.

¹⁰⁰¹ German Report, Q. 24.

¹⁰⁰² E.g. Austrian Report, Q. 24; French Report, Q. 24.

6.10.2.4 The proposal to protect against changes of the COMI only

It has also been argued that there was only a need for safeguarding against manipulations or changes of the COMI.¹⁰⁰³ However, this implies that a present or improved definition of the COMI could provide for the same degree of predictability of the applicable law as the choice of law with regard to contract law, which is not the case.

6.10.2.5 Result

In summary, it is not advisable to abolish or limit the reference to the *lex causae* standard provided for by Article 13 EIR.

6.10.3 Need for an extension?

At the occasion of the Heidelberg conference, it was discussed whether the “negative” reference to the *lex causae* in Article 13 EIR should be amended so that it could also positively justify an avoidance. Indeed, such an extension of Article 13 EIR would not contradict any expectations of the parties with regard to the existence and stability of their legal relationship. However, such an amendment of Article 13 EIR would mean that the *lex causae* would positively and negatively determine questions of avoidance. As a consequence, Article 4(2)(m) EIR became irrelevant so that only the *lex causae* would determine questions of avoidance. Such a change has not been advocated by any of the national reports. It would potentially result in the application of a great number of different avoidance laws, which rendered avoidance more complicated for an administrator. One might argue that an administrator already bears the burden of considering all these laws with regard to their negative effect under Article 13 EIR. However, there is still a difference between the present situation and a general (positive and negative) reference to the *lex causae*. Under the present system, the administrator only has to state the requirements for avoidance based on the *lex consursus* and may wait and see whether any debtor of a claw-back claim will raise objections based on Article 13 EIR. As conceded above, this is more

¹⁰⁰³ INSOL-Europe proposals, p. 59 et seqs.

burdensome than solely applying the *lex concursus*. However, it is still more appropriate with regard to the practical needs of an effective insolvency administration than a sole reference to the *lex causae*. It therefore seems that a general reference to the *lex causae* (positively and negatively) is not advisable.

In summary, the General Reporter does not recommend any changes with regard to Article 13 EIR.

6.11 Article 14 EIR: Protection of third-party purchasers

6.11.1 Underlying policy

The general policy of Article 14 EIR is similar to that of Article 11 EIR, although it does not require registration as far as immoveable assets are concerned. Therefore, it desires not only “*to protect the confidence of third parties in the content of property registers*”, but also covers “*all acts of disposal concerning immovable assets which take place after the opening of the insolvency proceedings*.”¹⁰⁰⁴ However, as far as ships, aircrafts and securities are concerned, the provision only applies to registered rights.

6.11.2 Main issue

With regard to Article 14 EIR, we face the same issue as we have already encountered in the context of Article 6 EIR. Just as the latter, Article 14 EIR does not explicitly refer to the law of a Member State, but rather only to the “*the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept*.” That raises the question as to whether the provision is also applicable in Third-State-cases.

6.11.3 Implementation in the Member States

In a majority of the Member States, Article 14 EIR is interpreted to also apply to Third-State-cases¹⁰⁰⁵, whereas some National Reports deny the applicability in those cases.¹⁰⁰⁶ German scholars argue that, in contrast to Article 6 EIR, Article 14 EIR does not apply to Third-State-cases, since the Regulation generally does not apply to assets situated in non-Member States. In four Member States, the interpretation of Article 14 EIR is still unclear in this respect¹⁰⁰⁷, and another five National Reports did not answer to the question.¹⁰⁰⁸

¹⁰⁰⁴ Virgós/Schmit, Report on the Convention on Insolvency Proceedings, para. 140.

¹⁰⁰⁵ Belgium, Cyprus, France, Hungary, Latvia, Lithuania, probably Luxembourg (there is no legal doctrine about the issue; however, it is likely that Luxembourgian scholars would follow the French interpretation), Malta, Romania, Slovakia, Slovenia.

¹⁰⁰⁶ Germany, Greece, Netherlands, Poland; Spain, Sweden (but Articles 6 and 14 may possibly apply *mutatis mutandis* if Third States are concerned).

¹⁰⁰⁷ Austria, Czech Republic, Estonia, UK.

¹⁰⁰⁸ Bulgaria, Finland, Ireland, Italy, Portugal.

6.11.4 Discussion

The exclusion of Third-State-cases from the scope of Article 14 EIR is only justified if, in practice, those issues will not rise before the courts of a Member State. As far as immoveable property is concerned, this is the case. Issues involving the validity of acts disposing of immoveable assets situated in a Third State will very likely be treated before the courts of this Third State due to its exclusive jurisdiction.¹⁰⁰⁹ Since the courts of the Third State will apply their domestic choice-of-law provisions, Article 14 EIR would not be relevant. However, with regard to registered ships or aircrafts and securities whose existence presupposes registration in a register laid down by law, there are no exclusive jurisdiction rules. Therefore, the validity of acts disposing of ships, aircrafts or securities registered in a Third State may have to be determined by the courts of a Member State. In this context, it is not justified to prohibit the application of the law of the (Third) State of registration allowing a *bona fide* purchase based on the register. The restriction of the choice-of-law provision to assets situated in a Member State would lead to the same trap as Article 22 (1) Brussels I Regulation.¹⁰¹⁰

Although *Manfred Balz*, permanent chairman of the working group elaborating the European Insolvency Convention, holds that Article 14 of the Convention shall only apply to the extent to which the law of a Member State is concerned,¹⁰¹¹ we plead for the applicability of the provision also in Third-State-cases. This opinion is shared by the overwhelming majority of scholars among the Member States as well as in accordance with the wording of the provision.

¹⁰⁰⁹ If the liquidator in European insolvency proceedings challenged the acquisition of a *right in rem* on the debtor's real estate in a Third State, the jurisdiction of the courts of a Member State would be excluded by Article 22 (1) Brussels I Regulation or Article 22 (1) of the new Lugano Convention respectively if the real estate is situated in Denmark, Switzerland, Norway or Iceland and the defendant was domiciled in a Member State or the aforementioned Third States (the European Area of Justice). If the defendant was domiciled in the State of the opening of proceedings, it is likely that exclusive jurisdiction of the *forum situs* would be accepted. If the real estate and the defendant were situated outside the European Area of Justice, the same result is likely under the applicable autonomous jurisdiction rules (Article 4 (1) Brussels I Regulation). However, if the defendant was domiciled within the European Area of Justice and the real estate was situated outside, Article 2 (1) Brussels I Regulation could apply, since the prerequisites of Article 22 (1) Brussels I Regulation are not met.

¹⁰¹⁰ Cf. *Hess/Pfeiffer/Schlosser*, The Heidelberg Report on the Application of Regulation Brussels I in 25 member states, (study JLS/C4/2005/03) (2008), para. 362.

¹⁰¹¹ *Balz*, ZIP 1996, 948, 950.

6.11.5 Recommendation

Article 14 EIR is fully satisfactory and its wording should not be amended. The applicability of the provision in Third-State-cases may be clarified in a recital.

6.12 Article 15 EIR: Effect of the insolvency proceedings on individual proceedings in other Member States

The National Reports do not address any serious problems raised in the context of Article 15. As it seems, most or all Member State laws have a rule or tendency to provide for a priority of insolvency proceedings over individual litigation or proceedings, e.g. by a stay of proceedings¹⁰¹², a transfer to the insolvency court¹⁰¹³ or a prohibition of enforcement proceedings¹⁰¹⁴, although the technical details of these rules are conceived differently.¹⁰¹⁵

6.12.1 Information problem

Information issues are discussed in some of the Member States.¹⁰¹⁶ The Lithuanian Report mentions that bailiffs complain about their lack of information with regard to the effects that a foreign insolvency proceeding brings about in relation to individual enforcement proceedings in Lithuania. Yet, according to the Lithuanian Report, this is a factual rather than a legal problem. It is not doubtful that Lithuanian authorities respect the legal effects of an insolvency proceeding in another Member State. The problem is rather a lack of information as to what these effects are. The Lithuanian Report suggests a rule requiring the opening decision to expressly state the effects of the insolvency proceedings on individual proceedings in other Member States. This suggestion, however, does not relate to Article 15 EIR.

¹⁰¹² Austrian Report, Q. 25; Belgium Report, Q. 25; Lithuanian Report, Q. 25; Romanian Report, Q. 25.

¹⁰¹³ Lithuanian Report, Q. 25.

¹⁰¹⁴ Hungarian Report, Q. 25.

¹⁰¹⁵ The UK Report, Q. 25, states that there is no “automatic” stay by way of applying national laws analogously; a different position has been taken in other Member States, see e.g. French Report, Q. 25.

¹⁰¹⁶ E.g. Maltese Report, Q. 25.

6.12.2 Qualification issues

There may be some questions of qualification with regard to Article 15 EIR. Although the *MG Probud* case of the *ECJ*¹⁰¹⁷ does not directly raise any such questions with regard to Article 15 EIR, this can also be discussed with regard to questions of qualification. More specifically, such issues have been reported from the Netherlands for example. In this regard, it was discussed in the Netherlands whether proceedings aiming at provisional measures fall into the scope of Article 15 EIR.¹⁰¹⁸ The General Reporters do not see any need for legislative action in this respect.

6.12.3 Arbitration

In the famous case of *Elektrim v. Vivendi*, the question was whether a Polish rule providing for the non-continuance of arbitration proceedings in the case of insolvency¹⁰¹⁹ is applicable with regard to arbitration proceedings in another state. An affirmative answer was given under Swiss private international law by the Swiss Bundesgericht¹⁰²⁰, whereas the Court of Appeal for England and Wales took the opposite view based on Article 15 EIR.¹⁰²¹ The General Reporter has supported the position that Article 15 EIR is already applicable (analogously) with regard to arbitration proceedings, which seems to be the prevailing opinion under the EIR.¹⁰²² Although the appropriate result (Article 15 EIR covers arbitration) seems to have sufficient support on the basis of the present wording of this provision, the issue is still not sufficiently certain.¹⁰²³

¹⁰¹⁷ *ECJ*, 21 January 2010, C-444/07, para. 25 – *MG Probud Gdynia* and *ECJ*, 2 May 2006, C-341/04.

¹⁰¹⁸ Dutch Report, Q. 13, referring to *Hoge Raad*, 11 December 2009, LJN: BK0867, 08/04993.

¹⁰¹⁹ To be sure, according to the Swiss decision, the technical effect of the Polish provision was not a non-continuance of the arbitration proceedings but the (personal) non-arbitrability of the matter.

¹⁰²⁰ *Schw BG*, 31 March 2009, 4A_428/2008.

¹⁰²¹ *Syska and Elektrim S.A. v. Vivendi S.A. a.o.*, [2009] EWCA Civ 677, 9 July 2009.

¹⁰²² *Thomas Pfeiffer*, in: *Festschrift für Jobst Wellensiek* (2011), 821-832; in favour of a direct application e.g. *Mankowski*, ZIP 2010, 2478; Polish Report Q. 25; Spanish Report, Q. 25; UK Report, Q. 25.

¹⁰²³ Explicitly: Romanian Report, Q. 25; cf. also the Austrian Report, Q. 25, stating that Article 4(2)(e) EIR does not apply to the arbitration agreement (a position to which the General Reporter agrees); the French Report, Q. 25, and the Latvian Report, Q. 25 refer to national law in this respect.

Although there is no urgent need in this respect, it would be rather easy and may thus be advisable to simply add the words “or an arbitration proceeding” to Article 15 EIR.¹⁰²⁴

¹⁰²⁴ For a proposal for an amendment in this direction, cf. also INSOL-Europe proposals, p. 63-65.

7 Coordination of Proceedings

7.1 General

In the first place, many lawyers automatically associate "coordination" with the rules on the coordination between main and secondary proceedings, i.e. Art 31 et seq EIR. Coordination, however, is a much broader issue. As a matter of fact, the law of the EIR could be described as a tool for the coordination of liquidation or recovery efforts as a whole. The situation on the eve of the opening of insolvency proceedings is normally at least to some extent a chaotic one and in many cases it is simply a mess, both from the business and the legal perspective. This is especially true in cases involving an international element. Creditors seek to enforce their claims out of court or in litigation or enforcement proceedings, try to seize goods, apply for insolvency proceedings, negotiate with the debtor etc., while the debtor is trying, for example, to avoid or delay the opening of insolvency proceedings, "shop" for an optimal forum, transfers goods from one country to the other or commits acts detrimental to the creditors such as discharging the most "pressing" debts etc. The situation leads to enormous risks with respect to the fair treatment of all stakeholders involved, especially the creditors. Above all, such a situation creates a very high degree of legal uncertainty. It would go far beyond the objective of this study to give an overall economic picture of all the problematic situations that can occur in such an environment.

Although the insolvency systems of the Member States differ widely, all have one common goal, i.e. to create a procedural framework serving the purpose of liquidating or restructuring the insolvent business or any other estate in orderly manner. Therefore, insolvency proceedings themselves are a tool of coordination, and every measure that makes such proceedings more effective creates a higher degree of coordination which leads to a better protection of fair expectations, especially, but not only, of creditors' rights. In an international environment, however, these coordinative effects of insolvency proceedings are endangered; on the one hand, parallel "main" or "territorial" proceedings have a tendency to conflict with each other. Different liquidators following different, uncoordinated rules might have different objectives or

ideas how to liquidate the estate. In particular, such conflicts can prevent attempts to restructure a business in a situation where literally all assets and facilities of a business are needed because of the economic situation of the debtor. Moreover, it is typical of such international insolvency situations that not even all assets are subject to insolvency proceedings, some of them because insolvency proceedings in the respective state are opened only at a later stage, others, because such proceedings in the respective state are not opened at all. This results in conflicts between insolvency proceedings on the one hand and other debt enforcement proceedings such as litigation and enforcement proceedings on the other hand and opens loopholes for shifting assets, detrimental acts and even fraud. In such a situation, the lack of coordination can result in severe impediments for reaching the overall goals which are (in many different ways) common to all the insolvency laws of the Member States, which are the fair and equal treatment of creditors, the attachment of all the debtor's assets and, last but not least, the creation of opportunities for recovery. This is the reason why international insolvency law is all about "coordination". This is especially true for EIR's rules on jurisdiction, definition and, to some extent, applicable law.

7.2 Tools

7.2.1 Jurisdiction

7.2.1.1 Uniform Law as Tool of Coordination: The COMI

In the first place, *uniform rules on the jurisdiction* to open insolvency proceedings are a very important tool of coordination in this respect. First and foremost, Art 3 EIR provides that there must be no parallel main proceedings with respect to one debtor. In a situation where courts of different states have to apply different provisions in the jurisdiction for main proceedings, it is conceivable that parallel main proceedings are opened, e.g. one at the debtor's registered office, the other at the centre of the debtor's business activities. By introducing the *COMI* as the relevant uniform requirement for the jurisdiction for main proceedings, the EIR created a situation where this

cannot occur.¹⁰²⁵ (Of course, this does not exclude that parallel applications for the opening of main proceedings before the courts of different Member States are made or that courts of different Member States may be of different opinions with respect to the location of the COMI; I will deal with this aspect below.¹⁰²⁶)

Moreover, as already discussed in greater detail¹⁰²⁷ in the chapter on jurisdiction, the fact that the EIR does not simply refer to more or less “formalistic” criteria (such as the registered office alone), but allows the rebuttal of the presumption under Art 3(1) EIR, is also a very important aspect when it comes to the coordination of liquidation or restructuring efforts: The COMI concept allows to take into account the reality of the relevant business and therefore the opening of main insolvency proceedings at the place where the administration of the business by the liquidator can be executed in the most efficient fashion. This is normally the place where the business administration took place before the opening of the proceedings.

After the ECJ decision in the case *Eurofood*¹⁰²⁸ one could have doubts about the ECJ’s approach that the COMI concept might be too formalistic in this respect by allowing the rebuttal of the presumption under Art 3 (1) only in very exceptional cases.¹⁰²⁹ Most experts, however, seem to agree that the criteria outlined by the ECJ in the subsequent case *Interedil*¹⁰³⁰ are flexible enough to respond to the needs of the actual business reality. All this is discussed in much greater detail in the chapter on jurisdiction above.¹⁰³¹ Nevertheless, the COMI concept raises particular issues in situations where a group of

¹⁰²⁵ This principle should also be applied where main proceedings have been closed in one Member State; in such a situation, courts of other Member States should not be allowed to open main proceedings consecutively when the facts underlying the COMI analysis have not changed since the opening of the prior main proceedings; see, however, *RAPLA Invest AB i likvidation*; *District Court of Stockholm* 21.3.2005, K 6276-05, BeckRS 2011, 23976, extract from *Morgell*, IILR 2012, 60, where the court came to a different conclusion.

¹⁰²⁶ See below in this chapter .

¹⁰²⁷ See chapter on jurisdiction].

¹⁰²⁸ *ECJ* 2.5.2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813, paras 26-37.

¹⁰²⁹ *Oberhammer*, KTS 2009, 27 (33, 62); *Kammel*, NZI 2006, 334 (338).

¹⁰³⁰ *ECJ* 20.10.2011, C-396/09, *Interedil Srl. i.L. / Fallimento Interedil Srl*.

¹⁰³¹ See chapter on jurisdiction.

companies is involved. I will return to this aspect in the chapter on groups of companies.¹⁰³²

Groups of companies in insolvency issues are, of course, predominantly give rise to coordination issues as well, and one could also discuss them in the broader framework of coordination in general. However, as there is a consensus that the revised EIR should create specific provisions for groups of companies, this aspect will be discussed in a separate chapter based on the general discussion in this chapter.¹⁰³³

7.2.1.2 Territorial Proceedings

The rules on *jurisdiction for the opening of independent territorial proceedings and secondary proceedings* (Art 3 (2) and (4) and Art 27 in connection with Art 3 (2) through (3) EIR) are also important in the context of coordination. First, they guarantee that no territorial proceedings can be opened simply because assets of the creditor are located in the respective Member State. This was typical of the situation before the enactment of the EIR and created opportunities for the opening of a larger number of insolvency proceedings in different (member) states against one debtor which, of course, was detrimental to coordinating liquidation or recovery efforts. It is generally accepted today that doing away with such procedures simply based on the location of assets in a state was a huge success and did not cause relevant problems.¹⁰³⁴ Therefore, the definition of the term “establishment” in Art 2(h) is crucial for the success of coordinating insolvency proceedings under the EIR.¹⁰³⁵ In some cases, the notion “human means” was construed by courts

¹⁰³² See chapter on groups of companies.

¹⁰³³ See chapter on groups of companies.

¹⁰³⁴ *Virgós/Schmit*, Report, para 70 pp., 81; *Paulus*, Europäische Insolvenzverordnung, 3rd ed. (2010), Art 2 para. 29; *Wessels*, International Insolvency Law (2012), para. 10532; *German Supreme Court (BGH)*, 21.12.2010 – IX ZB 227/09, WM 2011, 243, EWiR 2011, 185 (*Mankowski*) = FD-InsR 2011, 314162 (*Esser*); *Supreme Court of Estonia*, 21.11.2011, case no. 3-2-1-114, see National Report Estonia, Q 31; Kalpič-Zalar, Teritorialni (sekundarni) insolvenčni postopek po uredbi Sveta (ES), št. 1346/2000, Podjetje in delo 2007, No. 1, p. 110; see National Report Slovenia, Q 31.

¹⁰³⁵ See especially the clarification in *ECJ* 20.10.2011, C-396/09, Interedil Srl. i.L. / Fallimento Interedil Srl., para. 60-64. The debtor’s own professional activity is not sufficient to fulfil the criteria of “human means”, see *Austrian Supreme Court (OGH)*, 30.11.2006, 8 Ob 12/06g, SZ 2006/182 = EvBl 2007/59, 325 = ZIK 2007/111 (p. 67) = EuLF 2007 II-33, see National Report Austria (Q 31); the same was decided regarding a body of company such as a director: *German Supreme Court (BGH)*, 21.6.2012 – IX ZB 287/11, WM 2012, 1635 = NZI 2012, 725 =

of the Member States in a very broad fashion, in particular, by decisions based on the understanding that employees who are not actually employed by the debtor itself but by other entities “working for the debtor”, in a manner of speaking, is sufficient in this context.¹⁰³⁶ I do not submit that this view is necessarily wrong, but, from the perspective of coordination, it can cause a loss of coordination by a multiplication of proceedings. Sometimes, a very low level of “human means” was considered to be sufficient, such as in the English case where the mere fact that the debtor as the owner of a building was presumed to collect the rent itself was considered to be sufficient to fulfil the requirement of “human means”.¹⁰³⁷ This view is not convincing as debt collection vis-à-vis tenants can, of course, also be executed from a foreign country and does not necessarily include activities by “human means” in the

FD-InsR 2012, 335998 (Esser). Nevertheless the National Report Czech Republic (Q 31) mentioned that one judge in the interview was of the opinion that also a non-self-employed individual could have an establishment (which is problematic).

See also National Report Slovakia, Q 31. There is no need for being registered in a commercial registry (Handelsregister) in order to be considered an establishment in the sense of Art. 2 lit h), see Rechtsbank van Koophandel, Tongeren, 9.9.2002, A.R.A/02/2587, www.law.kuleuven.ac.be (see on this case also National Report Belgium, Q 27); WM 2012, 1635 = NZI 2012, 725 = FD-InsR 2012, 335998 (Esser). According to Tallinn Court of Appeal (14.6.2006, Rapla Invest AB, Insol Europe Abstract No. 62 also the preparation conducted for purposes of pursuing activities such as purchasing property, signing contracts and hiring employees in Estonia can be sufficient to constitute an “establishment” within the meaning of Art. 2(h) EIR, see National Report Estonia, Q 31; see also a Greek Court (No. 693/2003), mentioned in National Report Greece, Q 31. In several cases after main insolvency proceeding were opened in another Member State the registered office was at least qualified as an establishment, cf. National Report Belgium, Q 31, referring to Belgian Cour de Cassation, 27 June 2008 confirmed by Court of Appeal Brussels, 17 November 2011; National Report Austria, Q 29 referring to District Court Innsbruck, 11.5.2004, 9 S 15/04m, Hettlage Österreich, ZIK 2004/137 p. 107 = ZIP 2004, 1721 = KTS 2005, 223 (Schopper) = EWIR 2004, 1085 (Bähr/Riedemann); District Court Klagenfurt, 2.7.2004, 41 S 75/04h Zenith Maschinenfabrik Austria GesmbH, EWIR 2005, 217 (Beutler/Debus); see also National Report Poland Q 31. The Romanian national report (Q 31) mentions a decision of Commercial Court Cluj (judgment no. 2294, 9.10.2008 in the case No. 860/1285/2008) in which the court wrongly dismissed the application to open secondary proceedings because it decided that the establishment had to be a distinct legal person and the assets had to be the assets of the establishment as the debtor. Indeed, the Court of Appeal Cluj (No. 471, 3.2.2009) set this decision aside. However the Romanian national report (Q 31 and Q 8) mentions another decision of the Court of Appeal Bucharest in which the term “establishment” seemed to get confused with the term “subsidiary”. See also below in this chapter.

¹⁰³⁶ Local Court (Amtsgericht) München, 5.2.2007, 1503 IE 4371/06, BenQ Mobile Holding B.V., ZIP 2007, 495 = EWIR 2007, 277 (K. Müller) = ZIK 2007/184, 102 = eir-database.com No. 173 = NZI 2007, 358 (Mankowski) = IPRspr 2007 No. 243; District Court Hannover, 10.4.2008, 20 T 5/08, NZI 2008, 631 (criticised by Vallender) = ZIP 2008, 2375 = IPRspr 2008 No. 225 = ZInsO 2009, 1332. In a case where the debtor had only mandated a tax advisor in Germany this was not decided to be sufficient for the requirement of “human means”, see German Supreme Court (BGH), IX ZB 287/11, WM 2012, 1635 = NZI 2012, 725 = FD-InsR 2012, 335998 (Esser).

¹⁰³⁷ London Court of Appeal, Civil Division, 27.7.2005, Malcolm Brian Shierson as trustee in bankruptcy of Martin Vlieland-Boddy ./. Clive Vlieland-Boddy, [2005] EWCA Civ 974 = 1 WLR 3966 = NZI 2005, 571 (Mankowski 575).

Member State where the building is located. This, however, is an aspect of the interpretation of the clear wording of the EIR and does not demonstrate a need for the amendment of the regulation in this respect.

