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THE REVIEW OF THE EU INSOLVENCY REGULATION: SOME PROPOSALS FOR AMENDMENT

Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht - NVRII
Netherlands Association for Comparative and International Insolvency Law - NACIIL

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Preface

In August 2011 the Netherlands Association for Comparative and International Insolvency Law (NACIIL) (in Dutch: Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht, NVRII) has been established. Its goal is to promote the interest for and the knowledge of comparative and international insolvency law. The association will for this purpose hold conferences and organise lectures or courses, initiate student initiatives and the publication and distribution of articles and reports. As many of the initiatives will be in English, the association also reaches out to professionals, scholars and students (with their COMI) outside the Netherlands in an aim to further jointly the development of comparative and international insolvency law. Presently the Association has over 130 members.

Its first Annual Conference was held on December 8, 2011, in Amsterdam. During the meeting Reports have been discussed written by Prof. Loes Lennarts, professor of Company Law, University Utrecht and of Comparative Company Law, University Groningen, and Prof. Francisco Garcimartín, professor of Private International Law at the University Autónoma of Madrid, Madrid, and Counsel of Linklaters Madrid. The authors have critically analysed parts of the EU Insolvency Regulation and have proposed amendments to change this Regulation. The board of NVRII thanks both reporters for their expertise and commitment to deliver their reports.
We would also like to thank the sponsors who have made the Annual Conference and the first initiatives of NVRII possible, the main sponsor De Brauw Blackstone Westbroek and the other general sponsors: ABN Amro, DLA Piper, Houthoff Buruma, RESOR, the German Publisher Beck Verlag, INSOL Europe and Kluwer Legal Publishers.

For further information about NACIIL see:
www.nvrii.org or *www.naciil.org*

Board NVRII
April 2012

Jaarrede prof. mr. B. Wessels

Aan de spits van een moderne rechtsontwikkeling

Eerste jaarvergadering, Amsterdam, donderdag 8 december 2011

Dames en heren,

Met de oprichting van de Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht is een nieuwe stap gezet in de ontwikkeling van ons Nederlandse insolventierecht. Binnen enkele maanden telt onze vereniging (NVRII) inmiddels ruim 120 leden! Dit weerspiegelt enerzijds dat de juridische en financiële praktijk met internationale vragen wordt geconfronteerd en anderzijds dat de behoefte aan voorlichting, kennis en discussie groot is. Ik leid dit ook af uit de hoge opkomst voor de vergadering van vanmiddag, onze eerste jaarvergadering.

Wie vijfentwintig jaar geleden deze internationale dimensie van het insolventierecht zou hebben voorspeld zou als risé zijn afgeschilderd. Internationaal insolventierecht werd door de echte specialisten op het terrein van het internationaal privaatrecht gemeden. Al in 1880 gold de waarschuwing van T.M.C. Asser: "De internationale regtsconflicten, waartoe het faillissement aanleiding geeft, zijn van zeer ingewikkelden aard".[1] Het was ook een bescheiden terrein. De honderd jaar later nog steeds gebruikte handboeken (Molengraaff-Star Busmann, 1955, en Handboek Polak, 1972) konden het gehele internationale faillissementsrecht makkelijk binnen twintig pagina's behandelen. Maar, zoals de bekende Amerikaanse hoogleraar Jay L. Westbrook vijftien jaar geleden al schreef: "Like the wail of a high speed train in the night, the field of transnational and comparative insolvency has come suddenly upon us, transformed from a distant possibility into a surrounding effect….".[2] In het laatste decennium is het zakenverkeer enorm geïnternationaliseerd. De uitbreiding van de Europese Unie, de introductie van de euro, de verdere opkomst van groepen van vennootschappen, het vrije verkeer van personen, de globale beschikbaarheid van kapitaal, het gebruik van IT-communicatie, maar ook de financiële crisis en de stabiliteit van de eurozone hebben direct impact op ons leven en op het recht dat het bedrijfsleven beheerst, en met een knipoog naar James

1 T.M.C. Asser, Schets van het Internationaal Privaatregt, Haarlem: De Erven F. Bohn 1880, p. 169.

2 Jay Lawrence Westbrook, Creating International Insolvency Law, in: 70 American Bankruptcy Law Journal 1996, p. 563 e.v. Zie ook van dezelfde auteur, in: 46 Texas International Law Journal 2011, p. 437: "The globalization of the markets acts like a superhighway through the middle of town" (deze aflevering bevat ca. 200 pagina's van een zevental auteurs over "the role of national priority systems in cross-border insolvencies").

Bond: “international insolvency has not shaken the law, but certainly has stirred it.”

Internationaal insolventierecht confronteert ons met belangrijke nieuwe regelgeving, zoals de Europese Insolventieverordening uit 2002, die door Nederlandse rechters op dit moment al in meer dan honderd zaken is toegepast. Die verordening onderstreept de belangwekkende rol van de rechter, want “…. de nationale rechter, die in het kader van zijn bevoegdheid belast is met de toepassing van de bepalingen van het Unierecht [moet] zorg dragen voor de volle werking van die bepalingen en [moet] daarbij zo nodig, op eigen gezag, elke strijdige nationale bepaling …. buiten toepassing …. laten zonder dat hij eerst de intrekking hiervan bij wet of enige andere constitutionele procedure heeft te vragen of af te wachten…”, aldus in oktober van dit jaar het Hof van Justitie van de EU in de Interedil-zaak. Naast die krachtige rol van de rechter benadrukt het Europese hof ook nog eens de manier van uitleg die afwijkt van de traditionele manier van interpretatie, want “…. volgens vaste rechtspraak vereisen de eenvormige toepassing van het Unierecht en het gelijkheidsbeginsel dat de bewoordingen van een bepaling van Unierecht, die voor de betekenis en de draagwijdte ervan niet uitdrukkelijk naar het recht van de lidstaten verwijst, normaliter in de gehele Unie autonoom en uniform worden uitgelegd, rekening houdend met de context van de bepaling en het doel van de betrokken regeling….”.[3] Deze methode van uitleg is niet nieuw, maar zij is in het Europese insolventierecht nog weinig beproefd, hetgeen een uitdaging is, niet alleen voor de rechterlijke macht, maar ook voor practici en academici.

Behalve nieuwe hard law regelgeving brengt het international insolventierecht de praktijk en de wetenschap in contact met een overweldigende hoeveelheid richtlijnen, best practices en ander vormen van soft law. Dit veld van semi-recht poogt bruggen te slaan over de hiaten die traditionele, door Staten gecontroleerde wetgeving laat. Hun betekenis, hun kwaliteit, hun democratische legitimatie en hun toepasbaarheid in internationale zaken zijn niet alleen onderwerp van discussie, maar deze instrumenten van soft law bieden ook nieuwe inzichten, voor rechters om grensoverschrijdende coördinatie van zaken op te pakken, voor partijen om afstemming van procedures in een protocol vast te leggen of voor wetgevers, bijvoorbeeld om bestaande wetgeving te evalueren.