In the discussion on the reform of the EIR, it was suggested to amend the definition of an establishment by not referring to “goods”, but to “assets and services”.¹⁰³⁸ It was argued that the notion of “goods” is too narrow, and indeed, one might (wrongly) assume that this wording only relates to tangible assets. Therefore, it might indeed be useful to replace “goods” with “assets”. However, it would be very detrimental to include the term “services” as well, especially in a European environment. As is generally known, European law includes a very broad notion of “services” in general. In the specific context of insolvency law, this could create cases where insolvency proceedings could be opened simply because, e.g., sales agents of the debtors have acted in the respective Member State on a regular basis and have availed themselves of services such as transportation, hotels etc. It is important to understand that on the one hand – as already pointed out above – doing away with territorial proceedings simply based on the location of assets in the respective Member State was a very good choice of the EIR; on the other hand, opening insolvency proceedings in a country where no assets (in a broad sense) at all are located because the debtor availed himself or herself of “services” there, would not only endanger coordination by creating opportunities to open multiple parallel proceedings, but could also result in completely useless applications for the opening of territorial or secondary proceedings, as insolvency proceedings without assets are actually pointless.¹⁰³⁹ Of course, one might also favour a more narrow interpretation of the term “services”, but

¹⁰³⁸ INSOL-Draft (Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]), p. 30, 38 (arguing with Article 2 sub (f) of the UNCITRAL Model Law); European Parliament, REPORT with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Committee on Legal Affairs (so called “Lehne Report”), para. 2.3. The National Report France (Q 31) mentioned that some French scholars have argued that the definition of an establishment for the purpose of the Regulation should be amended so that to add services to it. The Romanian National Report (Q 31) cited a Romanian judge, who criticised, that the problem of immaterial services was not addressed by the definition of an establishment in the sense of Art. 2 lit. h) EIR.

¹⁰³⁹ Cf. the National Report Belgium (Q 29) which refers to a case in which the court dismissed the request to open secondary insolvency proceedings, as the debtor’s assets in Belgium had already been liquidated in the main proceedings (Commercial Court Gent, 21 February 2006 confirmed by Court of Appeal Gent, 19 January 2009, NV Interstore ./ BV Megapool).

the term itself does not guarantee such a narrow understanding and, moreover, the term “assets” is completely sufficient to demonstrate that insolvency proceedings can also be opened in a state where the debtor only has rights, claims etc.

Moreover, Art 3 (4) limits the right to apply for independent territorial proceedings to situations where no main proceedings can actually be opened in the COMI state and to applications of local creditors in the respective Member State. As this provision limits the opportunities for the opening of parallel proceedings, it is also an important tool of coordination, as it limits the potential obstruction of liquidation and recovery efforts by territorial proceedings.

In this context, it is hard to understand why, different from said Article 3 (4) EIR, all parties entitled to do so under the respective national law have the right to apply for the opening of secondary proceedings under Article 29 (b) EIR. Even if no main proceedings are pending yet, foreign creditors cannot apply for territorial insolvency proceedings under Article 3 (4) (b) EIR unless the opening of main proceedings in the COMI state is not possible (Article 3 (4) (a) EIR). That means that such creditors must apply for main proceedings in the COMI state to pursue their rights if the opening of such main proceedings is possible. If such main proceedings are already pending, it is hard to see why foreign creditors shall then be entitled to request the opening of secondary proceedings in a Member State where an establishment is located under Article 29 EIR.

In general, limiting the right to apply for independent territorial or secondary proceedings is one possible tool to improve coordination. However, even if one decides not to enact such limitations, one should in any event prohibit creditors who are not domiciled in the establishment state in the sense of Article 3 (4) (b) EIR from applying for secondary proceedings.

7.2.1.3 Coordination of Putative Main Proceedings

As already pointed out above, the EIR expressly deals with the coordination between main and secondary proceedings in its Art 31 et seq. However, the *coordination between two putative main proceedings* is also an issue of

practical importance. Of course, the EIR does not allow parallel main proceedings. However, it is not unusual that parallel applications for the opening of main proceedings are submitted in different Member States, simply because the location of the COMI is unclear or disputed or based on strategic considerations. From a distance, the situation is similar with the one under Art 27 of the Brussels I Regulation.¹⁰⁴⁰ However, both the factual situation and the law in such cases are different for a number of reasons. In the first place, the EIR does not provide for *lis pendens* provisions, which means that the fact that a party has applied for the opening of main insolvency proceedings in one Member State does not result in a stay or inadmissibility of the proceedings on a parallel application in another Member State.¹⁰⁴¹

The reason for this is obvious: Although the application of Art 27 of the Brussels I Regulation can create substantial procedural delay in cases where the court first seised lacks jurisdiction but the proceedings on the jurisdictional defence of the respondent are time-consuming, the identical situation would be catastrophic in insolvency law: In insolvency cases, time is literally money. In order to achieve a coordinated situation out of the chaos of the eve of the opening of insolvency proceedings, the law needs to ensure that proceedings must be opened immediately or at least soon after the application. This is especially true with respect to cases where the restructuring or the sale of a business is on the agenda. Lengthy disputes on jurisdiction before the opening of proceedings preventing the opening of proceedings in other Member States are therefore no option in such a situation. Therefore, dissimilar to the law under the Brussels I Regulation, the relevant point of time for determining the “prior” proceedings taking precedent over the “later” proceedings is not the application for the opening of such main proceedings, but the opening decision itself. As a consequence, every other court in different Member States where parallel proceedings for the opening of main proceedings are pending is obliged to dismiss the application as soon as

¹⁰⁴⁰ See *Laukemann*, RIW 2005, 104 pp.; *Mankowski*, KTS 2009, 453 pp.; *Rugullis*, *Litispandez im Europäischen Insolvenzrecht* (2002).

¹⁰⁴¹ See e.g. *LG (District Court) Hamburg 18.8.2005*, ZIP 2005, 1697 et seq. = *EWiR* 2006, 15 (*Schilling/Schmidt*).

insolvency proceedings are opened in another Member State.¹⁰⁴² In particular, such court is not allowed to review the “prior” court’s decision on jurisdiction.¹⁰⁴³ The only alternative for the “later” court is to open secondary proceedings provided the requirements for an establishment are fulfilled.¹⁰⁴⁴

¹⁰⁴² See *German Supreme Court (BGH)*, 29.5.2008 – IX ZB 102/07, ZIP 2008, 1338 = EWIR 2008, 491 (Jessica Schmidt) = NZI 2008, 572 (Mankowski) = ZJP 122 (2009) 339 (Eckardt) = IPRax 2009, 73 (Fehrenbach 51) = DZWIR 2008, 464 (Gruber) = JurisPR-InsR 18/2008 Anm. 1 (Cranshaw) = JZ 2009, 633 (Laukemann) = WuB IV A §3 InsO Nr. 1.09 (Paulus) = Rpfleger 2008, 664 „ISA Daisytek“; *German Supreme Court (BGH)*, 29.5.2008 – IX ZB 103/07, ZInsO 2008, 745 = EWIR 2009, 17 (Herchen) = jurisPR-InsR 18/2008 (Cranshaw).

¹⁰⁴³ See *ECJ, Eurofood*, at para. 42; *Hessisches Landesarbeitsgericht*, 15.2.2011 – 13 Sa 767/10, ZIP 2011, 683 = NJW-Spezial 2011, 471; *LArbG Frankfurt a.M.* 9.6.2011, jurisPR-InsR 11/2011 (Cranshaw) = EWIR 2011, 215 (Schmidt); *Higher Regional Court (‘OLG’) Nürnberg* 15.12.2011, ZIP 2012, 241 = NJW 2012, 862 = ZInsO 2012, 658; *Cour d’appel de Versailles* 15.12.2005, ct0013, „Rover SAS“. However, it appears as if some courts have not understood this principle correctly: see, e.g., *Higher Regional Court Brandenburg (Brandenburgisches OLG)*, 25.5.2011 – 13 U 100/07, ZInsO 2011, 1563 = VIA 2011, 62 (Renger); *Administrative Court (VG) Leipzig*, 13.9.2011 – 6 K 86/08, JurisPR-InsR 22/2011 Anm 4 (Cranshaw); in *Regional Court Cologne (LG Köln)*, 14.10.2011, 82 O 298/11, ZIP 2011, 2119 = NZI 2011, 957 (Mankowski) = EWIR 2011, 775 (Vallender); see *Riewe*, NZG 2011, 970, the court wrongfully examined the foreign court’s jurisdiction to open the proceedings under the pretence of a review of public policy under Art 26 EIR.

¹⁰⁴⁴ See for example: *Local Court (Amtsgericht) Köln*, 23.1.2004, 71 IN 1/04, Automold, NZI 2004, 151 = ZInsO 2004, 216 = ZIP 2004, 471 = NJW-RR 2004, 1055 = DZWIR 2004, 434 = EuZW 2004, 160; *Local Court (AG) Düsseldorf*, 12.3.2004, 502 IN 126/03, ISA Supplies Team GmbH, ZIP 2004, 623 = NZI 2004, 269 (Liersch) = NZG 2004, 426 = EuZW 2004, 307 = DZWIR 2004, 432 = EWIR 2004, 495 (Herweg/Tschauner) = IPRax 2004, 431 (Weller 412); *Tribunale di Milano*, 18.3.2004, Criss Cross Communication Italy S.r.l., Eir-database, No. 7; *Local Court (AG) Düsseldorf*, 7.4.2004, 502 IN 124/03 and 502 IE 2/04, ISA Deutschland GmbH, ZIP 2004, 866 = EWIR 2004, 909 (Westpfahl/Wilkens); *Local Court (AG) Mönchengladbach*, 27.4.2004, 19 IN 54/04 – „EMBIC I“, ZIP 2004, 1064 (Bähr/Riedemann) = NZI 2004, 383 (Lautenbach) = ZInsO 2004, 563 = EuZW 2004, 478 = NZG 2004, 1016 = DZWIR 2004, 437 (Smid 397) = EWIR 2004, 705 (Kebekus) = IPRspr. 2004, No. 238; *District Court (Landesgericht) Innsbruck*, 11.5.2004, 9 S 15/04m (Hettlage Österreich), ZIK 2004/137, 107 = ZIP 2004, 1721 = KTS 2005, 223 (Schopper) = EWIR 2004, 1085 (Bähr/Riedemann); *District Court (Landesgericht) Klagenfurt*, 2.7.2004, 41 S 75/04h, Zenith Maschinenfabrik Austria, EWIR 2005, 217 (Beutler/Debus); *Tribunal d’arrondissement de et à Luxembourg, deuxième chambre*, 27.5.2005, Commercial judgment II N° 549/05 - bankruptcy N°229/05, Probotec Ltd., Insol Europe Database, Abstract No. 88; *Komárom-Esztergom Megyei Bíróság (First Instance Court Esztergom)*, 5.6.2005, 3.Fpk.11-05-070162/9, Insol Europe Database, Abstract No 35; *Commercial Court (Handelsgericht) Wien*, 20.7.2005, 2 SEU 1/05t Collins & Aikman Products GmbH, www.edikte.justiz.gv.at; *Commercial Court (Handelsgericht) Wien*, 13.4.2006, 2 SEU 1/06v, EMTEC Magnetics ECE GmbH, www.edikte.justiz.gv.at; *Tallinn District Court*, 14.6.2006, OÜ SigMar Invest J. Rapla Invest AB, Insol Europe Database, Abstract No. 62 = InCA No. 11 (IV/2006), 8 (Ounpuu); *Local Court (Amtsgericht) München*, 5.2.2007, 1503 IE 4371/06, BenQ Mobile Holding B.V., ZIP 2007, 495 = EWIR 2007, 277 (K. Müller) = ZIK 2007/184, 102 = eir-database.com No. 173 = NZI 2007, 358 (Mankowski) = IPRspr 2007 No. 243; *Nejvyšší soud České republiky*, 31.1.2008, Václav Fischer J. D.I. s.r.o., R 87/2008, www.nsoud.cz; *Tribunal d’arrondissement de et à Luxembourg, deuxième chambre*, 28.3.2008, Commercial judgment II N° 447/08, (Numéro 113 189 du rôle) - bankruptcy N°115/08, Immo Leu Real Estate SA J. PIN Group AG, Insol Europe Database, Abstract No. 45; *District Court (LG) Hannover*, 10.4.2008, 20 T 5/08, NZI 2008, 631 (this being criticised by Vallender) = ZIP 2008, 2375 = IPRspr. 2008 No. 225 = ZInsO 2009, 1332; *First instance court - Fővárosi Bíróság, Budapest*, 17.9.2008, 9.Fpk. 01-08-001806/9, Insol Europe Database, Abstract No. 56 (Csöke); *Curtea de Apel Oradea (Rumänien)*, 4.6.2009, Decizia comercială nr. 214 din 4 iunie 2009, Insol-Europe Database Abstract No. 172; *District Court (LG) Salzburg*, 25.8.2009, 23 S

In most cases, these principles were observed by the courts involved.¹⁰⁴⁵ There are only few examples where this caused problems.¹⁰⁴⁶ For example, in a German case soon after the EIR came into force, the court first opened parallel main proceedings but subsequently closed these proceedings soon after having understood the effects of the main proceedings.¹⁰⁴⁷ It seems that these principles are almost generally known among courts in the Member States today.

English courts seem to be of the opinion that they may render injunctions restraining debtors from filing applications for the opening of proceedings before a court lacking jurisdiction under the EIR.¹⁰⁴⁸ Note that under the Brussels I Regulation, the ECJ has clearly decided that anti-suit injunctions are not an admissible tool for the coordination of proceedings in Europe.¹⁰⁴⁹ In my opinion, the same is true under the EIR. Therefore, such injunctions are not a promising tool for the coordination of proceedings here.

The most important practical problem in this context is the determination of the *relevant point in time*. Under Art 2 (f) EIR “the time of the opening of proceedings” shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.

78/09d, non ferrum Metallpulver Gesellschaft mbH, www.edikte.justiz.gv.at; District Court (LG) Salzburg, 25.8.2009, 23 S 77/09g non ferrum Metallpulver Gesellschaft mbH & Co KG, www.edikte.justiz.gv.at; High Court of Justice, Chancery Division, 9.5.2012, Office Metro Ltd (formerly Regus Ltd), [2012] EWHC 1191 (Ch).

¹⁰⁴⁵ See e.g. *District Court (LG) Salzburg*, 23.8.2006, 23 Se 136/06d, 23 Se 134/06k, 23 Se 79/05w, AFA Arbeits- und Forschungs- gem.f.Arzneimittelsicherheit GmbH, www.edikte.justiz.gv.at; *Austrian Supreme Court (OGH)*, 30.11.2006, 8 Ob 12/06g, SZ 2006/182 = EvBl 2007/59, 325 = ZIK 2007/111 (p. 67) = EuLF 2007 II-33; Court of Appeal of Portugal, 18.5.2009, Case number 3175/06.1TBPRD.P1, 18.05.2009, Insol-Europe Database Abstract No. 135 (Correia). In some cases, the application to open main insolvency proceedings was interpreted as an application for secondary proceedings instead.

¹⁰⁴⁶ See, e.g., *Local Court (AG) Nürnberg 15.8.2006 and 1.10.2006*, NZI 2007, 185 = ZIP 2007, 81 = ZInsO 2007, 668 = EWIR 2007, 81 = ZIK 2007/237, 140 = Eir-Database No. 171, see also *Ballmann*, BB 2007, 1121 ff; *Andres/Grund*, NZI 2007, 137; NZI 2007, 186 = ZIP 2007, 83 = EWIR 2007, 179 = Eir-Database No. 172 = ZInsO 2007, 667 = ZIK 2007/238, 141, *Smid*, DZWIR 2007, 485, 515; *Ballmann*, BB 2007, 1121 ff.

¹⁰⁴⁷ *Local Court (AG) Düsseldorf*, 7.4.2004, 502 IN 124/03 and 502 IE 2/04, ISA Deutschland GmbH, ZIP 2004, 866 = EWIR 2004, 909 (*Westpfahl/Wilkens*); in another case, a first instance court in the Czech Republic also opened conflicting main proceedings (in *Re Vaclav Fischer*, Case No. 29 Odo 164/2006), but the *Czech Supreme Court* (Nejvyšší soud České republiky, 31.1.2008, Václav Fischer ./. D.I. s.r.o., R 87/2008, www.nsoud.cz) set this decision aside and the Czech main proceedings were finally converted into secondary proceedings, see National Report Czech Republic, Q 28 and Q 9).

¹⁰⁴⁸ See *English High Court 16.10.2002*, *Telia v Hillcourt* [2002]EWHC (CH) 2377.

¹⁰⁴⁹ See *ECJ*, 27.4.2004, C-159/02, *Turner ./. Grovit*, ECR 2004, I-3578; *ECJ*, 10.2.2009, C-185/07, *Generali Assicurazioni Generali SpA ./. West Tankers Inc.*, ECR 2009, I-686.

On the one hand, this definition makes clear that the mere existence of remedies against the decision to open the main proceedings or the fact that such remedies were actually raised by a party is no reason for denying the recognition, and, consequently, opening parallel main proceedings in another Member State.¹⁰⁵⁰

On the other hand, the determination of when the main proceedings “*became effective*” is not always an easy task. This is, in particular, true for the early stages of the proceedings where the court has already ordered certain (protective) measures, while another court order which would, as it were, definitively open the proceedings is still outstanding. This was the case in the ECJ decision *Eurofood*, where the ECJ decided that the appointment of a provisional liquidator under Irish law can already be considered as an opening of insolvency proceedings under the EIR.¹⁰⁵¹ This choice was both convincing and easy, as the provisional liquidator under Irish law is listed in Annex C of the EIR which suggests that the point in time where such liquidator is appointed should also be considered as an effective opening of the insolvency proceedings. Most disputes in this respect were caused by German law where normally a “*vorläufiger Insolvenzverwalter*” is appointed by the court upon the application for the opening of insolvency proceedings. Such provisional liquidator under German law normally is in charge for a considerable period of time until the appointment of a “*Insolvenzverwalter*” as a consequence of the actual opening of the proceedings under German law. The “*vorläufige Insolvenzverwalter*” is also listed under Annex C. However, the specific powers of such “*vorläufige Insolvenzverwalter*” may differ from one case to another, depending on the specific content of the relevant court order. In German practice, this is addressed under the headings “*starker*” or “*schwacher*” or “*halbstarker*” liquidator, meaning “strong”, “weak” or “semi-strong” liquidator. As Article 38 EIR provides for the recognition of measures taken by a provisional liquidator before the opening of the proceedings *in the*

¹⁰⁵⁰ This, however, does not necessarily have the consequence that parallel proceedings cannot be pending for quite a while in situations where the opening decision of the court which had opened insolvency proceedings first is subject to appeal; see, e.g., *Appellate court - Cour d'Appel de Mons* 24.4.2006, Belgium INSOL EIR-case register Nr. 134 (Wautelet).

¹⁰⁵¹ ECJ 2.5.2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813 = para 45 pp.; see *Thole*, ZEuP 2007, 1137 (1145 p); *Konecny*, ZIK 2006/185, 149 (152); *Herchen*, NZI 2006, 435 (437); *Geroldinger*, EuGH in Sachen Eurofood – ein Wespennest, euro.lex united 2007/3, para. 31 pp.

sense of the EIR, it is not completely clear whether all these situations can be considered as “opening” of the proceedings under the EIR. As a matter of fact, most European courts were of the opinion that the appointment of such a “vorläufiger Insolvenzverwalter” under German law was to be qualified as “opening” of the proceedings under the EIR¹⁰⁵². This, however, was not always the case¹⁰⁵³.

Such issues cannot only arise from the opening phase of the proceedings listed in Annex A today, but also *in connection with “hybrid” proceedings*. This issue is the subject of another chapter of this report.¹⁰⁵⁴ However, it is also relevant in the context of the coordination of proceedings. For example, in 2011 the German legislator enacted a so-called “Schutzschirmverfahren” (“protective shield proceedings”¹⁰⁵⁵) (in force since 1 March 2012) which requires an application for the opening of insolvency proceedings, but does not result in such opening – for the time being – but only in effects similar to such opening, such as stay of enforcement proceedings. It is disputed whether such proceedings come into the scope of the EIR today.¹⁰⁵⁶ It is important to understand that the inclusion of hybrid or pre-insolvency

¹⁰⁵² *District Court Patra* (Griechenland), 2.5.2007, 316/06, EWIR 2007, 563 (*Paulus*); *Local Court (AG) Hamburg*, 19.7.2007, 67a IE 2/07, ZIP 2007, 1767; *Higher Regional Court (Oberlandesgericht) Innsbruck*, 8.7.2008, 1 R 176/08d, ZIK 2008/347, 214; NZI 2008, 700 (*Mankowski*) = EWIR 2008, 653 (*Paulus*); *County Court Croydon*, 21.10.2008, 1256/08, NZI 2009, 136; *Local Court (AG) Köln*, 6.11.2008, 71 IN 487/07, NZI 2009, 133 see on this case *Mankowski*, KTS 2009, 453; *District Court (LG) Salzburg*, 25.8.2009, 23 S 78/09d, non ferrum Metallpulver Gesellschaft mbH, www.edikte.justiz.gv.at; *Austrian Supreme Court (OGH)*, 17.11.2009, 1 Ob 205/09t, ZIK 2010, 73 = RdW 2010, 125; *Commercial Court (Handelsgericht) Wien*, 12.2.2010, 5 SEU 1/10x, Maurice Ward GmbH, www.edikte.justiz.gv.at; *Commercial Court (Handelsgericht) Wien*, 19.3.2010, 4SEU 1/10i, FOC Neusiedl Fashion GmbH (vorm. firmierend Rosner Fashion GmbH), www.edikte.justiz.gv.at; *Tribunale di Venezia*, 21.12.2010, 23.12.2010 and 24.2.2011, Dir. Mar. 2011, 607, 619 and 622, see *Mankowski*, IILR 2012, 282; *High Court of Justice Queens Bench Division, Commercial Court*, Mr. Justice Christopher Clarke, 25.5.2012, *Westwood Shipping Lines Inc., Weyerhaeuser Nr Company ./. Universal Schiffahrtsgesellschaft mbH* (formerly GMB Schiffahrts GmbH), [2012] EWHC 1394 (Comm). See for difficulties regarding the recognition of the appointment of a German temporary liquidator in other Member States e.g. National Report Austria, Q 26.

¹⁰⁵³ *Cour d’Appel Colmar*, 31.3.2010 – B 08/04852, ZIP 2010, 1460 = EWIR 2010, 453 (*Mankowski*) = IILR 2011, 108 (*Mankowski*).

¹⁰⁵⁴ See chapter on the Scope of the Insolvency Regulation.

¹⁰⁵⁵ Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen vom 7. Dezember 2011, BGBl. I p. 2582, corrected p. 2800.

¹⁰⁵⁶ *Garcimartín*, IILR 2011, 321 pp.; *Porzycki*, *Controversies on Solvent Debtors Continue: More Cross-Border Problems Related to French sauvegarde*, *International Corporate Rescue* 2012, 96 pp.; *Menjucq/Dammann*, *La Sauvegarde Financiere acceleree*, *Nouvelle Recrue de l’annexe a du reglement 1346/2000?* (February 2011), < http://www.univ-paris1.fr/fileadmin/diplome_M2OFIS/Articles/La_sauvegarde_financiere_acceleree_FINAL.pdf >.

proceedings into the scope of the regulation also has an obvious impact on the coordination of parallel attempts to open main proceedings in different Member States.

Nevertheless, I am of the opinion that there is no need for a reform of the EIR in this respect: Both the case-law of the ECJ¹⁰⁵⁷ and of the courts of the Member States¹⁰⁵⁸ have shown a reasonable tendency to assume that the “opening” of the proceedings under the EIR takes place at a relatively early stage of the proceedings. There seems to be no general tendency not to accept the prior opening of main proceedings in another Member State based on the assumption that what happened there is not “definitive enough”. Moreover, an inclusion of pre-insolvency or hybrid proceedings into the scope of the EIR would also help to move the relevant point of time to an earlier stage and, consequently, would therefore be an effective tool of coordinating proceedings by creating a ground for the dismissal of parallel applications for the opening of main proceedings at a relatively early point of time. However, it is decisive that the hybrid proceedings taking priority in such situations already actually cause the effects which are normally associated with insolvency proceedings, such as, in particular, the attachment of assets and the stay of enforcement proceedings, because a mere “lis pendens effect” without such protective effects would not coordinate, but obstruct liquidation and recovery efforts.