Diverse spelers in de markt (rechters, adviseurs, financiers, curatoren) worden dus in hun verantwoordelijkheden en hun werk in toenemende mate beïnvloed door deze nieuwe ontwikkelingen. Maar ook in de rechtsweten-

3 HvJ EU 20 oktober 2011, zaak C-396/09, punt 38 en 42.

schap dringen zij door of wellicht zelf heeft de rechtswetenschap het pad gebaand. Geïnspireerd door de introductie van de Europese insolventieverordening in 2002 hebben de eerste vijf jaren van het eerste decennium van deze eeuw vier Nederlandse proefschriften (Veder, 2004; Israël, 2005; Berends, 2005, en als voorbode Bos, 2000) een enorme stimulans gegeven aan de ontwikkeling van wetenschap en praktijk van dit gecompliceerde vakgebied.[4] De aanwezigheid van een aantal PhD researchers op onze ledenlijst en van master-studenten en promovendi hier vandaag geeft alle vertrouwen dat deze lijn zal worden voortgezet. Dames en heren,

De Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht (NVRII) heeft ten doel het bevorderen van de belangstelling voor en de kennis van het rechtsvergelijkende en internationaal insolventierecht en alles wat daarmee in de ruimste zin verband houdt of daaraan bevorderlijk is. De vereniging tracht dit doel onder meer te bereiken door het houden van vergaderingen, het organiseren van cursussen, het initiëren van student-initiatieven, het uitgeven en verspreiden van publicaties en – uiteraard – verder door alle wettige middelen die tot het doel van de vereniging bevorderlijk kunnen zijn. Deze eerste jaarvergadering is tevens de eerste zichtbare activiteit van de vereniging. Gezien de overweldigende belangstelling heeft het bestuur zich voorgenomen ook in de eerste helft van volgend jaar al enkele activiteiten te organiseren. U moet dan denken aan workshops van twee tot drie uur over een bepaald thema of een lezing met discussie over recente rechtspraak. Daarbij kunnen ook buitenlandse sprekers worden uitgenodigd. Dat zal bijdragen aan een “eenvormige toepassing van het Unierecht”, maar ook aan een beter begrip van het denken en doen in andere juridische culturen. Ik ben er trots op dat we de jaarvergadering en toekomstige activiteiten mede mogelijk kunnen maken door onze sponsoren, de hoofdsponsor van vandaag De Brauw Blackstone Westbroek en de andere algemene sponsors ABN Amro, DLA Piper, Houthoff Buruma, RESOR advocaten, alsmede de Duitse uitgever Beck Verlag, INSOL Europe en Kluwer Juridische Uitgeverij. Met de internationale dimensie is ook in de statuten al rekening gehouden, want

4 T.M. Bos, Grensoverschrijdend faillissementsrecht in Europees perspectief. Een studie naar het faillissement in het Internationaal Privaatrecht van Nederland, België en Duitsland, diss. VU Amsterdam, 2000; Paul Michael Veder, Cross-Border Insolvency Proceedings and Security Rights. A comparison of Dutch and German law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency, diss. Nijmegen, 2004; Jona Israël, European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea, Doctoral Thesis, European University Institute, Florence, 2004; A.J. Berends, Insolventie in het internationaal privaatrecht, diss. VU Amsterdam, 2005 (in 2011 in een tweede druk verschenen in de serie Recht en Praktijk Insolventierecht, Deventer: Kluwer).

daarin staat dat de Engelse benaming van de vereniging is: Netherlands Association for Comparative and International Insolvency Law. Er wordt momenteel hard gewerkt aan een website, die zowel in het Nederlands als in het Engels beschikbaar zal zijn. Een uitnodiging om onze activiteiten te steunen zal ook begin volgend jaar naar buitenlandse collega's uitgaan.

De vereniging wil ook met al haar leden midden in de maatschappij staan. De laatste weken worden we telkens weer gealarmeerd door het financiële drama dat zich in Griekenland afspeelt en de financiële glijbaan waarop Italië, Portugal, Slovenië en ook Hongarije en België zich bevinden. Hoewel reorganisatie- en insolventiemethodieken voor bedrijven bekend zijn en bijvoorbeeld in Frankrijk en Duitsland weer van vernieuwingen worden voorzien, wordt daar bij de aanpak van financiële problemen van Staten zelden naar gekeken. Sterker, er is niet een internationale of Europese set aan voorspelbare en evenwichtige regels om het probleem van staats-insolventies aan te pakken. Er zijn tientallen personen uit allerlei landen die soms in de dubbelrol als politicus en als crediteur oplossingen aandragen. Over noodkredieten (via fondsen) of over de rol van een centrale financier (ECB) wordt volkomen verschillend gedacht! Op dit punt heb ik niet de indruk dat gebruik wordt gemaakt van insolventieprocedures die wij kennen, die soms gebaseerd zijn op de techniek van "debtor-in-possession" (of "Eigenverwaltung"), waarbij de debiteur met eigen regie, maar onder toezicht van een onafhankelijke persoon aan een oplossing kan werken. Er zijn evenmin effectieve procedures om bepaalde groepen van crediteuren tot medewerking te nopen. In Europa bestaat beslist een noodzaak om een eigen reorganisatie- en insolventiesysteem voor landen, die schuldenaar zijn te ontwerpen. Dat systeem zou specifieke kenmerken moeten hebben die verband houden met de bijzondere positie van een souvereine staat als debiteur, zoals regels over de disciplinering van de staatfinanciën en het inbouwen van belemmeringen om de vrije liquidatie van staatseigendommen tegen te gaan. Een procedure met betrekking tot een "sovereign debtor" zou mijns inziens onder toezicht moeten staan van een internationaal gerecht, bijvoorbeeld een speciale kamer binnen het Hof van Justitie van de EU.

Ik ga nu niet in op de ontwikkelingen in Nederland om een verbeterde insolventiewetgeving tot stand te brengen. Begin dit jaar heeft minister Opstelten veelbelovende activiteiten op wetgevingsterrein naar de bureaulade verwezen. In landen om ons heen, zoals Frankrijk, België en Duitsland, zijn en worden daarentegen nieuwe flexibele reorganisatieregelingen geïntroduceerd. Als de economische vooruitzichten inderdaad zo weinig belovend zijn als wordt voorspeld, dan mist Nederland op korte termijn een deugdelijke reorganisatieregeling die bedrijven kansen biedt om er weer bovenop te komen. Dan blijft het speelveld bepaald door onduidelijke regels en door de weinig begrensde macht van banken en fiscus. En hoe gaat Nederland om met faillissementen vanuit niet EU landen? De Yukos-tragedie die zich de laatste jaren via kort geding- en bodemprocedures in Nederland aan het ontrollen is laat schrijnend het gemis aan een goede stelsel van wetsbepalingen zien. Mijn huidige bestuurslid Berends zei bij het 200-jarig bestaan van het Ministerie van Justitie in 1999 ten aanzien van de toen geldende stand van zaken: "De conclusie is dat Nederland niet met goed fatsoen met zijn recht met betrekking tot grensoverschrijdende insolventie de 21e eeuw in kan".[5] Voor de Europese verhoudingen biedt de verordening een bruikbaar, maar – zoals we vanmiddag zullen bespreken – een voor verbetering vatbaar stelsel. Hoe nu in relatie tot faillissementen die uit niet-lidstaten komen, zoals die uit Rusland of de Verenigde Staten? Het uit 1887 stammende ontwerp van de Staatscommissie tot herziening van het Wetboek van Koophandel had in haar voorstel het beginsel van universaliteit tot leidend beginsel genomen, maar noch de Regering noch de Tweede Kamer was overtuigd[6]. De Staatscommissie meende dat de Nederlandse wetgever zich hierdoor "……. wat het faillietenrecht betreft, aan de spits [zal] stellen der moderne rechtsontwikkeling". Het is meer dan treurig om te constateren dat na 125 jaar de wetgever nog geen stap verder gekomen en dit terrein laat aan de weinig ervaren rechter. Ik roep de wetgever dan ook op om het in 2007 in het Voorontwerp in afdeling 10 opgenomen stelsel van "Internationaal Insolventierecht" met spoed ter hand te nemen opdat Nederland een systeem van internationaal insolventierecht heeft dat zich glansrijk met dat van de Verenigde Staten en onze buurlanden Engeland, Duitsland en België kan meten.[7]

5 A.J. Berends, Kan het Nederlandse recht met betrekking tot grensoverschrijdende insolventie de 21e eeuw in?, in: S.C.J.J. Kortmann en T.H.D. Struycken (red.), Herijking van het faillissementsrecht. Serie Privaatrecht van de 21e eeuw, Den Haag, 1999, p. 67 e.v.

6 Van Der Feltz II (1897), p. 466 e.v. respectievelijk p. 291 e.v.

7 Zie B. Wessels, Internationaal insolventierecht in het Voorontwerp, in: J.A. van de Hel e.a. (red.), Het Voorontwerp Insolventiewet nader beschouwd, Ars Aequi Libri, Nijmegen 2008, p. 283 e.v.

Dames en heren,

Zich aan de spits plaatsen van de moderne rechtsontwikkeling, dat is de ambitie van het bestuur van NVRII. Zij hoopt dat de vereniging belangrijke impulsen zal geven aan de voortgaande wetenschapsbeoefening in het rechtsvergelijkende en internationale insolventierecht en aan een solide en inventieve praktijkuitoefening, door practici en rechter. *And by disclosing our association's ambition we can switch to the theme of this afternoon, several proposals to improve the EU Insolvency Regulation. I will say no more and listen carefully. I wish you an interesting and entertaining afternoon and give the floor to professor Michael Veder, the associations Vice-Chair, who also will introduce our two speakers.*

Annual address prof. dr B. Wessels (Summary)

Annual address of professor Bob Wessels, Chairman of the Netherlands Association for Comparative and International Insolvency Law, First Annual Conference, Amsterdam, December 8, 2011

The goal of the Association (NACIIL), established September 2011, is to promote the interest for and the knowledge of comparative and international insolvency law. The association will for this purpose hold conferences and organise lectures or courses, initiate student initiatives and the publication and distribution of articles and reports. As many of the initiatives will be in English, the association also reaches out to professionals, scholars and students (with their COMI) outside the Netherlands in an aim to further jointly the development of comparative and international insolvency law. NACIIL started September 2012 and now has over 120 members. In his annual address Wessels highlights the (Dutch) developments, especially in international insolvency law: 20 years ago rather unknown, now in the words of professor Jay L. Westbrook: "Like the wail of a high speed train in the night, the field of transnational and comparative insolvency has come suddenly upon us, transformed from a distant possibility into a surrounding effect….".[1] International insolvency law is of utmost importance both for practitioners and judges, as it is in the words of the Court of Justice of the European Union "….. in accordance with settled case-law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation….". It continues: "The Court has consistently held that it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question….". These quotations underline (i) a firm role for a national court as well as (ii) the application of an interpretation which deviates from traditional, national approach to interpretation. [2] In addition to hard law, international insolvency practice is strongly influ-

1 Jay Lawrence Westbrook, Creating International Insolvency Law, in: 70 American Bankruptcy Law Journal 1996, p. 563 e.v. Zie ook van dezelfde auteur, in: 46 Texas International Law Journal 2011, p. 437: "The globalization of the markets acts like a superhighway through the middle of town" (deze aflevering bevat ca. 200 pagina's van een zevental auteurs over "the role of national priority systems in cross-border insolvencies").

2 Court of Justice of the EU 20 October 2011, Case C-396/09, para. 38 and 42.

ence by a vast volume of soft law, such as Guidelines, Principles, Best Practices and other sources of soft law. This area aims to bridge the gaps in traditional, State controlled legislation. Their meaning and quality, their democratic lawfulness and their applicability in cross-border cases are not only a subject of discussion, but these instruments also provide new views and approaches, for judges to align and coordinate international cases, for parties to best coordinate practical matters and to lay these down in protocols and for legislators to evaluate existing legislation.

Every year the NACIIL will organise activities, such as workshops, seminars or conferences, to which also non-Dutch speakers will be invited, which will contribute to the uniform application of Union law, as well as enable to understand ways of thinking and acting in other Legal cultures. The Annual Conference has been made possible with support of the main sponsor De Brauw Blackstone Westbroek and the other general sponsors: ABN Amro, DLA Piper, Houthoff Buruma, RESOR, the German Publisher Beck Verlag, INSOL Europe and Kluwer Legal Publishers.

In a final note Wessels encourages the establishment of a framework for the solution of sovereign debts, using methods of reorganisation known in several countries in the solving of Financial troubles for business is distress. He refers to many court cases relating to the unsecure position of insolvent Yukos Oil and its assets in the Netherlands, and calls for the Dutch Ministry of Security and Justice to finally introduce a system of international insolvency rules, already drafted in 2007. NACIIL aims to position itself in the forefront of modern legal developments.