As the recognition of prior main proceedings is only provided for in cases where these main proceedings were opened on the basis of Art 3(1) EIR, it is important that the court opening such proceedings *expressly states that these proceedings were opened on this basis*. Some Member States have already implemented rules requiring their courts to expressly note the jurisdictional basis of the opening of the insolvency proceedings in their respective order.¹⁰⁵⁹ Although I am of the opinion that such a duty does already exist

¹⁰⁵⁷ ECJ 2.5.2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813, paras 50-58.

¹⁰⁵⁸ See above in this chapter.

¹⁰⁵⁹ See Art. 102 § 2 EG-InsO in Germany, § 220a IO in Austria, or Art. 6 (4) Faillissementswet (Bankruptcy Code) in the Netherlands (see *Wessels*, International Insolvency Law [2012], para. 10556). In France a Circulaire of December 2006 also stresses the importance to explicitly describe whether the proceedings are main or secondary proceedings (see *Wessels*, International Insolvency Law [2012], para. 10556).

under the EIR today, it might be useful to include an express provision to this effect here.

As this report has pointed out in the chapter on jurisdiction, *a provision requiring the court to examine its jurisdiction ex officio*¹⁰⁶⁰ *is an important measure to prevent forum shopping*.¹⁰⁶¹ Such an obligation to examine the court's jurisdiction ex officio is always important in the coordination context with respect to parallel applications for the opening of main proceedings. As I have already pointed out above¹⁰⁶², conflicts on the jurisdiction for the opening of main proceedings must never result in a situation where no insolvency proceedings at all can be opened for a certain period of time (which would be a result of the implementation of a "lis pendens provision" such as Art 27 of the Brussels I Regulation). On the other hand, the actual opening of insolvency proceedings always causes a *fait accompli* at least to some degree, as both the measures of the liquidator and the court in this state and the effect of the law of this state create situations where it is often not possible or not practical to revert to the situation prior to the opening of the proceedings.

As disputes on remedies against the opening of the proceedings based on the argument that the court was lacking jurisdiction usually take significant time, normally the court having opened the proceedings and the liquidator appointed by such court will actually be decisive for the liquidation or restructuring and it is normally no realistic option to close these proceedings after a lengthy dispute on jurisdiction and to open proceedings in the state where the COMI is actually located. Therefore, the opening of the first main proceedings can be decisive irrespective of whether the court actually had jurisdiction to do so. As already pointed out above, there is no reasonable alternative to this kind of priority rule in international insolvency cases. As the EIR creates the space where transnational insolvencies are coordinated on the basis of this principle, it should also create effective tools in order to prevent abuse of this procedural coordination by relying upon the factual power of the opening of insolvency proceedings by courts lacking jurisdiction

¹⁰⁶⁰ See, e.g., *Higher Regional Court (OLG) Wien*, 6.5.2011 – 28 R 70/11m, ZIK 2011/273, 191.

¹⁰⁶¹ See chapter on jurisdiction.

¹⁰⁶² See above in this chapter.

to do so. Of course, *creditors should have access to remedies against a decision wrongfully opening insolvency proceedings*, but – as already pointed out before – such appeals might simply come too late. *Therefore, it would be highly desirable to introduce a provision expressly requiring the court opening main insolvency proceedings to examine its jurisdiction ex officio also for safeguarding fairness in the process of coordination.* (The same is true with respect to secondary proceedings; I will deal with this aspect below.¹⁰⁶³)

7.2.1.4 Jurisdiction for Insolvency-Related Litigation

Moreover, the jurisdiction of the courts of the Member State where the main proceedings are pending for non-collective proceedings (i.e. litigation) which derive directly from the bankruptcy and are closely connected with the proceedings invented by the ECJ in the *Seagon/Deko Marty Belgium* case¹⁰⁶⁴ also improves coordination as it leads to a concentration of such proceedings in the state where the main proceedings are pending.¹⁰⁶⁵

7.2.2 Recognition

The recognition of the main proceedings as well as the recognition of the powers of the liquidator appointed in these main proceedings in all Member States may be the most important instrument for the coordination of liquidation and recovery efforts under the EIR. As already pointed out above, this is especially true with respect to the coordination of parallel applications for the opening of main proceedings where the recognition of the first decision opening such main proceedings leads to the inadmissibility of conflicting main proceedings in all Member States.¹⁰⁶⁶ Recognition, however, is also of importance in a much broader sense. The EIR chose to provide for a *direct*

¹⁰⁶³ See below in this chapter.

¹⁰⁶⁴ See *Christopher Seagon v Deko Marty Belgium NV* 12.2.2009 (C-339/07), Slg 2009, I-767, RIW 2009, 234 (*Mankowski/Willemer* 669) = NZI 2009, 199 (Riewe 549 [550]) = ZIP 2009, 427 (*Mörsdorf-Schulte* 1456) = DZWIR 2009, 365 (*Cranshaw* 353) = KTS 2009, 375 (*Hau*) = IPRax 2009, 513 (*Fehrenbach* 492) = EWIR 2009, 411 (*Karsten Müller*) = GWR 2009, 152 (*Wolfer*) = LMK 2009, 278572 (*Stürner/Kern*) = WuB VI A § 3 InsO 2.09 (*Reinhart*) = FD-InsR 2009, 276473 (*Tashiro*) = ZIK 2009/109, 66 (*Konecny* 40 and *Machtinger* 151) = Zak 2009/108, 78 (*Neumayr*) = ÖBA 2009/30, 665 (*Kodek* 629) ÖJZ 2010/90, 851 (855 *Längle*) = ELR 2009, 184 (*Wittwer*); see also *Thole*, ZEuP 2010, 904 ff; *Ernst*, ZVI 2010, 253; *Ries*, ZInsO 2010, 2382; *Gundlach/Frenzel/Strandmann*, DStR 2009, 697; *Mock*, ZInsO 2009, 470, AG *Colomer* 16.10.2008, ZIP 2008, 2082 = EWIR 2009, 53 (*Keller/Stempfle*); *Hau*, KTS 2009, 378.

¹⁰⁶⁵ See chapter on jurisdiction.

¹⁰⁶⁶ See above in this chapter.

recognition of the powers of the main liquidator, that is, without any intermediary steps to be taken in all other Member States. In particular, the main liquidator neither has to apply for ancillary proceedings in other Member States in order to act in such states, nor does the EIR provide for any recognition proceedings. Therefore, the main liquidator is empowered to act directly in all other Member States by, for example, withdrawing amounts from bank accounts, selling the debtor's assets, availing himself or herself of the services of the debtor's employees, exercising the debtor's rights as a shareholder in subsidiary companies etc. Therefore, this direct recognition of the opening of the proceedings and powers of the main liquidator are already, as it were, the maximum solution that can be achieved in this context and, therefore, no additional reform steps need to be taken into account in this respect. However, some details need to be addressed in this context.

On the one hand, under Art 21 (2) EIR, any Member State within the territory of which the debtor has an establishment may require *mandatory publication* of the opening of the main proceedings. Member states have actually enacted such provisions.¹⁰⁶⁷ The failure to comply with this publication obligation may result in claims for damages against the liquidator¹⁰⁶⁸, but does not affect the duty to recognise the proceedings and the powers of the liquidator in the respective Member State. Nevertheless, one may ask whether this publication obligation could be replaced by a better access to information on the opening of insolvency proceedings via the internet. Such a solution might be more cost-effective, less time-consuming and maybe even a more efficient way to inform third parties about the opening of the proceedings. However, one should take into account that lack of information on the opening of insolvency

¹⁰⁶⁷ See, e.g., Art. 102 § 5 (2) EGI_{nsO} in Germany, § 219 IO in Austria (see National Report Austria, Q 40), Art. 3 LF in Belgium (see National Report Belgium, Q 40); the Netherlands (see *Wessels*, International Insolvency Law [2012] para. 10780, p. 694); and Hungary (see Court of the Capital of Hungary, First instance court - Fővárosi Bíróság, Budapest, 13.9.2004, No. 9 Eufpk 01-01-04-000001/6, Insol Europe Database, Abstract No. 21; *Wessels*, International Insolvency Law [2012] para. 10780, p 694/695). The National Report Malta (Q 40) explains the problems resulting from a lack of such mandatory publication in detail in Malta. Many of the National Reports suggest to impose such a mandatory obligation for publication on a European level, see e.g. National Reports Austria, Bulgaria, the Czech Republic, Estonia, France, Germany (if cost and language related problems could be solved), Greece, Hungary, Italy, Latvia, Lithuania, Malta, The Netherlands, Poland, Romania, Slovenia, Sweden and United Kingdom all on Q 40; only the Spanish National Report mentioned several interview partners who were of a different opinion.

¹⁰⁶⁸ *Paulus*, Europäische Insolvenzverordnung, 3rd ed (2010) Art 21 margin note 5; see § 219 (3) IO and Austrian National Report Q 40 for Austrian law.

proceedings is a serious problem in an international insolvency context. Therefore, one should be cautious before doing away with rules that provide for such information. In case the future development shows that future publication systems on the opening of insolvency proceedings on the internet are a sufficient source of information, one could consider doing away with the publication obligation under Art 21 (2) EIR. For the time being, however, I recommend to keep this provision in the EIR. After all, it only applies in cases where “human means” are involved in another Member State and, therefore, it is no unreasonable burden for the liquidator to be obliged to take care of the necessary publications in a Member State where even secondary proceedings could be opened.

On the other hand, Art 18 (3) EIR states that – in exercising his or her powers – *the liquidator shall comply with the law of the Member State within the territory of which he intends to take action*, in particular with regard to procedures for the realisation of assets. It seems as if for some commentators the content of this provision is not altogether clear.¹⁰⁶⁹ The reason for that might be that the content of this provision is just too trivial. It is obvious that it does not change the rules on applicable law, in particular the applicability of the *lex fori concursus* under Art 4 EIR. Art 18 (3) EIR simply states that the main liquidator has to respect the applicable foreign law, if it is applicable, for example, rules providing for public registration of the transfer of title in real estate etc. There is, however, no need for clarification here. In particular, a clarification pointing out which rules need to be observed can, of course, never be exhaustive anyway. In addition, such a discussion could lead to a wording that suggests that Art 18 (3) EIR is a conflicts of law rule limiting the applicability of the *lex fori concursus*, which is not the case today and should not be the case in the future.

Moreover, Art 18 (3) EIR points out that the powers of the main liquidator in other Member States may not include coercive measures or the right to rule

¹⁰⁶⁹ See, e.g., *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 164 pp.; *Haas*, in: FS Gerhardts (2004) 319 pp.; *Kindler*, in: MünchKomm-BGB, Vol. 11, 5th ed. (2010), Art 18 VO 1346/2000, para. 18-20; *Moss/Smith*, in: Moss/Fletcher/Isaacs, The EC Regulation on Insolvency Proceedings, 2nd ed. (2009), para. 8.283-8.286; *Wessels*, International Insolvency Law (2012), para. 10759 pp.

on legal proceedings or disputes. Nothing indicates that this “last resort of territorial sovereignty” causes any practical problems.

The same is true for the public policy reservation under Art 26 of the EIR, although there are a few cases where courts of Member States referred to public policy when considering not to recognise foreign main proceedings.¹⁰⁷⁰

¹⁰⁷⁰ See ECJ 2.5.2006, C-341/04, *Eurofood IFSC Ltd*, ECR 2006, I-3813 para 60-67; for national court decisions see: *Supreme Court of Ireland*, 147/04 27.7.2004, Eurofood, [2004] IESC 45; [2005] 1 ILRM 161 = NZI 2004, 505; *Local Court (AG) Nürnberg*, 15.8.2006, 8004 IN 1326-1331/06, Hans Brochier Holding Ltd. NZI 2007, 185 = ZIP 2007, 81 (*Kebekus*) = EWIR 2007, 81 (*Duursma-Kepplinger*) = ZIK 2007/237, 140 (see on this case *Ballmann*, BB 2007, 1121 pp., *Andres/Grund*, NZI 2007, 137); *High Court of Justice Chancery Division*, 17.2.2011, Re A Bankrupt and in the matter of the insolvency act 1986 and the EC Regulation on Insolvency Proceedings, [2012] BPIR 469; *District Court (LG) Köln*, 14.10.2011, 82 O 15/08, NZI 2011, 957 (*Mankowski*) = EWIR 2011, 775 (*Vallender*). In the majority of cases the public policy exception was invoked unsuccessfully, see: *Local Court (AG) Düsseldorf*, 7.4.2004, 502 IN 124/03 and 502 IE 2/04, ISA Deutschland GmbH, EWIR 2004, 909 (*Westpfahl/Wilkens*); *Higher Regional Court (OLG) Wien*, 9.11.2004, 28 R 225/04w, NZI 2005, 56 (*Paulus*); *Austrian Supreme Court (OGH)*, 17.3.2005, 8 Ob 135/04t, Stojevic, NZI 2005, 465 (*Paulus*) (see on this case *L. Fuchs*, *ecolex* 2005, 901 and *Mair*, ZIK 2008/128, 83); *Cour de Cass. Com.*, 15.2.2011, N 09-71.436, La Semaine Juridique, Entreprise et affaires, 20.10.2011 (*Menjucq*) = La Semaine Juridique, Edition générale, 3.10.2011 (*Menjucq*); *Higher Regional Court (OLG) Brandenburg*, 25.5.2011 – 13 U 100/07, VIA 2011, 62 (*Renger*); *Administrative Court (VG) Leipzig*, 13.9.2011, 6 K 86/08, JurisPR-InsR 22/2011 Anm 4 (*Cranshaw*); *Higher Regional Court (OLG) Nürnberg*, 15.12.2011, 1 U 2/11, ZIP 2012, 241; see on this topic *Mankowski*, KTS 2011, 185 pp; *Laukemann*, IPRax 2012, 207; *Hess/Laukemann*, in: FS Wellensiek (2011), 813 [817]; *Mansel*, in: FS von Hoffmann (2011), 683 pp.; *Jacoby*, GPR 2007, 200; *Knof*, ZInsO 2007, 629; *d’Avoine*, NZI 2011, 310; *Seraglini*, in: Affaki (ed.), *Faillite internationale et conflit de juridictions* (2007), 171 pp.

In *Rechtbank van Eerste Aanleg te Brussel* (Beslagrechter), 11.7.2005, NV MG R.B. ./. vzw K.B.T.C., Insol Europe Database, Abstract No. 122 (see on this case also National Report Belgium, Q 27) the court decided that the decision to open English main insolvency proceedings violated public policy on the basis of lack of motivation / giving reasons. The National Report France (Q 27) informs about the fact that French courts have not denied recognition to any insolvency decision rendered by a judicial authority of a Member State on the ground of public policy. However, the *Cour de cassation* ruled that it might do so in an *obiter dictum* in one case (Com. 15 Feb. 2011, case no 09-71436, Rev. Crit. DIP 2011, 903, Rev. des sociétés 2011, 443). The court ruled that it would deny recognition for the following violation of procedural public policy: If creditors domiciled outside the state where the primary proceedings were opened were not entitled to challenge the jurisdiction of the court under the Regulation, it would violate the right to access to court of foreign creditors. In both French cases on the insolvency of Daisytek (Cour de Cassation, Audience publique 27.6.2006, Pourvoi No C 03-19863, Procurator General (France) ./. SAS Isa Daisytek, [2006] B.C.C. 841 = Insol Europe Database Abstract No 24, see Vallens, Comments on recent caselaw from France, InCA 11 (IV 2006) 13 pp.) and Rover (Cour d’appel de Versailles, 15.12.2005, www.legifrance.gouv.fr; see *Toube*, European insolvency news, Eurofenix Spring 06, 10 [11 Dupoux]) the exception for public policy violation was invoked unsuccessfully (National Report France, Q 27). The German National Report (Q 27) mentioned only one case (*District Court Köln*, 14.10.2011, cited above) and estimated that the public policy exception was invoked only rarely, typically in cases regarding so called “insolvency tourism”. The Italian National Report (Q 27) mentioned only one case (*Consiglio di Stato*, 25.1.2007, No. 269/2007, Riv.dir.int.priv.proc. 2007, 457). In Lithuania (see National Report Lithuania, Q 27) a creditor (a bank) unsuccessfully invoked a violation of public policy in one case, see Vilnius Court, 7.5.2012, Case No. 2T-26/2012. From Poland (National Report Q 27) several decision of lower instance courts (in the context of Christianapol) were reported in which the jurisdiction of the court in another Member State to open main proceedings was contested by invoking a violation

However, there seems to be no overall tendency to abuse this provision. Of course, it is a fundamental issue of European policy whether such public policy provisions should stay in force or whether they should be abandoned as they are in conflict with the principle of mutual trust. It is not the purpose of this report to discuss this general issue. Nevertheless, it is obvious that one might be inclined to strive for a consistent policy in this respect, in other words, there is no specific reason to abandon public policy with respect to the recognition of foreign decisions in general but keeping it in insolvency law.

7.2.3 Applicable Law

Finally, the rules on applicable law (Art 4 et seq EIR) are also an important tool with respect to the issue of coordination. The broad applicability of Art 4 EIR, in particular, guarantees that all parties involved “play by the same rules” and that the main liquidator can perform his or her task under uniform rules he is familiar with. Applying different laws to, e.g., different groups of creditors, does not only lead to a loss of equality among the creditors (by creating situations that exist under no law), but can also be a severe impediment to liquidation or restructuring efforts by creating situations that are overly complicated and which might result in legal uncertainty. Therefore, providing for a broad applicability of the *lex fori concursus* can be a valuable tool for improving the coordination of insolvency administration in Europe. In general, the list under Art 4 is based on a reasonable approach and can therefore remain unchanged. If I had to identify one issue which is both problematic and relevant in practice here, it would be company law.

Of course, improving the efficiency of insolvency proceedings and their international coordination is not the only purpose of the rules on applicable

of public policy (see Regional Court (Sąd Okręgowy) Poznań, 18.8.2010 and Court of Appeal (Sąd Apelacyjny) Poznań, 7.12.2010). Furthermore it was argued that the Polish subsidiary was not insolvent at all, although insolvency proceedings (French *sauvegarde*) were opened against this solvent company. Following subsequent cassation in this case, the Supreme Court finally decided in line with the *Eurofood* judgment and clearly excluded the possibility to invoke Art. 26 of the EIR in cases of incorrect assessment of COMI by a court of another Member State. In the judgment of 2.2.2012, II CSK 305/11, the Supreme Court invoked the underlying principle of mutual trust between courts in the EU and clearly emphasised that Polish courts are not entitled to examine the correctness of decisions of other Member States on COMI. Similar Polish decisions are: Court of Appeal of Poznań on 11.3.2010, referring to the *Eurofood* decision as an argument. The judgment of the Court of Appeal was subsequently upheld by the Supreme Court on 16.2.2011, II CSK 406/10 [full text in Polish available on <http://prawo.lego.pl/prawo/ii-csk-406-10/>].

law; they also need to take into account legitimate interests of third parties, and that is what is actually done by Art 5 et seq EIR. All this is dealt with in much greater detail in the chapter on applicable law.¹⁰⁷¹ In the context of coordination, however, it is sufficient to note that choices for a law other than the *lex fori concursus* are never a “free lunch”; on the contrary, not only parties such as unsecured creditors have to pay dearly for such choices, but they are also detrimental to the overall efficiency of transnational insolvency proceedings. Therefore, from a coordination perspective, I suggest a very cautious approach with respect to proposals for adding aspects to Art 5 et seq EIR where the *lex fori concursus* is not applicable. Moreover, *ceterum censeo* that coordination of insolvency proceedings also requires that the European legislator provides that in an insolvency under the EIR at least one insolvency law applies in any event. There should be no situations where neither the *lex fori concursus* nor the insolvency law of the *situs* state applies. Situations where no insolvency law applies in an international insolvency case are an obvious failure of coordination. This might suggest to do away with the idea that Art 5 EIR provides for anything different than a conflicts of law rule; it is, however, not the task of this chapter to make recommendations with respect to the Regulation’s provisions on applicable law.

In an English case it was argued that the insolvency law of the Member State where an establishment is located should be applied irrespective of the fact that no actual secondary proceedings were opened.¹⁰⁷² It has even been suggested that such rule should be introduced in the EIR.¹⁰⁷³ Under the present law it is clear that such a rule does not exist¹⁰⁷⁴; it would also be wrong to introduce such a rule because this would be obviously detrimental to the coordination of liquidation and recovery efforts and would also create enormous legal uncertainty because the applicable law would depend on whether there were assets and human means in a specific Member State at the outset of the proceedings. (Admittedly, such a solution would help to

¹⁰⁷¹ See chapter on applicable law.

¹⁰⁷² This was argued in *Manchester County Court*, 19.5.2010, Re Volksbank Paderborn-Höxter-Detmold eG ./. Hagemeister [2010] BPIR 1093.

¹⁰⁷³ Cf. *Tollenaar*, IILR 2011, 252 (257).

¹⁰⁷⁴ *Manchester County Court*, 19.5.2010, Re Volksbank Paderborn-Höxter-Detmold eG ./. Hagemeister [2010] BPIR 1093.

overcome the problematic results of the prevailing opinion that Art 5 EIR is a rule of uniform law – however, it almost goes without saying that if one wants to overcome the shortcomings of Art 5, one should clarify the law there.) Moreover, there is no need for the protection of interests in the applicability of the *lex fori concursus* of the establishment state in case nobody actually applies for the opening of such proceedings. Of course, reducing the number of secondary proceedings would be one important step in order to improve the coordination of transnational insolvencies in the Member State.¹⁰⁷⁵ Doing away with secondary proceedings and providing for the applicability of the *lex fori concursus* of the establishment state instead would, however, be no reasonable trade-off, as this would result in the applicability of laws other than the *lex fori concursus* of the main proceedings even in states where no secondary proceedings would have been opened under today's laws. It is, however, worth discussing whether the main liquidator should be empowered to enter into an undertaking guaranteeing local creditors the rights they are entitled to under the law of the establishment state in a situation where an actual application for the opening of such secondary proceedings by such creditors is pending in order to avoid the secondary proceedings.¹⁰⁷⁶

7.3 Coordination of Main and Secondary Proceedings

7.3.1 Politics as the Raison d'Être for Secondary Proceedings

7.3.1.1 Universality and Territorial Sovereignty

The legislator of the EIR had to find a politically acceptable balance between striving for full universality of the main proceedings and respecting the Member States' wish for respect for their territorial sovereignty. National systems of insolvency law would never think of providing for parallel proceedings against one debtor within the respective territory – generally the opening of insolvency proceedings within one jurisdiction has universal effects, i.e. there must be no parallel proceedings and (save for exceptional cases such as conflicts of interest) there is only one liquidator taking care of

¹⁰⁷⁵ See below in this chapter.

¹⁰⁷⁶ See below in this chapter.

the all the debtor's assets within such a jurisdiction. After all, insolvency proceedings are collective proceedings resulting in an attachment of the entirety of the debtor's assets. Within the national systems, one would therefore normally not think of, e.g., appointing different liquidators for different assets and/or different groups of creditors, as this would obviously be detrimental to the efficiency of such collective proceedings.

At least theoretically, the same is true in transnational cases. In a "perfect world" the proceedings opened at the debtor's COMI would affect all assets in all Member States in the interest of all creditors involved and there would be no space for parallel proceedings. This is about the situation under the Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125/15, 5.5.2001 and the Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, OJ L 110/28, 20.4.2001. Nobody would deny that insolvencies of banks or insurance companies are very complicated cases; maybe they are the most complicated insolvency cases existing. Nevertheless, the solution chosen by European law in this context does not provide for an option for parallel proceedings at all.

7.3.1.2 Recital 19: The Truth Well Told

One should, however, not forget that it was already an important practical success of the EIR that it could avoid parallel proceedings based on the mere location of assets in different Member States. However, the EIR contains an option for the opening of such parallel proceedings based on the existence of an establishment in a Member State (Art 2 (a), 3 (2) and 27 et seq EIR). In recital 19 of the EIR the following explanation is given: "Secondary insolvency proceedings may serve different purposes, *besides the protection of local interests*. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request

the opening of secondary proceedings when the efficient administration of the estate so requires.”

To be frank, this reasoning belongs to the category “the truth well told”. In the first place, it is important to understand that the main reason for problems resulting from secondary proceedings is the fact that – contrary to this recital – it is not only the main receiver who can apply for the opening of such secondary proceedings, but also “any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested”¹⁰⁷⁷. As a matter of fact, the detrimental effects of secondary proceedings with respect to the coordination of liquidation and restructuring efforts over Europe would simply not exist if only the main liquidator could apply for their opening! It would be a significant improvement of the efficiency of transnational insolvency law in Europe if such a solution became the law.