THE REVIEW OF THE EU INSOLVENCY REGULATION: SOME GENERAL CONSIDERATIONS AND TWO SELECTED ISSUES (HYBRID PROCEDURES AND NETTING ARRANGEMENTS)

Francisco J. Garcimartín
University Autónoma of Madrid

SUMMARY

1. Introduction

2. General Considerations
    2.1. The EU legal framework on cross-border insolvency
    2.2. Internal consistency of the legal framework
    2.3. The analytical framework for the revision of the Insolvency Regulation

3. Particular issues
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        3.2.2. The concept of close-out netting: an outline
        3.2.3. Cross-border problems
        3.2.4. Diagnosis: the lack of parallelism between the EU instruments

4. Final conclusions

§ 1. Introduction

1. Article 46 of the EU Insolvency Regulation (IR) envisages that, no later than 1 June 2012, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of such Regulation. The report shall be accompanied, if need be, by a proposal for adaptation of the Regulation.

2. This process of revision of the IR requires: (i) an evaluation of how the Regulation has worked in practice until now, (ii) the identification of its shortcomings (iii) and the elaboration of proposals to improve the text, if need be. The purpose of this paper is to provide some guidelines to such process.

3. The paper is divided in two parts.

Firstly, I will make three general considerations about the revision of the IR (Section 2). The IR is a key element of the EU legal framework on cross-border insolvency. However, there are also other instruments dealing with this matter. In the process of reviewing the IR, it is important not to forget these instruments to avoid loopholes and to ensure legal consistency within the legal system as a whole.

Secondly, I will deal with two particular issues: hybrid procedures and netting arrangements (Section 3). The legal regime laid down by the IR with regard to such issues has given rise to many doubts. The EU legislator should, therefore, consider a possible amendment of the text in order to clarify such regime.

§ 2. General Considerations

2.1. EU legal framework on cross-border Insolvency (the "hermeneutic circle")

4. The IR is the most important piece of the EU legal framework on cross-border insolvency. However, it is not an all-embracing text. With regard to its personal scope, the IR excludes from its sphere of application three categories of debtors: (i) insurance undertakings; (ii) credit institutions; (iii) and investment firms (see recital 9 and art. 1.2 IR). The insolvency of *insurance undertakings* is subject to a special regime: The Directive 2001/17/EC on the reorganization and winding-up of insurance undertakings. The insolvency of *credit institutions* is also subject to another special regime: the Directive 2001/24/EC on the reorganization and winding-up of credit institutions.

5. However, there is no EU instrument for the third category of debtors, investment firms, i.e. *"investment firms that provide services involving the holding of funds or securities for third parties and collective investment undertakings"* (see art. 1.2 *in fine* IR). Thus, the insolvency of these debtors is governed by the Private International Law (PIL) rules of each Member State.

Cross-border insolvency within the EU: legal map

Debtor	Instrument
General debtors, i.e. non financial debtors	Insolvency Regulation
Insurance undertakings	Directive 2001/17/EC
Credit institutions	Directive 2001/24/EC
Investment firms	Domestic PIL rules

6. Set aside the abovementioned instruments, there are also material insolvency-law provisions dealing with particular aspects such as, for example, settlement finality in payment and securities settlement systems, financial collateral or protection of employees[1].

1 See, with further references, M. Virgós/F. Garcimartín, *The European Insolvency Regulation: Law and Practice,* 2004, p. 9.

7. From the legal map described above, it is noteworthy to mention an important *lacunae* in the EU legal framework on cross-border insolvency: There are no common PIL rules for investment undertakings[2]. The rules on jurisdiction to open insolvency proceedings and on applicable law remain in the hands of Member States, which implies a risk of different and even contradictory approaches. Furthermore, there is no guarantee of the *mutual recognition* of insolvency proceedings, with regard to such undertakings, within the EU. This loophole has caused in practice considerable problems.

Example: The **Lehman case** offers a good example. Lehman Brothers International (Europe) was a company incorporated in the UK, which had a branch in Spain. UK courts opened insolvency proceedings against that company in the UK. Since no EU instrument was applicable, the recognition of the effects of the UK insolvency proceedings in Spain was subject to Spanish PIL rules. According to these rules -and unlike the principle of *automatic recognition* embodied in EU rules (see arts. 16 and 17 IR)-, the recognition in Spain requires an exequatur procedure: a specific and autonomous declaration by the Spanish courts confirming that the foreign ruling meets certain conditions. In this case, the request for recognition was filed in September, 2008, and declared by the Spanish judge in June, 2009[3]. That is, *nine months later!* It took nine months to give legal effects to the English insolvency proceedings in Spain and, therefore, to recognize the power of the English liquidator. Additionally, serious problems arose as to the possibility of applying for provisional measures or to the law applicable to the effects of such proceedings, since Spanish conflict-of-law rules differ from UK conflict-of-law rules. Is it not worrying that in one of the most relevant cross-border insolvency case recently experienced in the EU, no EU instruments were applicable?

8. In view of the above, the first question we must ask ourselves is whether -instead of or together with focusing on the review of the IR -it would be necessary to fill that loophole and set forth a complete legal framework for cross-border insolvencies within the EU. I believe that the answer to that question should be an affirmative one. Furthermore, since

2 See also, E. Braun/J. Heinrich, "Finanzdienstleister in der "grenzüberschreitenden" Insolvenz - Lücken im System?", *N.Z.I.,* 11/2005, p. 578 *et seq.*; B. Wessels, ""Towards a European Bank Company Law?", in F.B. Graaf/W.A.K. Rank (eds.), *Financiële markten en Internationaal Privaatrecht, NIBE-SVV,* 2011 (forthcoming); or European Commission, *Summary of the public consultation on the reorganization and winding-up of credit institutions,* December 2007, p. 3, at www.ec.europe.eu.

3 Judgement of the Commercial Court of Madrid, of 4 June 2009, see *A.E.D.I.Pr.*, 2009, p. 1045.

we already have a set of instruments that may be used as “patterns or models” for that new text, the task does not seem particularly complicated. In particular, the option for a Directive on cross-border insolvency of investment firms based on the approach followed by the other two instruments on financial entities (credit institutions and insurance undertakings) should be preferable to a mere extension of the personal scope of the IR. Actually, the simplest solution would be to extend the scope of application of the Directive on credit institutions to investment firms.

9. Thus, the *first general conclusion* of this paper is *the importance of drawing the attention of the EU legislator to the need of finishing the job and complete the EU legal framework on cross-border insolvency with an instrument on investment undertakings.*

2.2. Internal consistency of the legal framework

10. As stated above, the IR is not the only EU instrument related to cross-border insolvency. There are two Directives, one of which for credit institutions and the other for insurance undertakings. This is so because those financial institutions are normally subject to special schemes of prudential supervision by the national authorities, which have been granted wide-ranging powers of intervention in cases of financial difficulties (see recital 9 IR). The particularities of such institutions justified the adoption of special rules[4].

11. Nevertheless, all those instruments are part of a *single common system on cross-border insolvency.* Within this system, the IR constitutes the general rule. It forms the core of the system as a whole and has been taken as the reference model for deciding whether to adopt the same solutions or to depart from them, when drafting the special rules, i.e. the Directives. Accordingly, they all form the *“hermeneutic circle”* within which the rules should be interpreted and construed[5]. The EU legislator is the main guarantor of the unity and coherence of the system. As such, one of its main tasks is to safeguard the completeness and internal consistency of all of the parts forming the EU legal system on cross-border insolvency.

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4 See, with further details and references, E. Braun/J. Heinrich, *loc.cit.* footnote 2, p. 579; B. Wessels, *loc.cit.,* footnote 2, *passim*.

5 See, elaborating this idea, M. Virgós/F. Garcimartín, *loc.cit.*, footnote 1, p. 9-10; an in-depth analysis at B. Wessels, “The hermeneutic circle of European Insolvency Law”, in E.H. Hondius/J.J. Brinkhof/M. de Cock Buning *et al.*, *Contracteren international,* 2006, p. 351 *et seq.*

12. The relation of the IR with other EU PIL instruments is also important, in particular, with the Brussels I Regulation. It is true that the Brussels I Regulation excludes insolvency proceedings from its sphere of application (see art. 1.2.b), and in principle there are no gaps or overlaps between the two texts: the criteria for defining the limits of the respective spheres of application has been established by the case-law of the ECJ (in particular, see cases 133/78, C-111/08 or C-292/08)[6]. But they are not completely separate instruments. Thus, for example, with regard to the enforcement of judgements, the IR makes a reference to the procedural rules of the Brussels I Regulation. According to Article 25 of the IR, judgements handed down by the courts dealing with insolvency proceedings shall be enforced in accordance with Articles 38 to 58 of the Brussels I Regulation[7].

13. From those ideas, we can draw three important consequences for our analysis.

13.1. *First*: *The need to keep the parallelism between the IR and the Directives.* It is true that the Directives are based on a normative model slightly different from the one underpinning the IR, for example the Directives are based on a principle of unity and home country control, which excludes the possibility of opening territorial proceedings[8]. Nevertheless, there are several provisions in the Directives which are inspired by the IR. Actually, most of the conflict-of-law rules are identical in the three texts. They envisage the application of the *lex fori concursus* as a starting point and establish a set of exceptions for, e.g., rights in rem, set-off, contracts relating to immovable property or employment contracts. In principle, and although some differences may occasionally be justified, this parallelism is reasonable: *from a conflict-of-law perspective, the law applicable should not change depending on the nature of the debtor.*

Example. The three instruments include a special conflict-of-law rule for employment contract. The effects of insolvency proceedings on such con-

6 According to the ECJ, an action is related to bankruptcy and therefore excluded from the scope of the Brussels I Regulation if *"it derives directly from the bankruptcy and is closely linked"* with the insolvency proceedings; note that Recital 6 and Article 25.1 II of the IR mirrors such characterization.

7 Note that the reference in Article 25 IR is to the Brussels Convention, but it must be understood as being made to the Brussels I Regulation (see art. 68.2 of the latter: "*in so far as this Regulation replaces the provisions of the Brussels Convention between the Member States, any reference to the convention shall be understood as a reference to this Regulation"*).

8 See pointing out the main differences between those instruments and with further references, B. Wessels, *loc.cit.*, footnote 5, p. 360-364.

tracts are not governed by the *lex fori concursus* but by the law applicable to the employment contract (art. 10 IR, art. 20.a Directive on credit institutions and art. 19.a Directive on insurance undertakings). The rationale of this exception is to safeguard certain aspects of employee and labour relationships from the application of a foreign insolvency law other than that which governs the contract. This rationale is valid irrespective of the employer: from a legal standpoint, the need of workers´ protection does not vary depending on the nature of the employer, i.e. a non-financial or a financial undertaking. For this reason, the legal regime must be parallel in the three instruments.

Therefore, and in order to maintain the coherence of the system, any amendment to the IR should be accompanied by the corresponding amendment to the Directives, insofar as the solution is the same in the three instruments. This is a circumstance that should also be taken into consideration by the EU legislator in the process of reviewing the IR.

Example. Certain authors have suggested that Article 5 IR should be amended since it establishes an immunity rule which grants an unjustified privilege to rights *in rem* creditors[9]. Note that the Directives contain a parallel provision (art. 21 Directive on credit institutions and art. 20 Directive on insurance undertakings). Thus, any amendment of the former should be accompanied by an amendment of the latter. Otherwise, the result will be completely inconsistent: if the insolvent debtor is a non-financial company, the secured creditors do not benefit from such immunity rule (assuming that art. 5 is amended), but if the insolvent debtor is a credit institutions, they do. In principle, the same holds for the rest of parallel conflict-of-law provisions.

Additionally, there are marginal differences among the instruments that were not formulated consciously. In the context of the review of the IR, the opportunity should be taken to align all the instruments.

Examples. The IR envisages an exception to the *lex fori concursus* for transactions carried out in financial markets. There is a parallel provision in the Directives. Nevertheless, the former referred to “financial markets”, in general, and the latter to “regulated markets”, in particular. Since they are not exactly the same, the concept should be aligned: in principle, it should include both “regulated markets” and “multilateral trading facilities” (as defined by the MiFID, Directive 2004/39/EC). Furthermore, the IR (and

9 See, with further references, M. Veder, “The future of the European Insolvency Regulation – Applicable Law in particular security rights”, *Int.Insolv.L.Rev.,* 2011, p. 285 *et seq.*

the Directive on insurance undertakings) refers to *the law applicable to the financial market* as such, whereas the Directive on credit institutions refers to *the law applicable to the transaction carried out in such market*. Although this seems to be an irrelevant difference, the three instruments should also be aligned on this point to prevent any misunderstandings.

The divergences are more relevant as regards proprietary rights over financial instruments or netting agreements. With regard to rights in rem in general, Article 5 IR establishes an "immunity rule": rights in rem are not affected by the opening of insolvency proceedings when the encumbered asset is situated in another member State; actions to set aside are, nevertheless, subject to the *lex fori concursus,* with the exception laid down by Article 13: the *lex fori concursus* shall not apply when the act is subject to another law which does not allow any means of challenging in the relevant case. The Directive on credit institutions, in turn, lays down parallel provisions for rights in rem in general and for actions to set aside (arts. 21 and 30). Nevertheless, it includes a special provision for rights in rem over book-entry securities (art. 24) for which there is no equivalent in the IR. That special rule for proprietary rights over book-entry securities does not establish an immunity clause, but a reference to the law applicable to the relevant account, and does not include a cross-reference to the *lex fori concursus* for actions to set aside. The difference between the regime of the IR and the regime of the Directive is not justifiable and, therefore, both instruments should be aligned.

The problems raised by netting arrangements are analysed in detail at Section 3.2 (*infra*).

13.2. *Second: The need to clarify the role of the IR as a general rule and, therefore, as the rule applicable by default.* As has been said, the IR is the general rule within the EU legal system on cross-border insolvency and, thus, should be applied to provide a solution for the ambiguities, gaps and loopholes of the special rules. When the Directives do not provide, expressly or implicitly, a rule for a particular issue, the solution should be taken from the IR.