Then again, cases where the main liquidator applies for the opening of such secondary proceedings in an establishment state seem to be rare. The reason for this is obvious: In case the main liquidator needs assistance from “people on the ground” in the establishment state, he or she can simply avail himself or herself of assistance by hiring local specialists. There is no need to open secondary proceedings in order to get such assistance. It is true that differences between the laws of the Member States may cause problems with respect to the extension of effects of the main proceedings to other Member States not only, but also when an establishment is existing. It is, however, not necessarily the case that the opening of secondary proceedings makes the administration of the estate more efficient in such situations. A good and maybe the most important practical example in this context are local social security rules providing for payments to employees in insolvency cases which are sometimes more or less tailor-made for the domestic insolvency case, which might result in practical problems where domestic employees of an establishment are confronted with a main insolvency in another Member

¹⁰⁷⁷ See for controversies whether this provision refers to the right to request the opening of secondary proceedings or insolvency proceedings in general by national law: National Report Poland, Q 30 referring to *Polish Supreme Court* 20.1.2010, III CZP 115/09 (<http://pub.sn.pl/>), critical remarks by P. Filipiak, in F. Zedler, A. Hrycaj, P. Filipiak, ‘Europejskie prawo upadłościowe. Komentarz’, Wolters Kluwer, Warsaw, 2011, 221-228, paras 9-21 to Art. 29.

State.¹⁰⁷⁸ It is, however, very doubtful whether European insolvency law should put up with the detrimental consequences of such rules which do not sufficiently take into account the situation that an employee has a foreign employer by providing for parallel proceedings; rather, such national provisions should be responsive to the needs of the internal market.

7.3.1.3 “The Protection of Local Interest”: An Opaque Approach

Even recital 19 of the EIR does not really conceal the fact that the main reason for the existence of secondary proceedings is “the protection of local interests”; however, it does not make clear the actual nature of such “local interests”. As a matter of fact, this argument is rather opaque: First and foremost, preferential rights and privileges of certain, normally local, creditors can be protected to some extent by the opening of such secondary proceedings. Such creditors can actually obtain a preferential treatment from the proceeds of the secondary proceedings (which, therefore, is contrary to the principle of the equal treatment of the creditors). Note that this, however, is only relevant in situations where the legislator of the EIR chooses not to protect such rights in Art 5 et seq EIR! In other words: The protection of such local interests through the opening of secondary proceedings leads to a protection of interests not protected under the relevant rules on applicable law

¹⁰⁷⁸ Several National Reports mention advantages of secondary proceedings in order to benefit from labour law which only applies in the event of insolvency (National Report Austria Q 23, National Report Spain Q 29); the same is true for pension protection schemes in the UK, see National Report United Kingdom Q 29, referring to Olympic Airlines SA Pension and Life Assurance Scheme *.l.* Olympic Airlines SA, [2012] EWHC 1413 (Ch). In this case the secondary proceeding was essential for access to the Pension Protection Funds in the UK. In Poland, in the meantime some problems in this field were solved, as Art. 6(1)(1) of the Polish Act of 13.7.2006 on protection of the employees in the event of the insolvency of their employer [Ustawa o ochronie roszczeń pracowniczych w razie niewypłacalności pracodawcy, Dz.U. of 2006 No 158, item 1121] has been amended [by law of 19.8.2011, Dz.U. of 2011 No 197, item 1170] to correct the implementation of the directive and include insolvency proceedings opened in other Member States against Polish entrepreneurs as events triggering payouts to employees covered by the guarantee, see National Report Poland, Q 23. Note, however, that secondary proceedings are not necessarily beneficial for employees: The National Report Netherlands (Q 29) mentioned one case in which the main liquidator successfully used secondary proceedings to make use of the more lenient rules on the dismissal of employees under *lex fori concursus secundariae* (which would not have been available in the main [reorganisation] proceedings (see *Rechtsbank 's Hertogenbosch* 24.5.2004, JOR 2004/212 and 16.6.2004, JOR 2004/213, 24.6.2004, JOR 2004/214; see on that case *Zacaroli*, The Powers of Administrators under Schedule B1 Prior to the Creditors Meeting – Transbus International Limited, 1 Int. Corp.Resc. 2004, 208). Moreover, the opening of secondary proceedings can also be detrimental for creditors protected by Art 5 EIR, as the *lex fori concursus secundariae* can actually affect their rights *in rem* in the establishment state even if one is of the opinion that Art 5 is a uniform law rule.

of the EIR (and is, of course, limited to funds available in the secondary proceedings). Moreover, such preferential effects are limited by Art 20 (2) EIR anyway. In addition, the fact that such advantages are resulting from the existence of an establishment in the respective Member State is not always a convincing reason: Preferential rights of employees actually have an obvious legal connection with the existence of an establishment while, e.g., this is not necessarily the case with preferential rights of tax authorities or maintenance creditors. Note, moreover, that it seems to be generally accepted that the establishment (which is the jurisdictional basis for the opening of such secondary proceedings) must actually exist when the court of the respective Member State decides on the opening of such proceedings.¹⁰⁷⁹ (It is, however, not completely clear whether mere measures for the liquidation of an establishment qualify as an economic activity in this respect.¹⁰⁸⁰) Therefore, the simple fact that the establishment was closed before this decision was made – which is a typical situation in insolvency cases – leads to the consequence that such local interests are not protected any longer (although the relevant local interests did not disappear simply because the establishment was shut down!). In other words, the right to apply for secondary proceedings depends on the coincidence whether the establishment is still operative after the economic collapse of the debtor.

It is, of course, easier for local creditors to lodge claims before local authorities.¹⁰⁸¹ This, however, is a fact, irrespective of whether an

¹⁰⁷⁹ *High Court of Justice*, Chancery Division, 29.5.2012, Olympic Airlines S.A., [2012] EWHC 1413 (Ch): The establishment continues to exist when the business activities have been closed but there are still employees there accomplishing the last dealings at the time when the application to open secondary proceedings is filed. *High Court of Justice, London 9.5.2012, Trillium (Nelson) Properties v Office Metro Limited* [2012] EWHC 1191 (Ch). See *Court of Appeal for Northern Norrland 14.2.2006*, Sweden INSOL EIR-case register Nr. 159 (Körling). *Appellate court - Hof van Beroep te Gent 19.1.2009*, www.juridat.be = INSOL EIR-case register Nr. 124 (Wautelet). See also National Report Latvia, Q 31 referring to a case in which the Estonian debtor had already ceased conducting business in Latvia but the assets and the creditors still remained in Latvia so that secondary proceedings could be opened in Latvia. See also National Report Slovenia, Q 31 referring to a similar case and National Report Sweden (Q 31) which also discusses this problem.

¹⁰⁸⁰ See *High Court of Justice, Chancery Division, 29.5.2012, The Trustees of the Olympic Airlines S.A. Pension and Life Assurance Scheme v Olympic Airlines S.A.* [2012] EWHC 1413 (Ch), where the court answered this question in the affirmative.

¹⁰⁸¹ Many of the National Reports mention the protection of local creditors as one of the main purposes of secondary proceedings. The foreign main proceedings might cause problems if creditors have to be aware of foreign insolvency law (see National Report Austria, Q 29, Q 23; Spain Q 29;). Especially when creditors had to accept the opening of insolvency proceedings in Member State other than the one with the registered office (due to the head office doctrine)

establishment (still) exists when a local creditor wants to lodge such a claim. In addition it is worth noting that this also protects creditors from lodging their claims in a foreign country in cases where in the establishment state no forum for such claims would exist outside an insolvency situation.¹⁰⁸² It is indeed true that lodging claims in foreign insolvencies is always a burden and sometimes overly complicated because creditors lack information on when and how they have to lodge such claims. Such problems, however, should be resolved by improving Art 39 et seq EIR, i.e. by providing that claims can be lodged without legal representation by using a simple claim form, by providing for efficient information on the necessity and deadlines for lodging such claims and, maybe, also a uniform minimum deadline based on the compliance with such information obligations in order to ensure that every creditor can properly react.¹⁰⁸³

It is important to understand that insolvency practitioners might have a natural economic preference for parallel proceedings, as they create business opportunities for more than one liquidator. It is understandable that practitioners view bankrupt establishments in their vicinity as potential business opportunities, but this should not be a guideline for European law-making.

Finally, the defence of the existence of rules allowing parallel proceedings sometimes simply seems to be based on diffuse fears and nationalism. As is generally known, politicians have a natural tendency to promise the creation and protection of jobs in their territory. It is, of course, not politically popular to face situations where “foreign law firms shut down businesses and destroy jobs”. This, however, is only the consequence of international insolvency law accepting the realities of transnational business on the internal market.

in many cases they applied for secondary proceedings at the place where they had expected main proceedings to be opened (see National Report Austria Q 29; National Report Czech Republic Q 29; National Report Spain Q 29; all with further references). Of course also language problems or costs of lodging a claim in foreign insolvency proceedings might be a motivation for creditors to apply for secondary proceedings (cf. National Report Hungary Q 29).

¹⁰⁸² *Oberhammer*, KTS 2009, 27 (61).

¹⁰⁸³ See chapter on information for creditors and lodging of claims.

7.3.1.4 Secondary Proceedings in Practice

As already pointed out above, the suggestion made in recital 19 of the EIR that secondary proceedings are a tool for the main liquidator, is in reality only true in rare cases. As a matter of fact, even published case law shows that secondary proceedings occur in quite different situations; the following examples might suffice to get an impression about the broad variety of factual situations involved: Some cases actually deal with a “classical” establishment, so to speak, where the debtor performed a part of its business with assets and humans in another Member State without having founded a subsidiary company there.¹⁰⁸⁴ Sometimes, the application of the “head office theory”¹⁰⁸⁵ resulted in the opening of main proceedings against the subsidiary company at the COMI of the parent company and a subsequent opening of secondary proceedings against the subsidiary company at the registered office of the subsidiary company.¹⁰⁸⁶ In a number of cases creditors applied for secondary proceedings in the Member State of the former COMI after the COMI was shifted to another Member State.¹⁰⁸⁷ In some cases, the courts where the actual COMI was situated opened secondary proceedings after a court of another Member State had opened main proceedings over a mere letterbox company.¹⁰⁸⁸ In some cases, applications for the opening of main proceedings resulted in the opening of secondary proceedings after main proceedings were opened in another Member State.¹⁰⁸⁹ In a German case the court which had originally opened main proceedings conflicting with main proceedings against the same debtor company opened earlier in England

¹⁰⁸⁴ See, e.g., *First instance court - Tribunal d'arrondissement de et à Luxembourg, quinzième chambre* 9.2.2009, INSOL EIR-case register Nr. 90 (Dumont); *Appellate court - Cour d'Appel de Bruxelles* 17.11.2009, www.juridat.be = INSOL EIR-case register Nr. 125 (Wautelet).

¹⁰⁸⁵ See chapter on groups of companies.

¹⁰⁸⁶ See, e.g., *LG Innsbruck* 11.5.2004, ZIK 2004/137, 107 = KTS 2005, 223 (*Schopper*) and many others.

¹⁰⁸⁷ See, e.g., *Local court (AG) Wuppertal*, 14.3.2011, 145 IE 5/10, BeckRS 2012, 07471; *German Supreme Court (BGH)* 8.3.2012, ZInsO 2012, 699 = EWIR 2012, 315 (*Paulus*) = FD-InsR 2012, 332104 (*Tschentscher*); see also for 1st instance *Local Court Wuppertal*, 14.3.2011; *High Court of Justice, London* 9.5.2012, *Trillium (Nelson) Properties v Office Metro Limited* [2012] EWHC 1191 (Ch).

¹⁰⁸⁸ See for an obvious example *Appellate court - Tallinna Ringkonnakohus* 14.6.2006, OÜ SigMar Invest -v- Rapla Invest AB, eir-database.com No. 145, see Ounpuu, InCA No. 11 (IV / 2006), 8 = INSOL EIR-case register Nr. 62 (Kasak) [Estonia].

¹⁰⁸⁹ See, e.g., *Prague Regional Court* 26.4.2005, 78 K 6/05-127, ZIP 2005, 1431 (*Herchen*, 1401 ff) = eir-database Nr. 101.

subsequently converted these proceedings into secondary proceedings.¹⁰⁹⁰ In the famous BenQ case, a German court came to the conclusion that even a holding company can have an establishment in another Member State¹⁰⁹¹, which resulted in a situation where main insolvency proceedings against the holding company were opened in the Netherlands while secondary proceedings were opened in Germany (where also the main proceedings against the operative subsidiary company were pending). All in all, it is easy to see that in practice, applications for the opening of secondary proceedings are rather a strategic tool in disputes between different stakeholders than the measure taken by the main liquidator “when the efficient administration of the estate so requires” addressed in recital 19.

If secondary proceedings really were a tool designed to help the main liquidator in his or her liquidation or restructuring efforts, it would be the obvious choice to limit the right to apply for such proceedings to the main liquidator. In the discussion at the Heidelberg conference where the national reporters of this project and a number of other experts came together to reflect on the present status quo and reform options, one practitioner stated that limiting the right to apply for secondary proceedings to the main liquidator would, in his opinion, have the consequence that practically no such proceedings would take place any longer. There is no need to explain why this observation is telling with respect to the potential of secondary proceedings to help coordinate liquidation and restructuring efforts on the internal market today.

Although court decisions can give only a vague impression of what happens in practice in this respect, the case-law outlined above gives clear examples of the struggle of main liquidators in order to get along or even to get rid of the burdensome secondary proceedings in the overall interest of the

¹⁰⁹⁰ See *AG Düsseldorf* 12.3.2004, ZIP 2004, 623 ff. = NZI 2004, 269 (*Liersch* 271) = EWIR 2004, 495 (*Herweg/Tschauner*) = IPRax 2004, 431 (*Weller* 412); see also *Pannen*, European Insolvency Regulation, Appendix A to Art 3 para. 15.

¹⁰⁹¹ See *Local Court (AG) München* 5.2.2007, ZIP 2007, 495 = EWIR 2007, 277 (*K. Müller*) = NZI 2007, 358 (*Mankowski*). See also *Amsterdam Arrondissement Court* 31.1.2007, ZIP 2007, 492 = EWIR 2007, 143 (*Paulus*), = eir-database.com No. 174 (date 1.2.2007), see also *Smid*, DZWIR 2007, 485, 514.

administration and liquidation of the estate. The national reports give additional evidence of the problems caused by secondary proceedings.¹⁰⁹²

It is easy to understand *why, in general, secondary proceedings should be avoided*: It is conceivable that such proceedings actually have positive effects where the secondary liquidator is cooperative and where the lex fori concursus of secondary proceedings is favourable for the overall interest of the stakeholders involved. However, *such positive effects need to outweigh the negative effects which can be caused by the opening of such parallel proceedings*: Two or more liquidators will practically always result in higher cost, not only because cooperation is time-consuming, but simply because, necessarily, a certain amount of parallel work (such as getting acquainted with the business and the reasons for insolvency and many other things) needs to be done. Even where the secondary liquidator is very cooperative,

¹⁰⁹² See, e.g., National Report Czech Republic, Q 29, referring to the case GEHE Happich CZ, s.r.o. (case no. KSPL 20INS 5532/2009) in which the communication between the German main liquidator and the Czech secondary liquidator did not work effectively. See also National Report Estonia, Q 29, referring to a case (2-05-530, Rapla Invest AB) in which the existence of the establishment was disputed; nevertheless secondary proceedings were opened, although the main proceedings were reorganisation proceedings in Finland. Finally the *Estonian Supreme Court* had to postpone the appointment of the Estonian interim liquidator and wait for the reorganisation in Finland to be solved. The French National Report (Q 29) also mentioned one case (CA Paris 24 March 2011, Case No 10/21329) in which a creditor applied for secondary proceedings in a way that could be qualified as abusive. Also the Greek National Report (Q 29) mentioned a case (*First instance court Athens*, No. 693/2003) in which secondary proceedings were opened based on a problematic interpretation of the term “establishment” under Art. 3 (2) EIR in order to protect local creditors; the Greek National Reporter explains how difficult the coordination of several secondary proceedings is. In another case (MG Rover Netherlands) reported by the National Reporter Netherlands (Q 29), several controversies occurred between the main and the secondary liquidator e.g. regarding the access of the secondary liquidator to the company’s books and records and regarding the question whether the fees and costs of the main proceedings should be covered from assets of the Dutch secondary proceedings. As a consequence, the Dutch Reporter suggests to keep secondary proceedings to a minimum as they just add complexity and costs to cross-border insolvency cases. As the Polish National Report points out, in both of the two most famous Polish cases regarding secondary insolvency proceedings (Maflow and Belvedere/Christianapol, Polish National Report Q 29, Q 34) the secondary proceedings had adverse effects on restructuring efforts in the main proceedings and the tendency to protect only the local interests of the creditors. The Spanish National Report (Q 29) mentioned a case in Bilbao (*Commercial Court Nr. 1 of Bilbao*, 13.12.2011) where creditors applied for secondary proceedings in Spain regarding a company for which main proceedings were opened in Italy. The court dismissed the petition as there was no establishment in Spain, no business activity carried out with human means and goods and the branch was registered in Spain only for tax reasons. See, however, National Report Poland (Q 29) where secondary proceedings are nevertheless described as a useful tool for main liquidators to avoid dealing with the complexities of winding-up the insolvency estate in an unknown jurisdiction. The Romanian National Report (Q 29) mentioned the advantage of secondary proceedings for creditors who can lodge their claims easier than under a foreign lex fori concursus. The Spanish National Report (Q 29) reported a case in which the secondary proceedings were used as a “useful tool” to relocate the insolvency to Spain after French courts had considered the COMI of the debtor to be in France.

the mere fact that such cooperation is required makes things more complicated. The same is true for the parallel application of two insolvency laws to one business.

However, in cases where the secondary proceedings were not opened upon an application of the main liquidator, the secondary liquidator *will always face a conflict between the interests of the parties who have applied for the secondary proceedings (in particular local creditors) and the overall interest represented by the main liquidator*. A typical reported example is the Austrian case where the court denied a further stay of the liquidation of the establishment as local creditors were pressing the court and the secondary liquidator for a sale of the local assets in a situation where a potential purchaser had offered to buy these local assets in their entirety for a limited period of time.¹⁰⁹³ In such cases, there is always an obvious danger that the interests of local creditors (who are normally of significant influence vis-à-vis the local liquidator and court) will prevail over the overall interest of all creditors involved with a result that is or might appear more favourable for such local creditors, but is contrary to an efficient administration of the estate as a whole.

So even if the secondary liquidator acts bona fide and complies with the cooperation obligations under today's EIR, there are plenty of reasons that such secondary proceedings might be detrimental to the overall purpose of efficiently pursuing liquidation or restructuring efforts as a whole. This is, of course, even more true *where the secondary liquidator decides not to act in a cooperative fashion*, and there are a number of reasons to do so, such as pressure of local creditors, the secondary liquidator's interest to maximise his or her own income or simply a parochial approach to transnational insolvency. (It is, however, not always the liquidator or the court of the secondary proceedings that is reluctant to cooperate; there is also evidence that in some cases the liquidator of the main proceedings did not comply with his or her

¹⁰⁹³ *District Court (LG) Leoben*, 1.12.2005, 17 S 56/05m, Collins & Aikman, ZIK 2006/35, 33; see on this case National Report Austria, Q 35.

communication obligations vis-à-vis the liquidator of the secondary proceedings.¹⁰⁹⁴)

While there is clear evidence that secondary proceedings have not turned out to be the tool of assistance for the main liquidator envisaged by the legislator of the original EIR, one has to accept that, still, a solution altogether doing away with parallel proceedings (as is the case under the directives for banks and insurance companies) is not a realistic political option even today. It is not the purpose of this report to speculate about the reasons for this approach, but it might be fair to note that it is not an actual interest in making transnational insolvency more efficient which is the driving force behind that approach.

7.3.1.5 Two Options: Reduction of Secondary Proceedings and Improvement of Coordination

Therefore, a legislator striving for better coordination has to consider alternative solutions in order to reduce the negative effects of parallel proceedings. There are two groups of such measures: On the one hand, one may try to limit the number of cases where such parallel proceedings are opened; on the other hand, the coordination and cooperation between the main and secondary proceedings could be further improved.

7.3.2 Opening of Secondary Proceedings

7.3.2.1 The Right to Apply for Secondary Proceedings

Under Art 29 EIR the opening of secondary proceedings may be requested by the liquidator of the main proceedings (Art 29 (a) EIR) and by any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested. As already outlined above, it is not convincing that, accordingly, practically every creditor irrespective of his or her specific relation with the establishment state or the establishment itself may, therefore, request the opening of secondary

¹⁰⁹⁴ See, e.g., *Komárom-Esztergom Megyei Bíróság (First Instance Court Esztergom, Hungary)*, 5.6.2005, INSOL EIR-case register Nr. 35 (Csőke).

proceedings in case he or she is entitled to do so under the respective national law while the right to apply for independent territorial proceedings is restricted to specific situations or creditors in Art 3(4) EIR. *It would be a simple measure to make the EIR both more coherent and more effective to apply the limitation set forth in Art 3 (4) (b) EIR also to the request for the opening of secondary proceedings*, as the interest to have such territorial proceedings opened does of course not require more (but actually less) protection in cases where main proceedings are already pending.¹⁰⁹⁵

One might also think of *measures to further limit the right to apply for such secondary proceedings to groups of creditors having a legitimate interest to do so*. As already pointed out above, it might be a solution which is both radical und completely reasonable *to restrict this right to the main liquidator*. However, there seems to be no political consensus for such a solution. Nevertheless, one should discuss whether the right to apply for secondary proceedings should be *limited to specific groups of creditors which might require more protection than others*, such as, in particular, consumers, employees or maintenance creditors, i.e. creditors who also enjoy some degree of jurisdictional protection under European law in general. As this would not include public bodies such as tax or social insurance authorities, it is easy to see why such a proposal might, however, face political opposition.

7.3.2.2 The Opening Procedure

Today's law does not provide for specific *rules on the procedure for the opening of secondary proceedings*. As is generally known, time is normally of the essence when it comes to the opening of insolvency proceedings. This is not true to the same extent with respect to secondary proceedings, as this decision is taken in a situation where main proceedings have already been opened and the effects of the main proceedings in the establishment state already result in creditor protection there. However, the proceedings observed for the opening of secondary proceedings today are solely governed by the national laws of the Member State, i.e. rules normally designed for the opening of the "first" insolvency proceedings.

¹⁰⁹⁵ See above in this chapter.

Although the main liquidator is entitled to request the opening of secondary proceedings (Art 29 (a) EIR) and is entitled to participate in the secondary proceedings on the same basis as a creditor, in particular by attending creditors' meetings (Art 32(3) EIR), *it is not guaranteed by European law that the main liquidator needs to be heard before the opening decision with respect to the secondary proceedings is issued*. Even if the preconditions for the opening of secondary proceedings remained completely unchanged, the enactment of such an obligation of the court seised with the application for the opening of secondary proceedings to hear the main liquidator before deciding upon such an application would be a significant improvement. Under today's law, a situation may occur where the court seised with the application for the opening of secondary proceedings only examines the jurisdictional requirements, i.e. the existence of an establishment according to Art 2 (h) EIR, on the basis of the allegations made by the creditor who has applied for the secondary proceedings and/or the debtor. It is easy to understand that, therefore, such a court does not always have full and correct information on the actual status of the alleged establishment, as relevant information is only provided by parties that might have a specific interest in the opening of such secondary proceedings.

It seems to be generally accepted that the revised EIR should provide for a duty of the court to examine the jurisdictional requirements for the opening of any insolvency proceedings – including secondary proceedings – ex officio.¹⁰⁹⁶ Nevertheless, *the EIR should include a rule expressly providing for the participation of the main liquidator in the proceedings for the opening of secondary proceedings*. This would also correspond with the fact that – after the opening of the main proceedings – the main liquidator is already acting on behalf of the debtor and, therefore, should be entitled to exercise all powers of the debtor in such opening proceedings. One should, however, not leave this aspect to the law or the courts of the Member States.

¹⁰⁹⁶ See above in this chapter; see, more general, the discussion in the chapter on jurisdiction above.

7.3.2.3 Requirements for the Opening of Secondary Proceedings

In this context, one might also think of *adding additional requirements for the opening of secondary proceedings* in order to avoid unnecessary parallel proceedings. However, it is hard to imagine a reasonable and politically acceptable solution in this respect.