Examples. The Directives do not envisage any rules on location of assets –which may be relevant for the application of some exceptions to the *lex fori concursus*- or on declaration of enforceability of insolvency rulings. These *lacunae* should be solved by applying the rules of the IR.

Since this principle, i.e. the role of the IR as a general rule with regard to the Directives, is not formally set forth anywhere, it would be advisable to expressly declare it by a recital in the future text of the IR.

13.3. *Third: The need to maintain the consistency with the Brussels I Regulation.* In this case, the issue is slightly different, since there are no parallel provisions in these two instruments but a referral by the IR to the Brussels I Regulation. The IR establishes that the judgments handed down by the judge in the main insolvency proceedings shall be enforced in the other Member States in accordance with the rules of the Brussels I Regulation. The referral mainly includes the *procedural aspects* of the declaration of enforceability (*exequatur*). Conversely, the grounds for rejecting such *exequatur* are established by the IR itself. Theses grounds are practically reduced to controlling the public policy, including a special reference to the personal freedom and postal secrecy (arts. 25 and 26 IR).

However, the Brussels I Regulation is currently being reviewed (see Doc. COM 2010 (748) final). One of the proposed amendments is, precisely, the abolition of exequatur, i.e. the abolition of any intermediate proceedings in the Member State of enforcement for declarations of enforceability. This abolition will be accompanied by certain safeguards aimed at the protection of the procedural rights of the defendant. Event though a final draft is still to come, the EU legislator should consider this important element when reviewing the IR, i.e. the impact of the abolition of exequatur in the Brussels I Regulation on the IR.

In principle, the internal consistency of the system would call for a parallel solution in both instruments. Thus, if the exequatur, i.e. declaration of enforceability, were eventually abolished in the Brussels I Regulation, it should also be abolished in the IR. If an public order control (including the protection of personal freedom and postal services) remains in this latter instrument, it could be inserted in the corresponding enforcement procedure.

Furthermore, there are also other minor aspects in regard to which the consistency among the –insolvency and non-insolvency- EU instruments should be ensured.

Example: the location of credit claims and bank accounts. The current text of the IR contains a rule on location of credit claims, Article 2.g II: a claim is deemed to be located in the Member State within the territory of which the debtor has the COMI. This has been considered as a sensible solution, but for bank accounts[10]. A bank account should not be deemed to be located in the country of the COMI of the bank, but in the country where the branch managing the account is situated (*autonomous entity* approach). One can find no reason in the fact that if a Spanish Company opens a bank account in the Spanish branch of an English bank, the claim is deemed to be located in England. Actually, the Proposal of a Regulation on cross-border attachment of bank accounts (Doc. COM (2010) 445) lays down a special rule with regard to (i) the location of such accounts -the Member State indicated in the account´s IBAN-,(ii) the location of securities accounts (art. 4.6 (a)). The IR should pay attention to such rules and be amended accordingly. In principle, the rules on location of bank accounts or securities accounts should be consistent in all EU instruments.

14. Thus, the *second general conclusion* of this paper is the need to draw the attention of the EU legislator to ensure *the internal consistency of all EU instruments dealing, directly or indirectly, with cross-border insolvency*. This implies:

14.1. That any amendment to the IR should be accompanied by the corresponding amendment in the Directives, insofar as the rule is the same in the three instruments.

14.2. That the role of the IR as a general rule with regard to the Directives should be expressly stated in the recitals of the former.

14.3. That the impact of future amendments of the Brussels I Regulation on the IR should be carefully analysed, in particular the abolition of exequatur.

2.3. The analytical framework for the revision of the Insolvency Regulation. "A warning"

15. The third general consideration is related to the analytical framework within which the revision of the IR should be located. The process of revision of this instrument requires three steps. *First*, a study on how the IR has worked in practice until now. *Second*, an identification of the problems that the current text may have caused and, in particular, a diagnosis of whether the cause of the problem lies in (i) a defect in the policy decision underpinning the rule; (ii) an ambiguity or lack of clarity in the formulation of the rule; or (iii) a *lacunae* in the instrument. *And third*,

10 See, M. Virgos/F. Garcimartin, *loc.cit.,* footnote 1, p. 168; *vid*. also J. Marshall, "The Future of the European Insolvency Regulation – Rights in rem", *IILR,* 3/2011, p. 263 *et seq.*, p. 267.

a proposal, if possible, to improve the texts providing a solution to such problems.

16. Beyond this general consideration, I would like to make a warning or, at least, a plea of self-restrain. In general terms, the IR is a carefully drafted piece of legislation. It ensures the mutual recognition and cooperation between insolvency proceedings inside the EU. Furthermore, it provides legal certainty and a balanced outcome in a field where there are many different and contradictory interests at stake. Insolvency is a very political matter, where agreements on the content of the rules are never easy to reach. In comparative–law terms, the IR is exceptional. I believe that its existence is likely due to the fact that it was negotiated in a institutional, political and economic environment significantly different from the current one. Needless to say, it has ambiguities, gaps and other shortcomings, but a very ambitious proposal to amend the text is risky. It is difficult to resist the temptation to rewrite the whole text but this may jeopardize the success of the project, whilst triggering a Pandora´s box effect. The experience of the revision of the Brussels I Regulation provides a good example: the amendments to the text have being negotiated during a whole year by the EU Council without showing signs of attaining a successful text in a near future.

17. Thus, we should be cautious and limit the future revision of the IR (i) to those areas where there is a clear and solid consensus about the need to amend the text; (ii) as well as where there are also consolidated ideas about the path to be followed, i.e. about the best way to really improve the instrument. Otherwise, it would be preferable to wait until we have enough case-law and scientific production to come up with a clearly better solution. In the current situation, legal experiments in matters of insolvency law may prove to be highly risky.

§ 3. Particular issues

18. This second part of the paper analyses two particular issues: hybrid procedures and netting agreements. The regime of the IR with regard to them has given rise to important problems in practice and, therefore, it is worth considering a possible amendment of the text on those aspects. Within the analytical framework described above (para. 15), the former derives from a *lacuna* in the instrument; the latter, from an ambiguity in the current formulation of the rules.

3.1. Hybrid Procedures

3.1.1. Introduction

19. Any proposal to amend the IR calls for an accurate diagnosis of the problem. With regard to hybrid procedures, the problem can be summarized as follows: Hybrid procedures are becoming a very useful tool to restructure firms in financial difficulties and, therefore, to prevent them from falling into formal insolvency proceedings. However, the PIL legal framework applicable to these procedures inside the EU is ambiguous. This entails important opportunity costs: due to the legal uncertainty, parties are reluctant to initiate a negotiation of such procedures and, therefore, forgo the opportunity of resorting to them in cross-border situations. In order to overcome these problems, the EU legislator should clarify the legal regime governing those procedures[11].