I have already dealt with the aspect of limiting the parties entitled to request the opening of secondary proceedings above.¹⁰⁹⁷

It is hard to imagine how the *jurisdictional requirements* for the opening of secondary proceedings could be amended in this respect. The concept of “establishment” is relatively clear today.¹⁰⁹⁸ Therefore, there is no need to clarify the term „establishment“. Moreover, it is hard to think of additional requirements in this respect. As already addressed above, there can always be a conflict with the interest to have secondary proceedings opened and the overall interest of the stakeholders involved that the opening of such secondary proceedings does not impede the efficiency of liquidation and restructuring measures. One might be of the opinion that, therefore, the court opening such secondary proceedings could be given *discretionary powers* taking into account such conflicting interests as a basis of the opening decision.¹⁰⁹⁹ After all, Art 33 EIR allows a stay of the liquidation in the secondary proceedings in situations where such stay is not manifestly of no interest to the creditors of the main proceedings (Art 33(1) EIR); note that the EIR is somewhat inconsistent in this respect, as it allows a termination of such stay of the proceedings already in case it no longer appears justified by the interests of creditors in the main proceedings, which is a different standard than “not manifestly of no interest to the creditors of the main proceedings”.¹¹⁰⁰ The wording of Art 33(2) EIR allows the court of the secondary proceedings – which might have some inclination to respond to the interests of the local creditors anyway – to strongly emphasise local interests. In a case before Austrian courts, the stay of the liquidation was simply lifted in

¹⁰⁹⁷ See above in this chapter.

¹⁰⁹⁸ See in this chapter.

¹⁰⁹⁹ See e.g. National Report Poland, Q 30, “Recommendations“. See below in footnote 1098 in this chapter.

¹¹⁰⁰ See below in this chapter.

the interest of the local creditors without seriously taking into account the interests of the creditors in the main proceedings.¹¹⁰¹

One could think of a similar wording limiting the admissibility of secondary proceedings in case the interests of the creditors to avoid parallel insolvency proceedings in general outweigh the interests of the applicants for the secondary proceedings to have such proceedings opened, or if the opening of secondary proceedings would obstruct the effective administration of the debtor's estate etc.¹¹⁰² It is, however, easy to see that such a solution would give the court seised with the request for the opening of secondary proceedings rather broad powers, which could be a source of inefficient disputes. Moreover, it is hard to imagine how a plausible weighing of interests could take place in this context. If one refers to the interests of the creditors in the main proceedings or the creditors in the secondary proceedings only, the outcome of such a discretionary decision will be clear in most cases; if one refers to rather vague notions (such as, e.g., that the secondary proceedings are detrimental or that the actual interests of the applicants for the opening of secondary proceedings outweigh the interests of the creditors as a whole), the outcome of such decision-making is rather open-ended. Most importantly, it is very hard to see how the weighing of, e.g., the group interests of local creditors versus the group interests of the creditors as a whole could actually work in practice.

¹¹⁰¹ See *OLG Graz 20.10.2005*, ZIP 2006, 1544.

¹¹⁰² See in this context National Report Poland, Q 30, referring to an interesting decision of the Krakow Bankruptcy Court, 10.7.2009, (upheld on appeal by *Krakow Regional Court*, 18.11.2009) which refused to open secondary insolvency proceedings against *Destylarnia Polmos w Krakowie SA*, a local Belvedere subsidiary on the basis of a purpose-oriented interpretation of the right to request secondary proceedings based on recital 19. See also (Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]), p. 77) which makes a suggestion to amend Art 27 EIR in a way that insolvency proceedings shall be opened only if "the opening of secondary proceedings is justified by the interests of one or more creditors or an adequate administration of the estate". Such a provision would give the courts broad discretionary powers. Even the explanations for this proposal do not explicitly describe which should be the relevant aspects the court should take into account. Discussions with insolvency practitioners showed that the opinions were divided in this respect, see National Reports, Question 36. See also *High Court of Justice London*, Chancery Division, *Companies Court*, 9.6.2006, *Collins&Aikman III*, [2006] EWHC 1343 (Ch) = *EWiR* 2006, 623 (*Mankowski*) = *InCA* 11 (IV/2006), 27 pp (*Watson*), see on this case *Meyer-Löwy/Plank*, *NZI* 2006, 622 pp.

7.3.2.4 Undertakings in Order to Avoid Secondary Proceedings

English practitioners and English courts have, however, developed a rather promising approach to limit secondary proceedings on the basis of an agreement between the creditors and the main liquidator.¹¹⁰³ In these cases, the main liquidator made a binding offer to the creditors who might apply for secondary proceedings promising that he or she would respect all preferential rights such creditors would enjoy in secondary proceedings in order to prevent them from actually applying for such secondary proceedings. *This approach could serve as a model for an improvement of the law of the EIR:* Under today's law such measures face two main practical problems: On the one hand, the creditors are not obliged to enter into such an agreement and, consequently, cannot be prohibited from requesting the opening of secondary proceedings even if the main liquidator makes such an offer. On the other hand, it is not guaranteed that main liquidators will actually be entitled to enter into such an undertaking under their respective national laws; on the contrary, I assume that most continental European legal systems might not give such powers to the respective main liquidator. Therefore, *it might be a very promising approach to create uniform law entitling the main liquidator to enter into such an undertaking.* Of course, this means that the distribution of the proceeds of the main proceedings deviates from the applicable lex fori concursus of these main proceedings; however, from an economic perspective this only leads to the result that would have been caused by the opening of secondary proceedings anyway. In addition, *the opening of secondary proceedings should be prohibited as soon as the main liquidator enters into such an undertaking guaranteeing that the rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings.* Moreover, such offers should also be possible *at a later stage of the secondary proceedings* as the main liquidator might need some time to evaluate the claims which are relevant in this

¹¹⁰³ *High Court of Justice Birmingham*, 30.3.2006, No. 2377/2006, MG Rover Belux SA/NV, NZI 2006, 416 (*Mankowski*); see also *High Court of Justice London*, Chancery Division, Companies Court, 9.6.2006, Collins&Aikman III, [2006] EWHC 1343 (Ch) = EWIR 2006, 623 (*Mankowski*); *High Court of Justice (London)*, *Re Nortel Networks SA and Others* 11.2.2009, [2009] EWHC 206 (Ch), EWIR 2009, 177 (*Paulus*) = NZI 2009, 451 (*Mankowski*) = [2009] BPIR 316; see *Mock*, ZInsO 2009, 895. See also National Report United Kingdom, Q 29.

context. Therefore, an additional rule could provide *that secondary proceedings shall be terminated if the main liquidator makes such an offer*.

I believe that the existence of such an undertaking – in connection with the further improvement of the rules on the information of creditors and the lodging of claims in a transnational case – would be sufficient in order to protect the interests of local creditors who would otherwise be entitled to request the opening of secondary proceedings. Above all, it would not be necessary to combine this approach with an additional precondition for the inadmissibility of the secondary proceedings, such as, any kind of weighing of interests – if and when all relevant local creditors are offered the treatment they are entitled to in secondary proceedings in the main proceedings anyway and provisions such as the one outlined above¹¹⁰⁴ guarantee swift and easy lodging of claims based on easily accessible creditor information, it is hard to see why additional requirements should apply here.

7.3.3 Coordination of Parallel Proceedings

7.3.3.1 General

The actual coordination between main and secondary proceedings can be improved on the basis of two different types of measures provided for under today's EIR: On the one hand, Art 31 EIR provides for duties to cooperate and communicate. Such provisions are useful guidelines for the handling of parallel proceedings and the behaviour of the courts and liquidators involved. However, to some extent this is "soft law", as the legal consequences for breaches of these duties are rather vague. It is conceivable that a violation of such duties could result in claims for damages or in applications to replace a liquidator. However, such remedies are of limited practical relevance. In addition, express provisions on cooperation and communication duties confer the powers to do so in a clear fashion to courts and liquidators; this is of practical relevance in states where bureaucratic approaches might be an impediment to pragmatic solutions.

¹¹⁰⁴ See above in this chapter and in the chapter on information for creditors and lodging of claims.

Experience with today's cooperation and communication duties shows that although, in general, the EIR has turned out to be successful also in this respect, there are still practical problems which might call for an improvement of the coordination provisions of the EIR.¹¹⁰⁵

¹¹⁰⁵ Even if the EIR does not contain any explicit rules with regard to courts, communication worked pretty well in several cases even among courts, see e.g. *High Court of Justice London*, 11.2.2009, Nortel Group, [2009] EWHC 206 (Ch) = [2009] BPIR, 316 = EWIR 2009, 177 (Paulus) = NZI 2009, 451 (Mankowski) = ZInsO 2009, 914 (dated: 5.2.2009; Mock ZInsO 2009, 895). In *MG Rover (High Court of Justice Birmingham, Chancery Division, 11.5.2005, [2005] EWHC 874 (Ch))* controversies occurred between main and secondary liquidators on the question of whether cost of one proceeding could be claimed in the other. The National Report Poland (Q 34) mentioned the *Maflow Case* (with main proceedings in Italy, no. 260/09 and no. 261/09 of 11.5.2009 by the Court of Milan; and secondary proceedings in Poland, District Court Katowice – Wschód, 30.6.2009) in which the managers of the company and subsequently the main liquidators in Italy tried to remove assets from Poland in order to block Polish secondary proceedings; the proceedings were conducted in a very antagonistic fashion and Polish practitioners had serious doubts regarding the verification of claims in the main proceedings in Italy. Even if there is a duty of the main liquidator to provide information to the secondary liquidator it sometimes seemed to be easier to get the relevant information from the debtor himself or herself, see another Polish Case, mentioned by National Reporter Poland, Q 34. Practical problems often are language problems or differences in (legal) culture (see National Reports Austria, Czech Republic, Estonia (see also *Viimsalu*, The Meaning and Functioning of Secondary Insolvency Proceedings [2011]); Lithuania, all relating to Q 34. Cooperation and coordination in international insolvency cases is a field governed not only by law, but also by Guidelines and good practice such as softlaw, see e.g. the “European Communication and Cooperation Guidelines For Cross-border Insolvency” elaborated by Insol Europe’s Academic Wing (2007). Generally speaking the answers of the interviewed insolvency practitioners to questions on practical experiences and “how to do” the international cooperation were not very extensive. Several authors (*Geroldinger*, *Verfahrenskoordination im Europäischen Insolvenzrecht* [2010] 295 pp.; *Pogacar*, ZIK 2008/314; *Sarra*, 24 Banking & Finance Law Review [September 2008], 63 pp.; *Cherubini*, Italian-French Cross-border protocol, Eurofenix Summer 2011, 32 pp.; *Fletcher/Wessels*, *Global Principles for Cooperation in International Insolvency Cases*, to be published in IILR 2012; see also National Reports Austria, Czech Republic, Germany, Hungary, Ireland, and Poland on Question 33 and Malta and Spain on Q 34) mention the use of protocols to coordinate main and secondary proceedings in Europe. In one case, referred to in the National Report Austria (Q 33) the main liquidator applied to the insolvency court of the secondary proceedings to order the secondary administrator to sign a protocol but the court dismissed the application because the protocol was held to be not necessary (see the decision on appeal proceedings in this case *Higher Regional Court Graz* 20.10.2005, 3 R 149/05i – *Collins & Aikman Products GesmbH*, ZIP 2006, 1544). The National Report Finland (Q 33) mentioned the existence of a so called Bankruptcy Ombudsman in Finland, whose task is to supervise the proper administration of the estate (which should include cooperation and restructuring proceedings as well). On the other hand the involvement of several insolvency practitioners in the state where secondary proceedings are opened might consume a lot time for agreeing on coordination – time which is wasted for restructuring the enterprise, see e.g. National Report Belgium, Q 34 referring to the Case *Lernout & Hauspie Speech Products* (there called: *Lernhout & Haspie*): Under Belgian law at least two insolvency practitioners have to be appointed in secondary proceedings, one juge-commissaire and one or more curators. The National Reporter Czech Republic (Q 34) referred to a judge who felt a lack of power to use the same disciplinary measures vis-à-vis foreign liquidators as vis-à-vis domestic ones; see also National Report Germany (Q 34), which mentioned the wish to consider a strengthening of the sanction mechanisms in case of non-compliance with the duty to cooperate. National Report Malta (Q 34) took the view that main liquidators may intervene in secondary proceedings in cases of non-cooperation according to their dominant role explicitly mentioned in recital 20 EIR.

7.3.3.2 Duties under Art 31 EIR

It is obvious that the *duties under Art 31 EIR* are rather vague and might, therefore, be made *more specific*. In particular, they do not clearly refer to restructuring measures but only to “measures aimed at terminating the proceedings”. However, the cooperation between the liquidators is of specific importance in restructuring cases. Therefore, it might be useful to include an express reference to restructuring measures in this context. Moreover, it is not completely clear today that measures for the realisation of the debtor’s estate need to be coordinated between the liquidators. This, however, is a very important aspect in parallel proceedings – on the one hand, the main liquidator might be aware of more attractive ways to sell the debtor’s assets, such as, the sale of the business as a whole instead of the mere sale of the assets (e.g. a stock of goods) located in the establishment state, while the secondary liquidator might have an inclination to focus on an isolated sale of the assets in his or her territory. On the other hand, the assets located in the establishment state might be necessary for ensuring the continuation of the debtor’s business, which can be a precondition for corporate recovery or the sale of the business as a whole. Therefore, it might be useful to include an express reference to such realisation measures in Art 31 going beyond today’s opportunity of the main liquidator to make proposals in this respect.

7.3.3.3 Cooperation between Courts or Liquidators and Courts

Some authors have criticised that the EIR only provides for cooperation and communication duties between the liquidators and not *between courts or liquidators and courts*. While liquidators normally can be expected to take a

Many National Reporters suggested to include additional instruments empowering the main liquidator to influence the course of secondary proceedings or to restrict the possibilities to open secondary proceedings, see e.g. National Report Austria Q 36 (extension of Art. 33 EIR to allow to suspend secondary proceedings as a whole); Belgium Q 36, France Q 36; Estonia Q 36 and Greece Q 36 (suggestion to limit secondary proceedings to situations where they are really needed for the protection of local creditors and giving the main liquidator the right to challenge the opening of secondary proceedings); Hungary Q 36 (secondary proceedings only for the protection of local creditors); Latvia Q 36 (main liquidator shall have the power to object to activities in secondary proceedings or apply for replacement of the secondary liquidator), Malta Q 36 and Poland Q 36 suggest to give the main liquidator at least the right to be heard before opening secondary proceedings; Slovakia Q 36 (suggestion to empower the main liquidator to give certain instructions to the liquidator in secondary proceedings); Slovenia Q 36 (suggestion to introduce the concept of co-liquidators); Spain Q 34; United Kingdom Q 36 (strengthen the duty of co-operation and co-ordination). The Spanish National Report (Q 34) mentioned similar suggestions from Spanish practitioners.

“pragmatic” approach with respect to the administration of the debtor’s estate, courts might be reluctant to communicate either with the foreign courts or the foreign liquidators because they are insecure whether it is within their powers to get directly involved with foreign proceedings or officials. There are, however, also reported cases where courts did actually communicate with each other, which led to an obvious improvement of the coordination of the respective proceedings.¹¹⁰⁶ It is even reported that in the BenQ case¹¹⁰⁷ the German judge (who opened secondary proceedings at a holding company’s establishment) discussed the coordination of the proceedings with a Dutch judge (who had opened main proceedings at the registered office of the holding company) over the telephone. Therefore, it has been suggested to include such duties in the EIR.¹¹⁰⁸ Note that even the UNCITRAL Model Law provides for such communication duties of the courts (Art 25 through 27 UNCITRAL Model Law). There is also practical evidence that such obligations should expressly be provided for: For example, in a case decided by the Oberlandesgericht Wien in 2006¹¹⁰⁹ the court expressly voiced the opinion

¹¹⁰⁶ English courts however find themselves entitled to directly communicate to courts eventually competent to open proceedings, see *High Court of Justice London*, 11.2.2009, Nortel Group, [2009] EWHC 206 (Ch) = [2009] BPIR, 316 = EWIR 2009, 177 (*Paulus*) = NZI 2009, 451 (*Mankowski*) = ZInsO 2009, 914 (dated: 5.2.2009; Mock ZInsO 2009, 895). See also *Higher Regional Court (OLG) Wien*, 9.11.2004, 28 R 225/04w, NZI 2005, 56 (*Paulus*) where the court decided that the duty to cooperate is mandatory for courts as well. In the case *Local Court (AG) Köln*, 19.2.2008 – 73 IE 1/08, ZIP 2008, 423 (*Rotstegge* 955 et seqq.) = NZI 2008, 257 = ZInsO 2008, 388 (*Frind* 363; *Knof/Mock* 253) = EWIR 2008, 531 (*Paulus*) – „PIN Group II“ (PIN Group AG S.A. [Luxembourg]), a German court asked the Luxembourg court whether main insolvency proceedings were already opened in Luxembourg by fax and received a fax answer the following day specifically describing the status of the proceedings in Luxembourg.

¹¹⁰⁷ See *Local Court (AG) München* 5.2.2007, ZIP 2007, 495 = EWIR 2007, 277 (K. Müller) = NZI 2007, 358 (*Mankowski*); *Amsterdam Arrondissement Court* 31.1.2007, ZIP 2007, 492 = EWIR 2007, 143 (*Paulus*), = eir-database.com No. 174 (date 1.2.2007), see also *Smid*, DZWIR 2007, 485, 514.

¹¹⁰⁸ *Wessels*, Twenty Suggestions for a Makeover of the EU Insolvency Regulation, International Caselaw Alert 12 (2006), 68 (para. 17); European Parliament, REPORT with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Committee on Legal Affairs (so called “Lehne Report”), para. 2.4.; *Vallender*, cited at Riewe, report of a meeting, INDAT_Report 7/2011, p. 49; *Vallens*, Main and Secondary Proceedings: the challenge of parallel proceedings, in EIR-Reform, “The Future of the European Insolvency Regulation”, 38; *Paulus*, Der Binnenmarkt und das Insolvenzrecht: Bestandsaufnahme und Reformüberlegungen, in: Kengyel/Rechberger, Europäisches Zivilverfahrensrecht, Bestandsaufnahme und Zukunftsperspektiven nach der EU-Erweiterung (Wien/Graz 2007), 105 (113); in the Insol-Draft (Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]) such an entitlement is only to be found in Art. 81 of this Draft for communication of the court with courts in non-Member States but not so in Art. 31 EIR.

¹¹⁰⁹ See *Higher Regional Court (OLG) Wien* 14.7.2006, 28 R 15/06s, Stojevic, see *Mair*, ZIK 2008, 83; *Moss*, Viennese Waltz for Two Main Proceedings: The Stojevic Saga, ERA Trier,

that in case the main liquidator has not applied for a stay under Art 33(1) EIR, there is no need for the court to inform the main liquidator about a pending application for ending the secondary proceedings based on a composition arrangement! In the Nortel case¹¹¹⁰, the main liquidator applied to the court of the main proceedings to request legal assistance from the courts of various Member States to inform him or her of any request application for the opening of secondary insolvency proceedings in those jurisdictions in order to give the main administrator the opportunity to be heard on any such application. In this case, the main liquidator availed himself or herself of the cooperation between the courts of the Member States (although this is not provided for under the EIR); it is obvious that it might have been much easier for the main liquidator to directly address such courts in the Member States. I assume that the main liquidator was of the opinion that the chances that his or her request for legal assistance would be honoured would have been much smaller if he or she had directly addressed the foreign courts. In a 2009 decision a German court pointed out that it is problematic to obtain information on protective measures ordered by foreign courts under the EIR.¹¹¹¹ I therefore *suggest including such duties into the EIR as well.*

Such duties should not be limited to mere communication of information, but should also *include measures such as the coordination of the proceedings between the courts and communication and coordination with respect to court decisions approving measures such as the administration and realisation of assets or “protocols”, i.e. agreements between or solicited by the liquidators on measures such as the realisation of assets, the distribution of the estate between the parallel proceedings and all other liquidation and restructuring measures.*

In this context, the wording of the revised EIR should make it as clear as possible that a *maximum extent of cooperation and coordination is required from the courts*: On the one hand, this might be necessary to change

Europäisches Insolvenzrecht (18.-20.9.2006), http://www.era.int/web/de/resources/5_2341_3063_file_en.4452.pdf.

¹¹¹⁰ See *High Court of Justice (London), Re Nortel Networks SA and Others* 11.2.2009, [2009] EWHC 206 (Ch), ZIP 2009, 578 = EWIR 2009, 177 (*Paulus*) = NZI 2009, 451 (*Mankowski*) = [2009] BPIR 316; see *Mock*, ZInsO 2009, 895.

¹¹¹¹ See *AG Hamburg* 11.2.2009, ZInsO 2009, 539 = EWIR 2009, 441 (*Mankowski*) = jurisPR-InsR 25/2009 (*Fritze*).

bureaucratic traditions in some of the Member States; on the other hand, a maximum extent of cooperation and coordination can never be detrimental to anybody involved.

7.3.3.4 Poor Excuses for Non-Cooperation

In the course of the discussions on the reform of the EIR, concerns have been raised that the costs of such cooperation and coordination measures might be an issue and that such duties might touch upon aspects of judicial independence. In my opinion, both concerns are ill-founded: Intense cooperation and coordination of the proceedings between all liquidators and courts involved promise much more efficient liquidation and restructuring in transnational insolvency situations while the costs of exchanging and responding to relevant information will normally be very limited. And, of course, a duty of a court to gather and share information and to base its procedural decisions on such information can never be a violation of such court's independence. On the one hand, the court should respond to the needs of a transnational insolvency situation involving parallel proceedings; on the other hand, the court can, of course, do so independently on the basis of all available information and the relevant rules of the EIR and the *lex fori concursus* without taking "orders" from foreign courts or liquidators. *Judicial independence cannot be an excuse for an idiosyncratic approach to the handling of such cases.*

7.3.3.5 Art 33 EIR: The Mechanism for Resolving Disputes between the Main and the Secondary Liquidator

As already pointed out above, all these rules on communication, cooperation and coordination between courts and liquidators are to some extent only "soft law" provisions as they offer no *solution for cases of disputes*, i.e. cases where the main and the secondary liquidator and/or the courts involved disagree on certain issues. Under today's *Art 33 (1) EIR*, the main liquidator can apply to the court of the secondary proceedings to order a stay of the process of liquidation in whole or in part provided that in such event the court may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary

proceedings and of individual classes of creditors. Such a request from the main liquidator may be rejected only “if it is manifestly of no interest to the creditors in the main proceedings”. Such stay of the process of liquidation may be ordered for up to three months and may be continued or renewed for similar periods. Note that the *requirements for the termination of such stay of the process of liquidation under Art 31 (2) EIR are somewhat incoherent with the requirements set forth in Art 33(1) EIR*. I suggest including identical wording in both provisions, as there is no use in having different standards for the stay and the termination of the stay; this could even result in a situation where a stay is first ordered and then immediately terminated based on the same facts.

This power of the main liquidator is his or her *most powerful tool vis-à-vis the secondary liquidator* as this is basically the only rule in the EIR providing for *coordination measures against the will of the secondary liquidator*. It is the only actual practical dispute resolution mechanism under the EIR for conflicts between the main and the secondary liquidator. Therefore, this provision is not only important in cases where such applications are actually made, but also as a rule for influencing and steering the behaviour of the secondary liquidator, who must be aware of the fact that, as an ultima ratio, the main liquidator may avail himself or herself of Art 33(1) EIR in case the secondary liquidator does not comply with his or her cooperation duties voluntarily.

This provision could be improved in a number of aspects: In the first place, *it only refers to “the process of liquidation in whole or in part”*. In my opinion, this actually refers to all relevant measures of the administration of the debtor’s estate, including, e.g., measures to prepare restructuring, the lodging of claims against third parties, the termination of contracts by the secondary liquidator etc. It is, however, conceivable that this wording might be given a too narrow interpretation by the courts as “liquidation” is a very vague term. Therefore, *I suggest including a broader definition of the measures which can be the subject of an application under Art 33(1) EIR*.¹¹¹² The reference to the

¹¹¹² See National Report Austria, Q 33 and Q 35 referring to a decision by *Higher Regional Court (OLG) Graz* 20.10.2005, 3 R 149/05i – Collins & Aikman Products GesmbH, ZIP 2006, 1544. In this case the main liquidator applied for an overall stay of the entire secondary proceedings or, alternatively, for a stay of the liquidation process under Article 33 EIR. The insolvency court rejected both requests and held that there was no legal basis in the EIR justifying the stay of

“process of liquidation” should be replaced (or augmented) by “all measures in the secondary proceedings” or simply by “the secondary proceedings”.

Moreover, Art 33 EIR only refers to a “stay” of such measures. As such stay can be continued or renewed, this might actually result in a prohibition of such measures in case such stay is continued until the very end of the secondary proceedings. However, using the opportunity to request such a stay in order to prohibit such measures altogether can create legal uncertainty and situations of deadlock in the secondary proceedings where it would be much better to make the secondary liquidator propose and discuss alternative solutions and to cooperate with the main liquidator and all courts involved. Therefore, it would be very useful to include a power of the main liquidator to request the court of the secondary proceedings to actually *prohibit or to order certain measures in the secondary proceedings*.

Coordination of main and secondary proceedings requires that decisions taken in the secondary proceedings are responsive to the overall purpose of the main proceedings represented by the main liquidator. This is correctly reflected in the *standard that needs to be applied by the court of the secondary proceedings as a basis for the decision provided for under Art 33(1) EIR*, which is that such an application of the main liquidator may only be rejected if it is “manifestly of no interest to the creditors of the main proceedings”. As already pointed out above, a similar wording should be included in Art 33 (2) EIR as today’s wording is inconsistent with Art 33 (1) EIR.

It is important that Art 33 EIR provides for a *clear wording* in this respect: The decision under Art 33 EIR is actually *the only dispute resolution mechanism for conflicts between the main and the secondary liquidator*. (One might, of

the entire proceedings. Regarding the stay of liquidation it held that the secondary administrator had not even started to liquidate the assets yet and that the stay was manifestly of no interest to the creditors in the main proceedings, because they were identical with those in the secondary proceedings. The court of appeal held that the stay of the entire proceedings was not covered by the EIR. Regarding the stay of liquidation proceedings it held that a stay of the proceedings was not required, as the creditors in the main and in the secondary proceedings were identical. The appeal court then decided to stay liquidation in the secondary proceedings. Insol Europe (Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]), p. 84) suggests that Art. 33 EIR should concern not only the liquidation of assets, but also other activities of the liquidator of the secondary proceedings, which may undermine the integrity of the enterprise, such as termination of vital contracts.

course, discuss whether the liquidators may also try such disputes in ordinary court proceedings¹¹¹³, but it is easy to see why this is the worst option that could be imagined in this context.) In order to resolve such disputes in the overall interest of the creditors of the main proceedings and the liquidation or restructuring measures taken in the main proceedings, the main liquidator must turn to the court of the secondary proceedings. This is indeed the most efficient dispute resolution mechanism as this court is in charge of these proceedings, and any other court, such as the courts in main proceedings or a “neutral” forum, would be quite unpractical in this context. The only other conceivable practical way to resolve disputes in this context would be to give the main liquidator the power to directly order the secondary liquidator e.g. to refrain from certain measures for the time being or for good. This might be indeed a solution worth discussing.¹¹¹⁴ However, even if this were the law, the main liquidator might end up in a situation where he or she has to enforce such orders and, consequently, would have to turn to the courts of the secondary proceedings in case the secondary liquidator does not comply with such orders. I understand that such a power to give direct orders to the secondary liquidator might have no realistic chances to get accepted politically.

Nevertheless, one should think of a *power of the main liquidator to issue a (interim) veto against certain measures* until the court has decided upon an application under Art 33 (1) EIR.

In any event, *the standard under Art 33 (1) EIR must reflect the predominance of the interests of the creditors of the main proceedings over the interest represented by the secondary liquidator*. Therefore, one might think of further improving the wording of Art 33 (1) EIR (and, consequently, the wording of Art 33 (2) EIR¹¹¹⁵) by more clearly shifting the burden of proof

¹¹¹³ It is unclear whether litigation between the main and the secondary liquidator or between the secondary liquidator and the debtor company is even admissible; see *Kammergericht Berlin*, 21.7.2011 – 23 U 97/09, ZInsO 2011, 1504 = NZI 2011, 729 (Mankowski), where the court came to the conclusion that a liquidator in German territorial proceedings does not have the power to sue the debtor company. See *Oberhammer*, KTS 2008, 271 (288); see also *Luxembourg Court of appeal*, 28.10.2009, case no 33904, JT Lux. 2010 p. 188, mentioned by National Report Luxembourg, Q 34.

¹¹¹⁴ See *Wessels*, Twenty Suggestions for a Makeover of the EU Insolvency Regulation International Caselaw Alert 12 (2006), 68 (para. 11); *Tollenaar*, IILR 2011, 252 (257).

¹¹¹⁵ See above in this chapter.

to the parties (such as the secondary liquidator or creditors involved in the secondary proceedings) opposing the application of the main liquidator. Therefore, I suggest to replace “only if it is manifestly of no interest to the creditors in the main proceedings” by “*only if it is proven by the party opposing the main liquidator’s request that it is manifestly of no interest to the creditors in the main proceedings*”; an identical wording should be included in Art 33 (2) EIR (“only if it is proven by the party applying for such termination that such stay [or prohibition or order] is manifestly of no interest to the creditors of the main proceedings”).

Art 34 EIR empowers the main liquidator to propose measures such as a rescue plan, a composition or a comparable measure in the secondary proceedings; in addition, the main liquidator needs to consent to such measures in the secondary proceedings unless the financial interests of the creditors in the main proceedings are not affected by the measures proposed (Art 34(1) EIR). During a stay according to Art 33, only the liquidator of the main proceedings or the debtor, with the former’s consent, may propose such measures. The powers of the main liquidator under Art 33 are of specific importance in this context as well: National insolvency laws normally provide for a certain procedural framework with respect to such measures, which might not be fit to deal with conflicting proposals by the secondary liquidator or the debtor on the one hand and the main liquidator on the other hand. Therefore, requesting a stay of the secondary proceedings or prohibiting conflicting proposals might be necessary in the first place to adapt the secondary proceedings to such a proposal being made by the main liquidator.

7.3.3.6 Secondary Proceedings: Not Necessarily Winding-Up Proceedings

It seems to be generally accepted that the reform of the EIR should do away with the provision of Art 3 (3) second sentence EIR that *secondary proceedings must be winding-up proceedings*.¹¹¹⁶ It is true that a limited

¹¹¹⁶ See, in particular, the analysis of Advocate General Kokott of 24 May 2012, C-116/11 = ZIP 2012, 1133 at para 53 et seq. See INSOL Draft (Revision of the European Insolvency Regulation, provided by INSOL Europe [drafting Committee: Robert van Galen et al]), p. 36, 45, 87; see on that discussion *Paulus*, Europäische Insolvenzverordnung 3rd ed. (2010) Art. 3 para. 50; *Reinhard*, cited at Riewe, Richtschnur für Reform (report), Indat-Report 7/2011, 48. Several National Reporters confirmed that the restriction of secondary proceedings to winding up proceedings can cause practical problems (and should be abandoned), see National

rescue plan only with respect to the assets in the establishment state might not be a reasonable choice in most of the cases as it cannot change the overall economic situation of the debtor (see also Art 34 (2) EIR). Normally, such measures will only be effective if they involve all creditors in one way or another.

Nevertheless, the EIR's differentiation between insolvency proceedings in general (see Annex A) and winding-up proceedings (see Annex B) is to some extent naïve as, in practice, in many jurisdictions different types of proceedings can be used to attain both a winding-up of the debtor's business and a rescue plan. On the one hand, for example, the financial means needed to make payments under a composition schedule can result from the proceeds of the winding-up of the debtor's business; on the other hand, for example, winding-up proceedings can result in the sale of the debtor's business as a whole based on a rescue plan. Moreover, the differentiation between insolvency proceedings in general and mere winding-up proceedings is not at all clear in a number of jurisdictions where uniform insolvency proceedings – such as, for example, the proceedings under the German or to some extent also the Austrian Insolvenzordnung – offer a variety of tools both for the winding-up and the restructuring of the debtor.¹¹¹⁷

Therefore, *doing away with the restriction set forth above is a measure to achieve a higher degree of flexibility in secondary proceedings*. In particular, such restructuring proceedings might offer more favourable solutions for a specific case, such as debtor in possession provisions; accordingly, the main liquidator could act as the debtor in possession in the secondary proceedings¹¹¹⁸, which would significantly increase the coordination between the main and the secondary proceedings. The creditors of the main proceedings are protected by Art 34 (2) EIR anyway in such a scenario.

Reports Belgium (Q 30), Finland (Q 30), Malta (Q 30), The Netherlands (Q 30), Poland (Q 30) with detailed information regarding the famous case "Christianapol", Spain (Q 30), United Kingdom (Q 30).

¹¹¹⁷ According to *Higher Regional Court (OLG) Wien*, 14.7.2006, 28 R 15/06s, ZIK 2007/47, the debtor might be entitled to apply for a restructuring plan in the course of secondary proceedings as long the *lex fori concursus secundariae* allows him to do so anyway, see National Report Austria, Q 30; see also National Report Germany (Q 30) with reference to experiences in this field.

¹¹¹⁸ See *Local Court (Amtsgericht) Köln*, 23.1.2004, 71 IN 1/04, Automold, NZI 2004, 151, see on this case *Smid*, DZWIR 2004, 432; *Blenske*, EWIR 2004, 601; *Sabel*, NZI 2004, 126; *Meyer-Löwy/Poertzgen*, ZInsO 2004, 195.

As already pointed out above, it might be useful to include more specific provisions on the cooperation and coordination with respect to restructuring measures in the EIR; this is even more important if a broader range of restructuring proceedings will be available in the establishment state in the future.

8 Information for Creditors and Lodging of Claims

8.1 Introduction

In its seminal judgment in *Eurofood*¹¹¹⁹ the ECJ highlighted the significance of the right to a fair trial in the context of insolvency proceedings. More specifically, the Court emphasized the right of creditors (or their representatives) to participate in insolvency proceedings “in accordance with the equality of arms principle”¹¹²⁰. Consequently, creditors affected by insolvency proceedings enjoy the (fundamental) right to be heard, which is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union¹¹²¹ and Article 6 of the European Convention on Human Rights.¹¹²² In addition, creditors must be able to lodge their claims in a procedure that does not impose improper legal or practical barriers on the enforcement of their claims. Most importantly, the creditors will only be in a position to exercise their rights if they are properly informed about the opening of insolvency proceedings and their opportunity to lodge claims. However, in addition to safeguarding due process, the provisions of the EIR dealing with the information for creditors and their right to participate in insolvency proceedings by lodging claims also aim to ensure the equal treatment of creditors.¹¹²³ Chapter IV (i.e. Articles 39 to 42) of the EIR specifies the procedural rules designed to achieve that goal.¹¹²⁴ Before analysing the application of these rules, the position of Chapter IV within the regulatory framework of the EIR and its interplay with other provisions of the Regulation need to be addressed.

¹¹¹⁹ ECJ, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, paras 65 et seqq.

¹¹²⁰ *Ibid*, para. 66.

¹¹²¹ Official Journal 2000, C 364/1.

¹¹²² See, e.g. *Meyer-Ladewig*, Europäische Menschenrechtskonvention, (3rd ed. 2011), Article 6, para. 17; ECHR, 2 November 2010, *S.C. Apron Dynamics Srl. Baia Mare ./. Romania*, appl. No. 21199/03.

¹¹²³ See, e.g., *Paulus*, Europäische Insolvenzverordnung (3rd ed., 2010), Article 39, para. 1 and Article 40, para. 1.

¹¹²⁴ *Paulus*, Europäische Insolvenzverordnung (3rd ed., 2010), Article 39, para 1.

8.2 Regulatory Framework and Underlying Policies

Pursuant to Article 21 (1) EIR the liquidator may request the publication of the judgment opening insolvency proceedings, and where appropriate, the decision on appointing the liquidator, in any other Member State. Any Member State within whose territory the debtor has an establishment may provide for mandatory publication (see Article 21 [2] EIR). Article 21 primarily aims to protect existing and (potential) future contracting parties of the debtor in those countries where the debtor conducts business, by drawing their attention to the debtor's financial situation (see recital 29 EIR).¹¹²⁵ In a similar vein, Article 22 deals with the registration of the judgment opening main insolvency proceedings in the land register, the trade register and any other public register kept in the other Member States.¹¹²⁶ While information on the procedure of lodging claims might be of interest to third parties as well, it is neither mentioned in Article 21 nor in Article 22.¹¹²⁷ Consequently, informing creditors merely represents a by-product of publications under Article 21 and registrations under Article 22. The EIR provides for a different system to ensure that creditors are informed. It imposes a duty on the competent court or the liquidator appointed by it to immediately inform known creditors in other Member States¹¹²⁸ (see Article 40 [1]). Article 40 (2) EIR specifies the minimum content such individual notice shall include, i.e. time limits, the legal consequences of belated lodging, the body or authority with whom the claims must be lodged and (any) other measures required by the *lex fori concursus* for lodging claims.¹¹²⁹ The notice shall be provided in the official language of the Member State of the opening of proceedings. However, a standard form in all the official languages of the institutions of the European Union bearing the heading 'Invitation to lodge a claim. Time limits to be observed' has to be

¹¹²⁵ As *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 177, aptly put it: Article 21 "*contributes to the security of trade*"; cf. *Wessels*, International Insolvency Law (3rd ed., 2012), para. 10777.

¹¹²⁶ *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.306.

¹¹²⁷ Such items of information can be included in the publication according to Article 21 but there is no requirement to do so; see *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 181.

¹¹²⁸ See also Article 39 EIR. The procedure for informing creditors situated in the State in which insolvency proceedings are opened is governed by the *lex fori concursus*; see *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 271.

¹¹²⁹ *Wessels*, International Insolvency Law (3rd ed., 2012), para. 10917; *Reinhart*, in: MünchKomm-InsO, Article 40, para. 10.

used (see Article 42 [1] EIR). This will at least enable the recipient (creditor), who may be ignorant of the respective language, to understand the nature of the notification.¹¹³⁰

Article 4 (2) (h) EIR stipulates that the *lex fori concursus* governs the lodging, verification and admission of claims.¹¹³¹ This provision is, however, partially derogated by the substantive rules laid down in Articles 32, 39, 41 and 42 (2) EIR. Article 39 guarantees the right of creditors having their habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings to lodge claims in the insolvency proceedings in writing.¹¹³² Article 39 merely sets a maximum standard for the relevant formal requirements. Member States are free to provide for more favourable form requirements, such as electronic lodging of claims, in their national laws.¹¹³³ In addition, Article 39 clarifies that tax authorities and social security authorities of other Member States also qualify as intra-EU creditors.¹¹³⁴ While Article 32 (1) EIR allows creditors to lodge their claims in main and in secondary proceedings, Article 39 EIR establishes the basic right of (foreign) creditors to lodge their claims in insolvency proceedings opened in another Member State irrespective of whether multiple proceedings have been opened.¹¹³⁵ Moreover, Article 32 (2) EIR empowers the liquidator to (re)lodge the claims that were lodged in his/her proceedings in other proceedings, provided that this serves the interests of the creditors.¹¹³⁶ This might lead to a multiple-cross-filing of claims and the need to ensure the

¹¹³⁰ See *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings, para. 8.416; *Mankowski*, NZI 2011, 891.

¹¹³¹ The *lex fori concursus* also applies to the question of which claims are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings (see Article 4 [2] [g] EIR).

¹¹³² Article 39 EIR cannot be understood as a provision which explicitly excludes creditors from Non-Member States from lodging their claims in proceedings which are governed by the Insolvency Regulation. The rights of domestic creditors as well as the rights of creditors from third states are governed by national insolvency law. See National Report Malta (Q 37); *Taylor*, IILR 2011, 242, 244; *Moss/Fletcher/Isaacs* The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.406; *Geroldinger*, *Verfahrenskoordination im Europäischen Insolvenzrecht* (2010), 313

¹¹³³ See, e.g., *Geroldinger*, *Verfahrenskoordination im internationalen Insolvenzrecht* (2010), 316, with further references.

¹¹³⁴ For a detailed analysis see *Wessels*, IILR 2011, 131 et seqq.

¹¹³⁵ *Paulus*, *Europäische Insolvenzverordnung* (3rd ed., 2010), Article 39, para. 2; *Reinhart*, in: *MünchKomm-InsO*, Article 39, para. 1.

¹¹³⁶ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 236; *Wessels*, *International Insolvency Law* (3rd ed. 2012), para. 10860.

equal treatment of creditors on an EU level by application of the ‘hotchpot’-rule (see Article 20 [2] EIR).¹¹³⁷ The liquidator’s right is, however, subject to the right of creditors to oppose or to withdraw the lodging of their claims where the respective *lex fori concursus* so provides (see Article 32 [2] EIR).¹¹³⁸ Article 41 sets out the content of claims lodged by intra-EU creditors. It requires a creditor to send copies of supporting documents, if any, and to indicate the nature of the claim, the date on which it arose and its amount. Additionally, the creditor shall specify whether he/she alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he/she is invoking. It follows from Article 41 that Member States may not impose more stringent content requirements than those stipulated in Article 41 itself on the lodging of claims.¹¹³⁹ In order to make it easier for creditors situated in another Member State to lodge their claims, Article 42 (2) EIR provides that he/she may lodge his/her claim in the official language or one of the official languages of that other State. However, in that case their submission must be entitled “Lodgement of claim” in the official language or one of the official languages of the State in which the proceedings are opened. This rule aims to avoid delay and costs in the procedure for lodging claims.¹¹⁴⁰ Pursuant to Article 42 (2) EIR the creditor may, however, be required to provide a translation into the official language of the opening state, if necessary. In light of Articles 32, 39, 41 and 42 (2) EIR, the national law of the opening state remains, in particular, relevant for the following issues: the time limit for lodging claims, the effects of a belated lodging, the question whether the lodging is admissible and well-founded, the costs attached to the claim and the verification of debts.¹¹⁴¹

¹¹³⁷ See recital 21 and *infra* 8.3.3.

¹¹³⁸ Paulus, Europäische Insolvenzverordnung (3rd ed. 2010), Article 32, para. 13.

¹¹³⁹ Moss/Fletcher/Isaacs, The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.410; Riedemann, in: Pannen (ed.), Europäische Insolvenzverordnung (2007), Article 41, para. 14; but see Ghia, IILR 2011, 320.

¹¹⁴⁰ Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), para. 276.

¹¹⁴¹ See Corno, IILR 2012, 201; Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), paras. 265 et seqq.

8.3 Main Issues

8.3.1 Challenges of Ensuring a Pan-European Notification of Creditors

8.3.1.1 Application of Articles 40 and 42 (1) EIR in Practice

The equal treatment of creditors at EU level can only be achieved, and the creditors' right to be heard fully respected, if creditors situated outside the Member State of the opening of proceedings are adequately informed.¹¹⁴²

The national reports highlight that the application of the individual notification system laid down in Article 40 EIR proves difficult in practice.¹¹⁴³ In some instances the courts and/or liquidators have merely published the judgment opening insolvency proceedings in their respective national insolvency register without complying with their duty to inform foreign (known) creditors individually.¹¹⁴⁴ In other cases, an individual notice was sent to the creditor pursuant to Article 40 but failed to meet the requirements of Article 42 (2) EIR since the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union was omitted.¹¹⁴⁵

In addition, courts have raised the question whether a failure to comply with Articles 40 and 42 EIR entails legal consequences, and if so, of what kind. This is particularly relevant for the question whether a notification that does not fulfil the requirements enshrined in the EIR triggers the time limit for lodging claims under the applicable *lex fori concursus*.¹¹⁴⁶ The national

¹¹⁴² See for the *ratio legi* of Article 40 EIR e.g. *Kindler* in: Säcker/Rixecker (ed.), MünchKomm-BGB, Vol. 11, (5th ed. 2010), Article 40 EulnsVO, para. 1.

¹¹⁴³ See, e.g., National Report Czech Republic (Q 37) which described this problem as the single principal source of difficulties with the EIR in Czech insolvency proceedings. So, for instance, is rather unclear who the known creditors within the meaning of Article 40 EIR are. Furthermore, the Czech National Report mentioned some uncertainty on the interrelationship of *lex fori concursus* and the requirements imposed by Articles 39-42 EIR.

¹¹⁴⁴ *Cour de Cassation*, 7.7.2009, n° de pourvoi: 07-20.220, Fourtet *J.* ING Bank, Bulletin 2009, IV, N° 99; *Higher Regional Court Prague (Vrchní soud v Praze)*, 11.8.2011, IILR 2012, 74, annotated by Sedláček.

¹¹⁴⁵ See, e.g., National Report Belgium (Q 37) *Cour d'appel d'Orleans*, 9.6.2005, INSOL Europe Database, Abstract No. 141; *Appellate court (Rovaniemi hovioikeus)*, 18.10.2011, INSOL Europe Database, Abstract No. 162.

¹¹⁴⁶ *Paulus*, Europäische Insolvenzverordnung (3rd ed., 2010), Article 42, para. 3, submits that the time limit does not start to run in such cases; see also *Higher Regional Court Ljubljana (Višje sodišče v Ljubljani)*, 11.5.2011, INSOL Europe Database, Abstract No. 37; see National Report Slovenia, Q 37; *Higher Regional Court Prague (Vrchní soud v Praze)*, 11.8.2011, IILR 2012, 74, annotated by Sedláček; but see *Cour d'appel Bordeaux*, 3.1.2011, N° 09-04655, IILR 2012,

reports show that the insolvency laws of some Member States stipulate rather short time limits and provide at the same time that creditors are precluded from participating in the insolvency proceedings in the case of a belated lodging of claims.¹¹⁴⁷ If creditors miss the time limit, their claim may ultimately be precluded.¹¹⁴⁸ In a number of cases Czech¹¹⁴⁹, Slovak¹¹⁵⁰, Slovenian¹¹⁵¹ and French¹¹⁵² courts had to decide whether foreign creditors are precluded from participating in insolvency proceedings as a consequence of their failure to meet the time limit provided by the *lex fori concursus* even though they were not notified in accordance with the provisions of the EIR. In the *Commission v AMI Semiconductor Belgium et al*¹¹⁵³ case the ECJ had to deal with the ramifications of a violation of Article 40 EIR. It held that the recognition of insolvency proceedings in other Member States according to Article 17 EIR is not affected by the late information of the creditor under Article 40.¹¹⁵⁴ It might, however, entitle the creditor to compensation for harm

72, annotated by Mankowski; see also the decision by a Finish court according to which an information due to Article 40 and Article 42 EIR which lacked the headline required by Art. 42 EIR but contained all relevant and required information could not lead to an extension of a given time limit, see *Appellate court (Rovaniemen hovioikeus)*, 18.10.2011, INSOL Europe Database, Abstract No. 162.

¹¹⁴⁷ See, e.g., for critical remarks from interviewed participants regarding short deadlines for the lodging of claims in the UK e.g. National Report Germany (Q 37). Under Czech insolvency law the deadline to lodge a claim by creditors is not to be found in the insolvency act, but has to be set by the court, it can range from 30 days to two months, see Sedlaček, IILR 2012, 74, 75.

¹¹⁴⁸ This is, for instance, the case under French law; see *Cour de Cassation*, 7.7.2009, n° de pourvoi: 07-20.220, INSOL Europe Database, Abstract No. 29; *Cour d'appel Bordeaux*, 3.1.2011, IILR 2012, 72, annotated by Mankowski. This question is also governed by *lex fori concursus* according to Article 4 (2) h) EIR, see Paulus, Europäische Insolvenzverordnung, (3rd ed. 2010), Article 4, para. 31; Maderbacher in: Konecny/Schubert, Kommentar zu den Insolvenzgesetzen (2012), Article 4, para. 49.

¹¹⁴⁹ *Supreme Court Czech Republik (Nejvyšší soud České republiky)*, 9.4.2008, 29 NSCR 4/2008, Kellner s.r.o., <http://www.nsoud.cz>; *Higher Regional Court Prague (Vrchní soud v Praze)*, 17.2.2011, 1 VSPH 1203/2010-B-118, MSPH 94 INS 3902/2010, Palcor Czech s.r.o., <http://kraken.slv.cz/1VSPH1203/2010>; *Higher Regional Court Prague (Vrchní soud v Praze)*, 11.8.2011, IILR 2012, 74, annotated by Sedlaček; see also National Report Czech Republic (Q 37)

¹¹⁵⁰ See National Report Slovakia (Q 37).

¹¹⁵¹ *Higher Regional Court Ljubljana (Višje sodišče v Ljubljani)*, 11.5.2011, INSOL Europe Database, Abstract No. 37; see National Report Slovenia, Q 37.