3.1.2. The concept of hybrid procedures

20. From a legal perspective, there are different mechanisms to deal with a debtor in financial difficulties. The range of options can be reduced to three main techniques depending on the degree of judicial intervention: (i) on the one hand, out-of-court restructuring; (ii) on the other hand, formal insolvency proceedings and, between these two extremes, (iii) hybrid procedures.

21. Any debtor in financial difficulties can always renegotiate with his creditors the terms and conditions of their contracts. These modifications may result, for example, in a rescheduling of payments, a reduction of their interest rates, a total or partial debt write-off or new loan facilities. The concept *out-of-court restructurings* is usually employed to refer to these agreements. The key element of these restructurings is that they entail a workout based on voluntary negotiations between the debtor and

11 See, on this problem, and with further references, *i.a.* F. Garcimartín, “Review of the EU Insolvency Regulation: Hybrid procedures and other issues”, *Int. Insol. L. Rev.,* 3/2011, pp. 321 *et seq.*; J. Winsor/P. Sidle, “International recognition of Schemes of Arrangements”, *Butterworths J.Int.B.&Fin.L.,* 2010, p. 523 *et seq.*; P. Mankowski, “Anerkennung englischer Solvent Schemes of Arrangement in Deutschland”, *WM,* 2011, p. 1201 *et seq.*; or C.G. Paulus, “Das englishe Scheme of Arrangement – ein neues Angebot aus dem europäischen Markt für aussergerichtliche Restrukturierungen”, *ZIP,* 2011, p. 1077 *et seq.* ; K. Schümann-Kleber, “Recognition of English solvent schmes of arrangments affecting dissenting creditors of German companies“, *Int.Insolv.L.Rev.,* 2011, p. 447 *et seq.*; J. Schmit, „German International Insolvency Law: Recent Developments“ *INSOL Europe Academic Forum Series,* 2012 (forthcoming), at II; L. Westpfahl/M. Knapp, „Die Sanierung deutscher Gesellschaften über ein englisches Scheme of Arrangements“, *ZIP.,* 2011, p. 2033 *et seq.*

his creditors. No creditor is judicially or legally forced to change the content of his rights against his will. They are purely contractual transactions based on the individual consent of all affected creditors. From a conflict-of-laws perspective, they are governed by the law applicable to the corresponding contract according to the Rome I Regulation (see art. 12 (1)), i.e. pure “contractual workouts” are governed by the general conflict-of-laws rules on contractual obligations. In case of dispute, the Brussels I Regulation will determine the competent courts.

22. Formal insolvency proceedings are at the other end of the crisis management spectrum. They are collective proceedings subject to the control or supervision of a judicial authority or of another official body, either for reorganization or liquidation of the debtor. In the EU, and from a PIL perspective, formal insolvency proceedings are subject to the rules on jurisdiction, applicable law and recognition of foreign proceedings laid down by the IR.

23. So-called **“**hybrid procedures” fill a gap between these two alternatives, i.e. out-of-the court restructurings and formal insolvency proceedings. Several Member States have introduced in their legal systems *special rules* aimed at preventing the insolvency of the debtor whihc depart from the general rules of contract law, but do not fall under the framework of formal insolvency proceedings. They are mix techniques, which combine the advantages of informal workouts and formal insolvency proceedings. They constitute “pre-insolvency compulsory arrangements”.

24. The two main features of these hybrid procedures are: (i) the binding effect *vis à vis* minority creditors, and (ii) the sanction of the arrangement by a court or an administrative official.

25. Firstly, the main difference with out-of-court restructuring lies on the consent of the creditors. Under general contract law, any modification of the terms and conditions of any contract always requires the consent of the counter-party: a rescheduling of payments or a reduction of the interest rates, for example, can never take place without the individual consent of all affected creditors (naturally, unless they have *ex ante* agreed otherwise). The speciality of those pre-insolvency compulsory arrangements resides in allowing an amendment of the terms and conditions of a credit facility even when such amendment contravenes the will of an individual creditor, if a majority of creditors have given their consent to such amendment. The rules of the game change from unanimity to majority.

The *individual consent*, i.e. the rule under general contract law, is replaced by the *collective consent*, i.e. the rule under insolvency law (although no insolvency proceedings are formally opened yet). In addition, certain legal systems accompany these institutions by a restructuring moratorium. The effects of the *moratorium* are to cancel or temporarily suspend some rights of the creditors: in particular, the enforcement of security interests or, during the negotiation of the arrangement, *the right to file a petition for opening insolvency proceedings*.

26. In order to balance this sort of "expropriation of the individual consent" out of what is considered formal insolvency proceedings, all legal systems where these types of arrangements are recognized impose certain requirements. For example, the arrangement (i) must be aimed at preventing the bankruptcy of the debtor, (ii) and must be approved by a qualified majority of the affected class or classes of creditors and must be *sanctioned by an independent authority* (a judge, typically).

27. Most national laws of the Member States envisage these types of hybrid procedures, for example, the schemes of arrangement in England or the *sauvegarde financiére* in France. The effects vary from jurisdiction to jurisdiction as regards, *inter alia*, (i) the affected creditors (unsecured or even secured creditors, financial or even non financial creditors), (ii) the possible amendments of the terms and conditions of the financing contracts (iii) or the scope of the moratorium[12].
The Spanish legislator has recently adopted a sort of hybrid procedure which allows a majority of financial creditors to agree on a reschedule of payment which, once sanctioned by a court, is binding on dissenting minority creditors. The agreement must be supported by at least 75% of the debts held by financial creditors and accompanied by the favorable opinion of an independent expert. Furthermore, the negotiation of these arrangements is also accompanied by a *moratorium*, which facilitates its viability: creditors are prevented from initiating insolvency proceedings against the debtor for a certain period of time. Nevertheless, the agreements that may be binding on dissenting creditors are only those regarding the extension of the maturity date, but not those which relate to other matters such as possible discharges or debt for equity swaps. Furthermore, the agreement ratified in this manner does not bind secured creditors, i.e. financial creditors who hold an in rem guarantee (D.A. 4ª of the

12 A comparative description of the different solutions within the EU Member States France, Belgium, Italy or UK) can be found at *Rev. Dº Concursal y Paraconcursal,* 15/2011, p. 503 *et seq.*

Insolvency Act 2003)[13].

3.1.3. Cross-border aspects

28. To analyze the cross-border problems raised by these types of institutions, it may be useful to place them within the framework of the three main areas of PIL: jurisdiction, applicable law and recognition.

(i) *Jurisdiction*. Since most hybrid procedures require the intervention of a judicial authority to sanction the arrangement, it is necessary to determine which courts have jurisdiction to do so. Or, in other words, what is the relevant connecting factor to attribute jurisdiction to sanction the arrangement. Different possibilities can be brought forth: the statutory seat of the debtor, the COMI of the debtor or the domicile of the creditors, for example.