¹¹⁵² *Cour d'appel d'Orleans*, 9.6.2005, INSOL Europe Database, Abstract No. 141; *Cour de Cassation*, 7.7.2009, n° de pourvoi: 07-20.220, INSOL Europe Database, Abstract No. 29; *Cour d'appel Bordeaux*, 3.1.2011, IILR 2012, 72, annotated by Mankowski).

¹¹⁵³ ECJ, case C-294/02, *European Commission v AMI Semiconductor Belgium*, ECR 2005 I-2175, para. 71; cf. *Chan Ho*, International Corporate Rescue 2 (2005), 137.

¹¹⁵⁴ It is, however, necessary to take into account the peculiarity of this case, i.e. the Commission's role as a creditor. As Advocate General Kokott points out in her Opinion: "Furthermore, the opening of insolvency proceedings is entered in the Handelsregister (German commercial register) or the Firmenbuch (Austrian register of companies) and made public, with the result

caused by late notification.¹¹⁵⁵ By contrast, a German court refused to recognize the decision of an English bankruptcy court on the basis that the notification sent to the creditor situated in Germany was not fully translated into German, arguing that public policy was violated (see Article 26 EIR).¹¹⁵⁶ The reasoning of this decision is clearly irreconcilable with Article 42 (1) EIR.

Despite the clear requirements the EIR stipulates with regard to content and language of the information for creditors, it seems difficult for courts and/or liquidators to apply them in the individual case. This situation could easily be remedied. The information relevant for foreign creditors does usually not vary from case to case and the translation of the heading “Invitation to lodge a claim. Time limits to be observed” is readily available online.¹¹⁵⁷ Therefore, it would not be difficult to facilitate an information process in line with the EIR’s requirements by providing standardized forms for each jurisdiction. The adoption of such standard forms, which could also be published on the European e-Justice Platform together with a basic description of the lodging, verification and admission of claims under the Member States’ insolvency regimes, would facilitate and increase the efficiency of informing creditors at EU level.

8.3.1.2 Public Register as Information Tool

The current information system only deals with known creditors, e.g. creditors listed in the bookkeeping records or other documentation (or information) provided by the debtor.¹¹⁵⁸ In other words, the chances of foreign creditors to participate in insolvency proceedings will, in many cases, depend on the information provided by the debtor –which might be insufficient, for whatever

that the Commission was in a position to be aware that proceedings had been opened even though it was not so informed.”

¹¹⁵⁵ ECJ, case C-294/02, *European Commission v AMI Semiconductor Belgium*, ECR 2005 I-2175, para. 71.

¹¹⁵⁶ *District Court (LG) Koblenz*, 2.12.2010 – 1 O 40/10, confirmed by the *Higher Regional Court (OLG) Koblenz*, 19.7.2012 – 1 U 1/11, the authors thank Rechtsanwalt Frank Beck for sharing his information on that case.

¹¹⁵⁷ See National Report Malta (Q 37) where it was pointed out that there is no collection of official translations in the Regulation or its Annexes. Such translations can only be found in each language of the Regulation itself. INSOL Europe also offers technical assistance in this field, see <http://www.insol-europe.org/technical-content/eir-articles-40-42/>.

¹¹⁵⁸ See, e.g., *Wessels*, *International Insolvency Law* (3rd ed. 2012), para. 10915.

reason. The system has, therefore, raised concerns with regard to due process rights of unknown creditors.¹¹⁵⁹

According to the national reports most Member States provide for online registers in which the opening of insolvency proceedings is published.¹¹⁶⁰ Such registration seems to be the preferred and most effective way of informing (known and unknown) creditors. Under the EIR the liquidator is not generally obliged to publish and/or register the judgment opening insolvency proceedings in other Member States (see Articles 21 and 22 EIR, *supra* 8.2). However, the national reports show that a large number of Member States require mandatory publication if the debtor has an establishment within the territory of the respective Member State (see Articles 21 [2]) as well as mandatory registration pursuant to 22 (2) EIR.¹¹⁶¹ Other Member States have

¹¹⁵⁹ See, e.g., European Parliament, Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), Committee on Legal Affairs (so called "*Lehne Report*"), para. 4; *Moss/Paulus*, Insolvency Intelligence No. 1 (2006), 1 et seqq.; *Vallender*, Eurofenix Spring 2010, 38; *Wessels*, InCA 12 (V/2006), 68 et seqq., para. 14; *Stomel*, IES Working Paper 3/2011, 40.

¹¹⁶⁰ The national reporters provided the following information (see answers regarding Q 39): **Austria**: <http://edikte.justiz.gv.at>; **Czech Republic**: Website operated by the Ministry of Justice, see <https://isir.justice.cz/isir/common/index.do>; **Estonia**: <http://www.ametlikudteadaanded.ee>; **Finland** (no link provided); **France**: www.bodacc.fr; **Germany**: <http://www.insolvenzbekanntmachungen.de>; in **Italy** such a centralized register is not mandatory, but the Ministry of Justice introduced such an online-database: <http://procedureconcorsuali.giustizia.it>, besides there also exists a similar database offered by a private company: www.procedure.it; **Latvia**: http://www.ur.gov.lv/urpubl?act=mn_pjur; **Lithuania** (no link provided); **Luxembourg**: <http://www.guichet.public.lu/fr/entreprises/sauvegarde-cessationactivite/faillite/creancier/liste-entreprises-faillite/index.html>; **Malta**: website maintained by the Registrar of Companies (no link provided); **Netherlands**: <http://insolventies.rechtspraak.nl>; in **Poland** neither a centralised register of bankruptcies nor any official electronic database for announcements concerning bankruptcy proceedings exist although since May 2012 information has to be provided electronically. Databases containing such information are, however offered by a number of private companies; the correctness and completeness of information provided in such databases is not guaranteed, see, e.g., for (searchable) information on all bankruptcies in the district of the Warsaw court <http://www.upadlosci-warszawa.pl/>; no insolvency database exists in **Romania** and **Slovakia**; **Slovenia**: website of the Agency for Public Legal Records and Related Services, <http://www.ajpes.si/eInsolvl/>; in **Spain** information regarding specific insolvency proceeding has to be published in the Official State Gazette and can be found on the following website <https://www.publicidadconcursal.es/>; no such website exists in **Sweden** (no link provided).

¹¹⁶¹ See the answers given to Q 40 in the respective national reports: Article 21 (2) and Article 22 (2) EIR were implemented by **Austria** in sec. 219 Abs. 2 IO; **Belgium**: Article 3 LF; **Estonia**, sec. 33 and 39 Bankruptcy Act; **France**: Article R 621-8 Code de commerce (only regarding an establishment and the insolvency register, but not regarding the land register); **Germany**, sec. 102 § 5 (2) EGInsO (only regarding an establishment in Germany; publication in the land register is governed by sec. 102 § 6 EGInsO, but this publication is not mandatory); in **Hungary** both publication requirements (regarding Article 21 [2] and 22 [2] EIR) have been implemented, see *Csia*, The Hungarian Insolvency Publication Requirements under Article 21 and Article 22 of the European Insolvency Regulation, < <http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; in **Ireland** in fact both publications are mandatory, but only Article

not adopted such requirements.¹¹⁶² However, several of the national reports endorsed the introduction of a Europe-wide system of mandatory publication and registration.¹¹⁶³ Irrespective of these publication and registration requirements, creditors might still be forced to screen various national registers to learn about the insolvency of a debtor. Attempts to coordinate the information provided by different national insolvency registers have been undertaken by professional associations.¹¹⁶⁴ Moreover, the creation of a central EU register of insolvency proceedings has been recommended by most national reporters¹¹⁶⁵ and a number of insolvency practitioners and scholars.¹¹⁶⁶

21 (2) EIR was explicitly implemented by law in sec. 227 B (3) of the Companies Act 1963; in **Latvia** both publication requirements have been implemented into Latvian law by sec. 63 (6) and (7) of the Insolvency Act; the same holds true for **Lithuania**, where this has been implemented by the decision of the government No. 1407 of 12 November 2003 (as later amended), see *Heemann*, The Lithuanian Insolvency Publication and Registration Requirements under Article 21 and 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; with regard to the **Netherlands**, see *Tollenaar*, Publication and Registration Requirements under Dutch Insolvency Law and the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Slovakian** law also requires mandatory publication according to Article 21 (2) EIR, see *Kollar*, The Slovakian Insolvency Publication and Registration Requirements under Article 21 and 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; publication and registration under Article 21 (2) and Article 22 (2) EIR are mandatory under **Spanish** insolvency law, see Article 221.3.1 and Article 221.3.2 of the Spanish Insolvency Act; the same holds true for **Swedish** law, see *Körling/Bondesson*, The Swedish Insolvency Publication and Registration Requirements under Article 21 and 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>.

¹¹⁶² E.g., **England**, see *Flannery*, Publication and Registration Requirements under English Insolvency Law and the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; the same holds true for **Finland**, see *Alho*, Guidance on the Finnish Insolvency Publication and Registration Requirements under Article 21 and 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Greece**, see *Potamitis*, The Greek Insolvency Publication Requirements under Article 21 and Article 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Italy**, see *Oglio*, Publication and Registration Requirements under Italian Law and the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Malta**, see National Report Malta, Q 40; **Poland**, see *Sadowski*, The Polish Insolvency Publication Requirements under Article 21 and Article 22 of the European Insolvency Regulation <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Romania**, see *Chiper*, The Romanian Insolvency Publication Requirements under Article 21 and Article 22 of the European Insolvency Regulation, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>; **Scotland**, see *Burrow*, European Insolvency Regulation – Publication and Registration Requirements, <<http://www.insol-europe.org/technical-content/eir-articles-21-22/>>.

¹¹⁶³ See, e.g. National Reports Czech Republic (Q 37); Germany (Q 37).

¹¹⁶⁴ Most notably, INSOL Europe; see <http://www.insol-europe.org/technical-content/eir-articles-21-22/>.

¹¹⁶⁵ See above, footnote 1163.

¹¹⁶⁶ See above, footnote 1159.

8.3.2 Procedural Intricacies of the (Transnational) Lodging of Claims

According to most national reporters the lodging of claims under the EIR raises difficulties in practice¹¹⁶⁷, most notably, regarding the following issues: time limits, language requirements, costs (translation, legal advice etc) and the specific procedures for lodging and proving claims under the applicable (foreign) *lex fori concursus*.

It can be derived from Article 4 (2) (h) EIR that the time limit for lodging claims is governed by national law. It is, however, less clear whether the *lex fori concursus* also decides when exactly the time limit starts to run for intra-EU creditors who have either been informed about the opening of insolvency proceedings or not. The problem is aggravated by the fact that short time limits might lead to claims being barred for belated lodging.¹¹⁶⁸ The time limits applicable to domestic creditors often fail to take complications of cross-border lodging of claims into account. The time needed to prepare such action is longer and, as the national reports show, in many cases the involvement of local counsel is required.¹¹⁶⁹ Against this backdrop, it seems advisable to adopt a minimum time period (of one to three months) for intra-EU creditors to lodge their claims. This time period should either start to run once the creditor was notified of the proceedings or, alternatively, once the judgment opening insolvency proceedings was published or registered in an insolvency register in the Member State where the respective creditor has his/her habitual residence, domicile or registered office. The adoption of a minimum time period would foster legal certainty by creating awareness among intra-EU creditors about the time period available for lodging their claims.

¹¹⁶⁷ See e.g. all National Reports on Q 37; especially Austria, Belgium, Czech Republic, Estonia, Ireland, Italy, Lithuania, Malta (all regarding Q 37); see furthermore *Geroldinger*, *Verfahrenskoordination im internationalen Insolvenzrecht* (2010), 310 et seqq.; *Corno*, IILR 2012, 197 et seqq.

¹¹⁶⁸ See already *supra* 8.3.1.1.

¹¹⁶⁹ See, e.g., National Report Germany (Q 37) mentioning that involvement of a local counsel is required in many Member States. Even if this not a formal requirement by law, it is very useful and common to engage a lawyer to be aware of peculiarities of local (insolvency) law, see e.g. National Reports Italy (Q 37) and Sweden, Q 37. Furthermore, if not representation by local lawyers is required, a person authorised to receive service of official communications has to be mandated according to the *lex fori concursus* of some Member States, see *Higher Regional Court (OLG) Wien*, 14.6.2007, ZIK 2008/52, 31.

According to the *Virgós/Schmit*-Report Article 42 (2) EIR aims to avoid “*delay*” and “*unnecessary lodgement costs*”.¹¹⁷⁰ What was intended as the exception, namely the requirement to submit a translation into the official language of the opening state, has become the rule in some Member States, as highlighted by the national reports¹¹⁷¹. Consequently, national reporters suggested allowing claims to be lodged in a language commonly understood (such as English¹¹⁷²). On the basis of this suggestion an analogy may be drawn to the solution adopted with regard to language issues in other European instruments. Article 5 of the Evidence Regulation¹¹⁷³ for instance provides that “[e]ach Member State shall indicate the official language or languages of the institutions of the European Community other than its own which is or are acceptable to it for completion of the forms.” A similar approach might be taken in the EIR as well by requiring the Member States to indicate at least one language other than their own official language that will be accepted for the lodging of claims. However, if the translation requirement remains, creditors should be allowed to submit their claims in any official language of the European Union. This would, for instance, enable creditors to lodge their claims in English irrespective of their habitual residence, domicile or registered office. The language problem is intertwined with the content requirements stipulated for the lodging of claims. As correctly noted by the national reporters¹¹⁷⁴, Article 41 EIR is too unspecific in this regard and thereby contributes to the increase of translation costs.¹¹⁷⁵ This leads directly

¹¹⁷⁰ *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 276.

¹¹⁷¹ See e.g. National Reports Estonia (Q 37); Latvia (Q 37); in the author’s opinion it seems doubtful whether a full translation can be required under Article 42(2) on the basis of constitutional provision determining the official language of a Member State; but see Latvia, National Report (Q 37).

¹¹⁷² See National Reports Austria (Q 37); Belgium (Q 37); Poland (Q 37); Spain (Q 37).

¹¹⁷³ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 1-24 of 27.6.2001.

¹¹⁷⁴ See, e.g., National Reports Austria, Belgium, Estonia, Ireland, Italy, Lithuania, Malta (all regarding Q 37).

¹¹⁷⁵ There is also some uncertainty on the question whether courts or liquidators are entitled to request a certified translation which is not the case according to the prevailing opinion, see *Mäsch*, in: Rauscher (ed.), *Europäisches Zivilprozess- und Kollisionsrecht* (2010), Article 42 EG-InsVO para. 11; *Paulus*, *Europäische Insolvenzverordnung* (3rd ed., 2010), Article 41, para. 2; *Geroldinger*, *Verfahrenskoordination im Europäischen Insolvenzrecht* (2010), 315; see, however, *Wenner/Schuster*, in: Wimmer (ed.), *Frankfurter Kommentar zur Insolvenzordnung* (6th ed. 2011), Article 42 EulnsVO, para. 4.

to the next recommendation, voiced by the national reporters¹¹⁷⁶, i.e. the adoption of a standard form¹¹⁷⁷ for lodging claims available in all languages. Such standard form would improve the lodging of claims process on many levels: first, it reduces translation costs, provided the text that needs to be added is reduced to a minimum (preferably, even to a simple ticking of boxes). Second, it decreases transaction costs since the involvement of legal counsel will (and should also under the applicable *lex fori concursus*) no longer be necessary; in this respect the EIR should clarify that the involvement of a lawyer is not required. Third, the use of standard forms will reduce the need to get familiar with the specific procedures for lodging claims under the applicable *lex fori concursus*.

Moreover, any cost reduction improves the situation of the small claims' creditors, notably small and medium-sized enterprises, which might otherwise refrain from lodging their claims (in light of the cost-benefit ratio).

Since Article 39 EIR does not preclude Member States from introducing more favourable form requirements for lodging claims, the EIR would already allow for lodging of claims via internet.¹¹⁷⁸ However, a pan-European system for the electronic lodging of claims requires a common minimum level of

¹¹⁷⁶ See, e.g., National Reports Belgium (Q 37); Czech Republic (Q 37).

¹¹⁷⁷ *De lege lata* only two Member States have reported that there already is a specific standard form for lodging claims with respect to Article 41 EIR, so in Slovenia, see http://zakonodaja.gov.si/rpsi/r05/predpis_ZAKO4735.html and in England, where such a specific form only exists for winding-up proceedings by the court.

¹¹⁷⁸ Creditors can lodge their claims electronically in: **Austria** (see http://www.justiz.gv.at/internet/file/2c9484852308c2a60123e60049e70500.de.0/2007_koformfoanm1_na_engl.pdf); **Czech Republic** (see <https://isir.justice.cz/isir/common/stat.do?kodStranky=FORMULAR> in the line entitled "Prihlaska pohledavky"); **Hungary** (from 1 January 2013, a link to a website cannot be given yet); **Lithuania** (intended from 2013 on); in **Slovenia** creditors who are represented by an attorney must lodge their claims electronically according to Article 123a Insolvency Act; **Spanish** law also allows to lodge claims electronically according to Article 85 (2) Insolvency Act; in the UK electronic lodgement of claims is possible but unusual. Under **Belgian** law according to Article 62 Loi de Faillites creditors have to lodge their claims in writing. In practice, however, creditors often send their claims to the insolvency practitioner who then lodges all the claims with the commercial court. A similar situation exists in the **Netherlands**, where a system for an electronic lodgement of claims has been developed only on private initiative endorsed by several insolvency practitioners and courts and could become standard in the near future, see www.claimsagent.nl. There is **no such possibility** to lodge a claim electronically in **Bulgaria, Estonia, Greece, Ireland, Slovakia**. In **Finland** the Bankruptcy Ombudsman currently is setting up a specific electronic data base for bankruptcy proceedings which will allow to lodge claims electronically, see <http://www.konkurssiasiamies.fi/uploads/1g1ng1i7u.pdf>. Also in **Poland** it is very likely that in the near future an electronic lodgement of claims will be possible; the Warsaw Bankruptcy court has already provided an example which could be used as a model for the adoption of such a system, see http://www.upadlosci-warszawa.pl/pliki/zgloszenie_wierzytelnosci.pdf.

technological infrastructure in all Member States – which, at least so far, has not yet been reached.

8.3.3 Lodging of Claims: Substantive issues

The EIR, as it presently stands, establishes provisions governing jurisdiction, recognition of judgments and the applicable law but leaves the widely differing substantive laws mainly untouched.¹¹⁷⁹ Accordingly, the ranking of claims is governed by the *lex fori concursus* (see Article 4 [2] [i] EIR). As highlighted by recital 11 the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. The EIR respects these differences. Since Article 32 (1) EIR entitles a creditor to lodge his/her claims in (multiple) main and secondary proceedings, the following scenario might occur: the ranking of the same claim lodged in insolvency proceedings in Member State A and Member State B may not be the same in both proceedings. A creditor enjoying a preferential right in Member State A who has a non-preferential claim under the laws of Member State B, may lodge his/her claim in both proceedings. Assuming the creditor partially receives satisfaction (e.g. of 50%) in the proceedings in Member State A, he/she is allowed to keep what he has obtained in these proceedings. However, in order to guarantee the equal treatment of creditors, Article 20 (2) EIR provides that the creditor having received payment (in the proceedings in Member State A) may not participate in other distributions until all creditors of the same ranking (in the proceedings in Member State B) have obtained equal satisfaction (i.e. of 50%).¹¹⁸⁰ The rule according to which the creditor does not have to return “what he has obtained” (see Article 21 [1] EIR) if the satisfaction of creditors of the same ranking in the proceedings in Member State B does not reach the level of satisfaction the creditor received in the proceedings in Member State A has been criticized in legal doctrine.¹¹⁸¹ It is argued that it would favour major creditors since small creditors, such as

¹¹⁷⁹ See, in particular, recitals 6 and 11.

¹¹⁸⁰ See *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings (1996), para. 174.

¹¹⁸¹ See *Leonhardt/Smid/Zeuner*, Internationales Insolvenzrecht (2nd ed., 2012), para. 22.

employees, would generally not be in a position to participate in insolvency proceedings abroad.¹¹⁸²

In addition, the liquidator's power to exercise the creditor's rights and lodge the latter's claim in another proceeding has triggered a debate in legal doctrine.¹¹⁸³ The phenomenon referred to as "*multiple cross-filing*"¹¹⁸⁴ concerns the question how the EIR deals with cases where both the liquidator and a creditor lodge identical claims in one and the same insolvency proceedings. According to the prevailing view in legal literature the issue is governed by the *lex fori concursus* according to Article 4 (2) (h) EIR. Moreover, some national insolvency laws specifically address the problem by specifying that preference should be given to the creditor with regard to the claim as such, voting rights and the right to receive dividends.¹¹⁸⁵

The problems related to the substantive issues of lodging claims have received much attention in legal literature. However, the national reports do not confirm their practical relevance.

8.4 Conclusion and Policy Options

In the context of insolvency proceedings the right to a fair trial requires adequate information of creditors and a procedure for lodging claims that does not (unnecessarily) impair the enforcement of claims.

As correctly pointed out in the national reports and evidenced in case law, the application of the system to inform creditors individually, which is enshrined in the EIR, has proven difficult in practice. As a first step the deficiencies observed in practice could be remedied by providing a standard notification form available in all EU languages. Moreover, the creditors' access to information could be improved by using public registers as information tools. Such approach could build upon the infrastructure that does already exist in most Member States, i.e. the national insolvency registers (or equivalent

¹¹⁸² See *Leonhardt/Smid/Zeuner*, Internationales Insolvenzrecht (2nd ed., 2012), para. 22, with further references, who correctly submitted that such argument is not convincing in light of the liquidator's right to lodge claims under Article 32 (2) EIR.

¹¹⁸³ See, e.g., *Geroldinger*, Verfahrenskoordination im internationalen Insolvenzrecht (2010), 322, with further references.

¹¹⁸⁴ See *Wessels*, International Insolvency Law (3rd ed. 2012), para. 10860; *Taylor*, IILR 2011, 244.

¹¹⁸⁵ Cf. *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings (2nd ed. 2009), para. 8.369.

registers) which are available online. Providing a platform that interconnects existing databases would not only avoid a duplication of the process, which the adoption of a new database would entail as a consequence, but also provide a quick and efficient way to spread information. It would, however, require a clear definition of the information that needs to be made public (e.g. the details of the debtor, the details of the liquidator, the date insolvency proceedings were opened, potentially also the dates for hearings of creditors and notably the time limits for lodging claims). In addition, the publication and registration of such information needs to be mandatory in all Member States. In the long run, however, the creation of a central EU register should be envisaged, introducing a one-stop-shop solution.

In a similar vein, the current procedure for lodging claims raises concerns, *inter alia*, with regard to time limits, costs, language barriers and the interplay between the Regulation and the applicable *lex fori concursus*. The underlying problems could, on the one hand, be resolved by adopting a minimum time period (of one to three months) for intra-EU creditors to lodge their claims. On the other hand, the adoption of a standard form for lodging claims would significantly reduce costs and at the same time facilitate the lodging of claims in general, provided the text that needs to be added is reduced to a minimum (preferably even to a simple ticking of boxes). Language barriers could be overcome by requiring the Member States to indicate at least one language other than their official language that will be accepted for the lodging of claims.

By contrast, the substantive issues related to the lodging of claims do not require the European legislator to take action.

9 Annex: The recognition of decisions on insolvency proceedings under the EIR¹¹⁸⁶

The recognition of decisions opening insolvency proceedings is an important tool for the coordination of insolvency proceedings under the Regulation.¹¹⁸⁷ Accordingly, the recognition of decisions relating to insolvency touches upon various aspects of the EIR. First, the decisions opening the main proceedings are recognised throughout the European Judicial Area and bar the opening of parallel main proceedings (Article 16 EIR).¹¹⁸⁸ In this respect, recognition has a significant impact on the delimitation between main and secondary proceedings (Articles 27 et seq. EIR).¹¹⁸⁹ Second, the power of the liquidator to take action for the estate in other Member States derives directly from the decision opening insolvency proceedings and is explicitly addressed by Article 18 EIR.¹¹⁹⁰ Recognition under the EIR is not limited to the opening of insolvency proceedings, but applies to all decisions taken in the course of the proceeding (Article 25 EIR). However, the recognition under the EIR also has some limits and safeguards, especially the public policy exception of Article 26 EIR (and the protection of the personal freedom and the postal secrecy under Article 25 (3) EIR).

Both the EU-Commission and the project leaders agreed at the outset of the work for this study that recognition should not be among the reform issues to be covered extensively by the study. On the one hand, the EIR already provides for the maximum solution that can be achieved in this context, i.e. a direct recognition of foreign main proceedings without any intermediate steps (such as an *exequatur*) to be taken and guarantees the full recognition of the powers of the main liquidator. On the other hand, we were not aware of major problems calling for fundamental changes here. This study, however, discusses a few relevant issues in other chapters, such as, in particular, the problems resulting

¹¹⁸⁶ I am grateful to *Lars Bierschenk* who assisted me in the preparation of this part.

¹¹⁸⁷ See in detail *Oberhammer*, Coordination of proceedings, *supra* at 7.1.

¹¹⁸⁸ ECJ, case C-341/04, 5/2/2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, paras 39, 44; ECJ, case C-116/11, 11/22/2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp.z o.o.*, para. 41.

¹¹⁸⁹ See *supra* at 7.3.

¹¹⁹⁰ *Oberhammer*, Coordination of proceedings, *supra* at 7.2.2.

from the definition of insolvency proceedings¹¹⁹¹, the recognition of the opening of main proceedings as a tool for the coordination of parallel putative main proceedings¹¹⁹², the recognition of main proceedings and the main liquidator as a tool for the coordination of liquidation and recovery efforts¹¹⁹³ and the aspect of improving information on foreign proceedings which is also relevant in this context.¹¹⁹⁴

Three questions (26-28) of the questionnaire on the EIR addressed general and specific issues of recognition.¹¹⁹⁵ The answers obtained from the national reports confirm the approach set forth above – the provisions on recognition operate smoothly although causing some practical impediments resulting from the aspects mentioned above. Nevertheless, the EU-Commission and the project leaders agreed that the study should include an outline of the findings of the national reports in greater detail. The documentation of the answers received is provided for in this part annexed to the study.¹¹⁹⁶

9.1 Automatic recognition of decisions opening insolvency proceedings (Article 16)

9.1.1 Problems concerning the recognition of decisions opening insolvency proceedings

Regarding the issue of ‘insolvency proceedings’ to be recognised, several reporters referred to the discrepancies between Articles 1 and 2 (a) EIR and Annex A of the Regulation. A major issue causing legal uncertainty is the distinction between liquidation and reorganisation proceedings.¹¹⁹⁷

¹¹⁹¹ See Hess, Scope of the Regulation, *supra* at 3.2.1.

¹¹⁹² See Oberhammer, Coordination of proceedings, *supra* at 7.2.1.3.

¹¹⁹³ See Oberhammer, Coordination of proceedings, *supra* at 7.2.2.

¹¹⁹⁴ See Oberhammer, Coordination of proceedings, *supra* at 7.2.2; Koller/Slonina, Information for Creditors and Lodging of Claims, *supra* at 8.

¹¹⁹⁵ I.e. public policy and the effects of recognition.

¹¹⁹⁶ As the national reports did not provide for any specific information concerning case law in which the effects of decisions opening proceedings had been challenged, the annex does not address this issue specifically (Article 17 EIR). See for a comparative discussion of this problem Oberhammer, Coordination of proceedings, *supra* at 7.2.1.3.

¹¹⁹⁷ See Hess, Scope of the Regulation, *supra* at 3.4.2.

9.1.1.1 Austria

According to the Austrian report, the German debate on the question whether the appointment of a so called “weak” provisional administrator¹¹⁹⁸ in accordance with Section 21 (2) No. 1 InsO has to be recognized in other Member States under Article 16 EIR¹¹⁹⁹, caused some vagueness and uncertainty among Austrian banks and other creditors. In fact, the distinction between the “weak” and the “strong” provisional administrator is not included in Annex C of the Regulation.¹²⁰⁰ According to Austrian courts, German provisional insolvency proceedings are only considered as main insolvency proceedings, if they entail a divestment of the debtor. In that case, Austrian courts can only open secondary proceedings.¹²⁰¹

9.1.1.2 Belgium

Belgian courts adopted a pragmatic approach regarding the question of whether a foreign decision constitutes a judgment opening insolvency proceedings in the sense of Article 1 (1) EIR. According to their view, it is presumed that insolvency proceedings listed in Annex A meet the requirements of Article 1 (1) EIR. In *Monsieur le procureur general/Delos France SARL*, the Court of Appeal Liège¹²⁰² held that the decision to appoint a French *mandataire de justice* did not constitute a decision opening insolvency proceedings. The court pointed out that the sole appointment of an insolvency practitioner did not correspond to the criteria listed in Article 1 (1) and in Annex A of the EIR, if the debtor’s divestment of its assets and the appointment of an insolvency practitioner do

¹¹⁹⁸ “Schwacher“ vorläufiger Insolvenzverwalter. For a comparative discussion of this problem see *Oberhammer*, Coordination of proceedings, *supra* at 7.2.1.3.

¹¹⁹⁹ *Konecny*, Vom Umgang mit dem europäischen Insolvenzrecht, in: *Kodek*, Insolvenz-Forum 2007 (2009), 108; see also *Dammann/Müller*, NZI 2011, 752 et seqq.

¹²⁰⁰ For further information on the German system of provisional insolvency proceedings and the German debate on the “weak” and the “strong” provisional administrator, please consult *Hess/Laukemann/Seagon*, IPRax 2007, 89, 94 with reference to the ECJ’s “Eurofood” decision; *Böhm*, in: Braun (ed.), Insolvenzordnung (5th ed. 2012), § 21, para. 18.

¹²⁰¹ *Oberlandesgericht Innsbruck*, 8 July 2008, 1 R 176/08d, ZIP 2008, 347 and EWIR 2008, 653 (*Paulus*); *Oberster Gerichtshof*, 17 November 2009, 1 Ob 205/09t, ZIK 2010, 73 and RdW 2010, 125.

¹²⁰² *Court of Appeal Liège*, 28 April 2011, *BPPS v Delos France*.

not follow a request for the opening of insolvency proceedings mentioned in the Annex.¹²⁰³

9.1.1.3 France

The French national report gave an account of the new “*sauvegarde financière accélérée*”. Although the French “*sauvegarde*” has been incorporated into Annex A of the Regulation, there is a controversial debate in France whether the term also comprises the new “*sauvegarde financière accélérée*” (Article L 628-1 et seqq. Code de commerce).¹²⁰⁴

9.1.1.4 Germany

In Germany, Greek liquidation proceedings which were opened on the basis of a statute of 2008¹²⁰⁵, but are not listed in Annex A of the Regulation, generated a debate on their compatibility with Article 1 et seq. EIR.¹²⁰⁶ The fact that such proceedings can be opened in case of over-indebtedness and not only in case of definite insolvency constituted a major problem. German courts finally focused on the divestment of the debtor due to the opening of the proceedings and therefore applied Article 16 EIR.¹²⁰⁷

9.1.1.5 Poland

In Poland, problems have arisen in the context of English hybrid proceedings. In 2009, the court of Wrocław refused to recognise English winding-up proceedings on the grounds that in the particular case those proceedings were neither subject to the supervision of the court nor based on the debtor’s insolvency (voluntary winding-up). The national reporter emphasised that in that

¹²⁰³ This case demonstrates the practical problems of the current wording of Articles 1 (1), 2 and the Annex A to the EIR which do not provide for a comprehensive definition of “insolvency proceedings”, see *supra* 2.2.1.1 and 3.2.1.

¹²⁰⁴ *Paulus*, NZI 2012, 302 et seq.; *Wessels*, IILR 2011, 507 et seq.

¹²⁰⁵ Law No 3429/2005, recently modified by Law No 3710/2008.

¹²⁰⁶ *Landesarbeitsgericht (Higher Labour Court) Baden-Württemberg*, 14 April 2011, 6 Sa 115/10 (juris); *Landesarbeitsgericht Hessen*, 25 July 2011, 17 Sa 125/11, n. 9 and 54 seq. (juris); *Landesarbeitsgericht Hessen*, 31 October 2011, 17 Sa 761/11 (juris); *Landesarbeitsgericht Hessen*, 31 October 2011, 17 Sa 1909/10 (juris); a second appeal is currently pending at the *Bundesarbeitsgericht*: 6 AZR 755/11, 6 AZR 48/12 & 6 AZR 49/12.

¹²⁰⁷ See *Landesarbeitsgericht Hessen*, 25 July 2011, 17 Sa 125/11, n. 9 and 54 seq. (juris); *Landesarbeitsgericht Hessen*, 31 October 2011, 17 Sa 761/11 (juris); *Landesarbeitsgericht Hessen*, 31 October 2011, 17 Sa 1909/10 (juris), para. 64.

case the deciding judge had an understanding of English law and was therefore properly distinguishing between non-insolvency and insolvency-related proceedings.

9.1.1.6 Slovakia

The Slovakian national reporter mentioned problems with German and Austrian insolvency proceedings. In one case, the Slovakian Social Authority recognised a German proceeding against a Slovakian company as bankruptcy (liquidation) proceedings and paid out insurance proceeds from an Insolvency Guarantee Fund for the benefit of the company's employees. In the further course of the proceedings the Social Authority came to the conclusion that the German proceedings qualified as restructuring proceedings.¹²⁰⁸ However, according to Slovakian law, the Social Authority was only permitted to transfer the proceeds to the employees in the case of bankruptcy proceedings.

9.1.1.7 Spain

The Spanish reporter mentioned that several Spanish companies have been subject to English schemes of arrangement.¹²⁰⁹ Although the recognition of the English schemes had given rise to some discussion among Spanish academics, it did not cause practical problems.

9.1.2 Practical problems concerning the recognition of decisions opening insolvency proceedings

According to the findings of several national reporters, a practical problem for national courts resulted from lack of information on foreign proceedings, in particular the insufficient publication of decisions opening the proceeding in the cross-border context.¹²¹⁰ Similar criticism was expressed with regard to the formal requirements for the appointment of (foreign) insolvency practitioners and the legal powers conferred on them by the *lex fori concursus*.

¹²⁰⁸ From the perspective of German law, this finding is not convincing as the general definition in section 1 of the Insolvency Act does not separate liquidation and restructuring.

¹²⁰⁹ See *supra*, Hess, Scope of the Regulation, at 3.3.1.15.

¹²¹⁰ See in detail *Koller/Slonina*, Information for Creditors and Lodging of Claims, *supra* at 8; *Oberhammer*, Coordination of proceedings, *supra* at 7.2.2.

9.1.2.1 Belgium

According to the Belgian report, national courts were often not aware that main insolvency proceedings had already been opened in another EU-Member State. Two interviewees stated that in practice immediate recognition was not always possible due to a lack of knowledge of the opening of insolvency proceedings elsewhere. In one case, a Belgian Court opened main insolvency proceedings although a British court had already opened the proceedings.¹²¹¹ The Belgian report also gave an example of parties asking for 'exequatur' of EU-decisions opening insolvency proceedings. With respect to Article 16 EIR, the Belgian court formally denied the possibility of 'exequatur'.¹²¹²

9.1.2.2 United Kingdom (England and Wales)

The English report states that formalities required by foreign courts and officials to prove the appointment of the liquidator have caused administrative burdens. As some of the English insolvency proceedings¹²¹³ are opened without any formal intervention of the court and without any order or judgment, courts and judicial authorities of other Member States frequently ask for a certificate proving the opening of the proceedings. In practice, those English proceedings are not recognised abroad as there is no formal decision or judgment opening the proceedings (cf. Article 16 EIR).¹²¹⁴ Nevertheless, the report did not propose to introduce any formalities as these requirements would create (unnecessary) administrative burdens and costs. To achieve a higher level of legal certainty and to reduce administrative costs, the English report suggested introducing a Europe-wide register for the publication of decisions opening insolvency proceedings.

¹²¹¹ With regard to a similar situation see *Bundesgerichtshof*, 29 May 2008, NZI 2008, 572, annotated by *Laukemann*, JZ 2009, 636 et seqq.

¹²¹² *Burgerlijke Rechtbank Te Brussel*, Beslagrechter, 11 July 2005, in: *Rechtskundig Weekblad* 2005-2006 - no 26 – 25 February 2006, p. 1027.

¹²¹³ Especially administration-proceedings are initiated on application of the owner of a floating charge, cf. para. 14 et seq. IA 1986, or on application of the creditor (or its management) cf. para. 22 et seq. Schedule B1, IA 1986.

¹²¹⁴ *Hess*, Scope of the Regulation, *supra* at 3.4.1.

9.1.2.3 Estonia

The Estonian report criticised the fact that documents proving the appointment of a liquidator (Article 19 EIR) do often not provide for any information about the liquidator's legal competence. The report proposes to introduce a standardised form describing the legal effects of decisions opening insolvency proceedings. With regard to Article 19 (2) EIR the question remained unsettled who was responsible for the translation of the judgment opening insolvency proceedings and who should bear the translation expenses.

9.1.2.4 Germany

In Germany, several interviewed stakeholders mentioned that the lack of information concerning the filing of claims in foreign insolvency proceedings is a problem (cf. Articles 39 and 40 EIR). However, no specific case law has been reported.

9.1.2.5 Latvia

The Latvian national report referred to a practice of English courts sending notifications to Latvian creditors informing them about the opening of insolvency proceedings. Nevertheless, the report criticised that in many cases English courts did not indicate the name and the address of the appointed liquidator. The report also discovered that in many cases creditors were not informed sufficiently about the exercise of their rights and their duties in the main proceeding.

9.1.2.6 Poland

The Polish reporter shared the concerns of the Estonian report regarding Article 19 EIR.¹²¹⁵ Consequently, the report recommended elaborating a standard form on the appointment of the liquidator which should be annexed to the EIR.

9.2 The public policy exception (Article 26 EIR)

The application of Article 26 EIR by the courts and judicial authorities of EU-Member States has been recently explored by the Study IP/C/JURI/IC/2010-076

¹²¹⁵ See *supra* at 9.1.2.3.

elaborated for the European Parliament.¹²¹⁶ The study came to the conclusion that national courts reluctantly apply Article 26 EIR. The result, which corresponds to the underlying objectives of Article 26 EIR, has been confirmed by the current evaluation.¹²¹⁷

9.2.1 General

Traditionally, the public policy exception is regarded as a kind of safeguard for national courts to avoid gross injustice and to implement European and domestic fairness standards in the cross-border context.¹²¹⁸ According to Article 26 EIR, a foreign judgment in insolvency matters is not recognised where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, especially to its fundamental principles or constitutional rights and liberties. As a matter of principle, the public policy exception comprises fundamental values which may be derived from substantive and from procedural law.¹²¹⁹ However, in practice Article 26 EIR usually applies to procedural aspects (and to – alleged – abusive behaviour of the parties).¹²²⁰ In *Eurofood*, the ECJ directly referred to its case-law on the Brussels Convention (especially to the *Krombach*¹²²¹ decision) and held that the public policy exception of Article 26 EIR was “reserved for exceptional cases”. Recourse to Article 26 EIR shall only to be envisaged where recognition and enforcement of decisions opening insolvency proceedings would be “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle” and that “the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is

¹²¹⁶ Hess/Pfeiffer, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law”, <http://www.europarl.europa.eu/committees/it/juri/studiesdownload.html?languageDocument=EN&file=40891>.

¹²¹⁷ See for a comparative overview Oberhammer, Coordination of proceedings, *supra* at 7.2.2.

¹²¹⁸ Hess/Pfeiffer, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 20.

¹²¹⁹ According to Virgós/Schmit, Report on the Convention on Insolvency Proceedings (1996), para. 206 the main issues under Article 26 are the creditor's and the debtor's right of participation (procedural public policy) and the principles of non-discrimination and the protection of private property (substantive public policy), Hess, Europäisches Zivilprozessrecht (2010), § 4, paras 76 et seq. and § 6, para. 203.

¹²²⁰ For a compilation of case law cf. Hess/Pfeiffer, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 119 et seq.

¹²²¹ ECJ, case C-7/98, 3/28/2000, ECR 2000 I-1935, *Krombach./Bamberski*, para. 44.

sought or of a right recognised as being fundamental within that legal order” (para 63).¹²²² According to the case-law of the *ECJ*, there is a uniform concept of public policy in the European law of civil procedure. The public policy exception of the Brussels I and Brussels II^{bis} Regulation and of the Insolvency Regulation are interpreted and applied consistently by the *ECJ* as well as by the courts of the Member States.¹²²³

However, Article 26 EIR must equally be applied in the systematic context of the Regulation and in the light of its guiding principles: In this respect, the principles of universality (recital 11) and of equal treatment of creditors (recital 21) are opposed to any unnecessary fragmentation of insolvency proceedings based on a non-recognition of foreign insolvency proceedings. Against this backdrop, the scope of the public policy exception of Article 26 EIR is limited to exceptional pathological cases where parties had not been able to implement their rights under the laws of the opening State – mainly because the fair trial principle was not respected.¹²²⁴ However, the judicial protection of the creditors is generally guaranteed and implemented in the insolvency proceedings of the opening State. As a consequence, creditors must file their claims in the main proceedings, unless they get the additional protection in secondary proceedings.¹²²⁵ In any case, the public policy exception should not be used to challenge jurisdiction of the opening State.¹²²⁶ If a creditor asserts that the debtor relocated his COMI in an abusive way, he has to raise this objection in the Member State of the main proceedings.

¹²²² *Hess/Pfeiffer*, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 27-29.

¹²²³ *Hess/Pfeiffer*, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 30 et seqq. and p. 167-168.

¹²²⁴ *District Court Haarlem*, 7 September 2010, Nr. F. 172470. In this case, the debtor appealed against the recognition of a Greek decision on the opening of insolvency proceedings arguing that Greek insolvency law did not provide for any remedy against the opening of insolvency proceedings. Cf. *Hess/Pfeiffer*, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 163 (with further references).

¹²²⁵ Thereto *Laukemann*, IPRax 2012, 207, 213 et seqq.

¹²²⁶ *ECJ*, case C-444/07 *MG Proboud Gdynia* ECR 2010 I-417, paras 27 and 29; *ECJ*, case C-116/2011, 11/22/2012, *Bank Handlowy/.Christianapol*, para. 41. See also *Oberhammer*, Coordination of proceedings, *supra* at 7.2.2.

9.2.2 The application of the public policy exception in the EU-Member States¹²²⁷

Although national courts frequently refer to Article 26 EIR, there are only a few cases where the public policy exception was raised successfully.¹²²⁸ The guiding principles elaborated by the *ECJ* are generally applied by the courts of EU-Member States.¹²²⁹

9.2.2.1 Austria

In several cases, Austrian courts expressly held that the (alleged) lack of international jurisdiction of the court opening insolvency proceedings could not be qualified as a violation of public policy.¹²³⁰

9.2.2.2 Belgium

Concerning an English administration order, the Enforceability Court (*Beslagrechter*) Brussels¹²³¹ held in 2005, that neither a lack of jurisdiction to open insolvency proceedings nor a lacking reasoning of the decision were to be considered as a violation of public policy.

9.2.2.3 France

Although French courts have not denied recognition of any insolvency decision on grounds of public policy, the French Supreme Court (*Cour de cassation*) recently ruled in an *obiter dictum*¹²³² that it would deny recognition of decisions opening insolvency proceedings if creditors domiciled outside the opening State were not entitled to challenge jurisdiction of the opening court (right to access to court).

¹²²⁷ For relocation cases cf. *Hess*, Jurisdiction, *supra* at 4.1.3.4.

¹²²⁸ For statistical information cf. *Hess/Pfeiffer*, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 119-120.

¹²²⁹ *Oberhammer*, Coordination of proceedings, *supra* at 7.2.2.

¹²³⁰ *OLG Wien*, 9.11.2004, 28 R 225/04w, "Stojevic", NZI 2005, 56 (*Paulus*) = ZIK 2005/28, 37 = cimejes.com No. 72; confirmed by the Supreme Court: *OGH*, 17.3.2005 - 8 Ob 135/04t, "Stojevic", NZI 2005, 465 (*Paulus*).

¹²³¹ *Beslagrechter Brussel*, 11 July 2005, NV MG Rover B. v. VZW K.B.T.C., RW 2005-06, 1027.

¹²³² Com. 15 February 2011, case no. 09-71436, Rev.Crit. DIP 2011, 903, Rev. des sociétés 2011, 443.

9.2.2.4 Germany

In the case-law of German courts, the distinction between substantive and procedural public policy is present. Most cases relate to procedural public policy, especially to the creditor's right to be heard and procedural fraud (relocation cases). Article 26 EIR is regarded as an exception which is to be applied narrowly. There is a consensus in case-law and legal literature that available remedies in the Member State of origin must be exhausted.¹²³³

The only case in which Article 26 of the Regulation was expressly but wrongly applied is the decision of the German insolvency court at Nuremberg in the famous *Brochier* case. In this case, a German company had been transformed into a private limited company and its seat was transferred to England for the purpose of a reconstruction by English insolvency law.¹²³⁴ On August 4, 2006 the new board applied for the opening of insolvency proceedings in London. Forty-five minutes later, the German workers' council applied for the opening of insolvency proceedings in Germany. The insolvency court at Nuremberg had to decide whether the English application (and provisional opening of the insolvency) barred the German proceedings.¹²³⁵ It first scrutinised whether the English court had correctly stated that the centre of the debtor's main interests was in England and not in Germany, where the construction plants (and the former seat of the company) were located. According to the principle of mutual recognition, the application of such a test was incorrect – the jurisdiction of the court under Article 3 of the Regulation is not subject to review by the courts of other EU Member States.¹²³⁶ The German court went on to scrutinise whether the transfer of the seat to England had to be considered as an abuse of procedure. Finally, the court held that the lacking independence of the English administrator amounted to a violation of German public policy.¹²³⁷ When the joint English administrator visited the German site of the company, he quickly

¹²³³ Hess/Pfeiffer, Interpretation of the Public Policy Exception (Study IP/C/JURI/IC/2010-076), p. 130-131 with further references.

¹²³⁴ *Amtsgericht Nürnberg*, 8/15/2006, NZI 2007, 185.

¹²³⁵ See ECJ, case C-341/04, *Eurofood IFSC Ltd.*, ECR 2006 I-3813, para. 30.

¹²³⁶ Correctly: *District Court Katowice*, 1/22/2007, XIX GZ 705/06 – jurisdiction for opening of insolvency main proceedings in France cannot be reviewed under Article 26 of Regulation (EC) No 1346/2000. See also *Oberhammer*, Coordination of proceedings, *supra* at 7.2.1.3.

¹²³⁷ In this respect, the court did not correctly assess English insolvency law, see comprehensively *Laukemann*, Unabhängigkeit des Insolvenzverwalters (2010), p. 407 et seq.

realised that the company's centre of main interest was in Germany, not in England, and the application for opening insolvency proceedings in London was finally dismissed.¹²³⁸

9.2.2.5 Lithuania

In Lithuania, a national court recently denied the application of the public policy exception in a case where a Lithuanian citizen had shifted his COMI to Latvia to benefit from a more favorable insolvency regime.¹²³⁹ In this case, a creditor also alleged a violation of Article 26 EIR arguing that he had not been informed about the hearing of the case and that he could therefore not exercise his right to be heard. Although the Lithuanian court affirmed the importance of the right to be heard, it finally held that there was no evidence that the creditor actively tried to challenge the Latvian proceeding in order to be heard.

9.2.2.6 Poland

In Poland, there are some cases where recognition was refused at the first instance. However, these decisions were overturned on appeal or by the Supreme Court of Poland. In the context of the *Christianapol* case, the Regional Court of Poznan refused to recognise the decision of a French court opening insolvency proceedings (*sauvegarde*) against a company which had shifted its COMI to France and was not to be considered as insolvent pursuant to Polish law. The judgment was upheld on appeal by the Court of Appeal of Poznan but annulled by the Polish Supreme Court. In its judgment of 2 February 2012¹²⁴⁰, the Supreme Court invoked the underlying principle of mutual trust between courts in the EU and clearly emphasised that Polish courts were not entitled to examine the correctness of decisions of other Member States concerning the determination of COMI. This case-law has recently been confirmed by the ECJ.¹²⁴¹

¹²³⁸ *Hans Brochier Ltd v Exner*, [2006] EWHC 2594 (Ch.Div.).

¹²³⁹ *Court of Appeal of Lithuania*, 7 May 2012, case no. 2T-26/2012.

¹²⁴⁰ *Supreme Court of Poland*, 2 February 2012, case no. II CSK 305/11. For a similar judgment please consult *Supreme Court of Poland*, 16 February 2011, case no. II CSK 406/10.

¹²⁴¹ ECJ, case C-116/11, 11/22/2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp.z o.o.*, para. 41.