(ii) *Applicable law*. Since those arrangements entail a modification of the contractual rights of the creditors, it is necessary to determine whether and under what material-law conditions those modifications can take place. Different possibilities are also possible: the law applicable to the respective contracts according to the Rome I Regulation, the law of the country where the debtor company is incorporated or the law of the country where its COMI is located.

(iii) *Recognition*. The third question relates to the extra-territorial effects of the arrangements, *i.e.* whether and under what condition an arrangement sanctioned by the authorities of Member State A is going to be recognized by the authorities of Member state B. This question is particularly relevant when a minority of dissenting creditors affected by the arrangement attempt to enforce their claims in a foreign jurisdiction. The cross-border effectiveness would prevent dissident creditors from pursuing their claims abroad and, therefore, enabling them to free ride on the restructuring while retaining the full pre-restructuring claim.

Example. Let us imagine a company (A) incorporated in Spain, with its COMI also in Spain, but with an establishment in different Member States. If A enters into negotiations with its creditors to refinance its indebtedness, one option they may consider is a scheme of arrangement under English Law. In this scenario, the first question which arises is whether

13 See, describing the new pre-insolvency arrangement procedure, J. Pulgar, "Acuerdos de refinanciación y escudos protectors en la reforma de la Ley Concursal española 22/2003", *Diario La Ley,* 8 November 2011, p. 1 *et seq.*

English courts have jurisdiction to sanction the scheme. If so, the second question would be whether they can sanction a scheme *vis à vis* creditors whose claims are not governed by English Law, but by Spanish Law, for example. And, finally, the third question is whether an eventual order sanctioning the scheme issued by an English judge is going to be recognized in Spain and, therefore, can be invoked to prevent a dissenting creditor from claiming his rights before a Spanish court. Recently, two Spanish companies, *La Seda* and *Metrovacesa*, have resorted to the English schemes of arrangement to restructure their indebtedness. In these two cases, the main connection with England was that the credit facilities were governed by English Law.

29. Due to the hybrid nature of those procedures, they do not easily fit within any of the current PIL EU instruments. Three alternatives may be considered: (i) The application of the Brussels I Regulation; (ii) The application of the Rome I Regulation; (iii) The application of the IR.

30. The application of the **Brussels I Regulation** is very doubtful. The legal nature of hybrid procedures is different from the legal nature of the proceedings to which that Regulation applies. Likewise, an order sanctioning a pre-insolvency arrangement does not share the same legal nature as the judgements to which that Regulation applies.

On the one hand, the rules on jurisdiction of this Regulation apply to actions or claims, in which the court resolves a conflict between the parties. Those rules are formulated in terms of *contentious or adversary proceedings* between a plaintiff (or plaintiffs) and a defendant (or defendants). This explains the reference to the idea that persons domiciled in a Member Sate "*shall"* or *"may be sued* …" (art. 2 or 5, for example). Chapter III, in turns, apply to judgments rendered in the context of those proceedings. This explains the reference, as a circumstance for denying recognition, to the fact that "the *defendant was not served* with the document which instituted the *proceedings* or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense" (art. 34 (2)). Hybrid procedures do not seem to have that character. The judge does not solve a conflict or controversy between the parties: he only intervenes to ensure that changing the "rules of the game" –from individual consent to collective consent- is not unreasonable. They cannot be characterized as contentious or adversary proceedings. They are not based on the structure of plaintiff versus defendant: the applicant cannot be considered a plaintiff, who files a claim, and the class of creditors summoned to the meeting cannot be considered as defendants *vis à vis* that claim. In other words, pre-insolvency arrangements do not seem to qualify as *proceed-*

ings for the purpose of the application of the Brussels I Regulation. For the same token, and even if the definition of judgments in that Regulation is very bread (see art. 32), the order sanctioning such arrangements cannot be considered as a judgement settling a true conflict or a contentious dispute between the parties[14].

31. On the other hand, the application of the **Rome I Regulation** may be defended from a *lege lata* perspective, however the solution is not an adequate one from a policy –or *lege ferenda*- perspective. The main function of hybrid produces is to impose a sacrifice opted for the majority of a whole class of creditors, in order to overcome the financial difficulties of the debtor, and hence, to prevent hold-out creditors from jeopardizing such objective. The policy underpinning this institution is insolvency-law oriented. In this sense, it is difficult to understand why only those creditors whose claims are governed by one particular law can be affected.

Example. In the former example, only those creditors whose claims were governed by English Law should be affected. The Rome I Regulation approach allows foreign claims to free ride on English claims. Foreign creditors could maintain their claim while at the same time benefit from the scheme imposed on English claims. The result is unfair and quite unpractical when claims are governed by different laws.

Having different procedures, in different jurisdictions and under different laws is rather inefficient. *As a general rule, the principle of universally, underpinning insolvency law, should also be applied to hybrid procedures*.

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14 With regard to the English schemes of arrangement, in favour of their characterisation as a "judgment" and therefore enforceable according to the Brussels I Regulation, see recently and with further references J. Schmidt, *loc.cit.* footnote 11, at II.3. Her main argument is based on the idea that the judge does not merely fulfil a notarial function, but makes a decision on the reasonability of the arrangements. As explained in the text, I am not convinced of such qualification. Apart from the abovementioned reasons (which are mainly related to the nature of the procedure), note that if the Brussels I Regulation were applicable, the jurisdiction of the English judge would also be determined by this instrument. It is true that the jurisdiction of the English courts is not relevant in the moment of cross-border recognition, but it is relevant in the moment of sanctioning the arrangement. The problem, then, is that the jurisdiction of the English courts could only be based on the general rule, i.e. Article 2 of the Brussels I Regulation. The other *fora* are not applicable. This implies that the English judge could sanction the scheme but only *vis à vis* those creditors who have their domicile in England. Alternatively, the application of Article 6.1 (plurality of defendants) may be invoked to bring to England foreign creditors. However, in several cases, the conditions for the application of this provision will not be met: it is not foreseeable by all affected creditors that they may be sued in the domicile of any of them (see recently, ECJ Case C-145/10 at para. 81).

32. Alternatively, the application of the IR has also been considered. Were this Regulation applicable, (i) the jurisdiction would be determined by the COMI of the debtor, i.e. the courts authorized to sanction the arrangement would be those of the country where the debtor has its centre of main interest, and (ii), the order sanctioning the scheme would be effective in the rest of the Member States according to Chapter II of that instrument. The law applicable to the substance would be the *lex fori concursus*, i.e. also the law of the country where the COMI of the debtor were located.

33. From a *lege ferenda* perspective, the application of the IR is the most convincing option[15]. However, *de lege lata* its application is also doubtful. The IR applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator (art. 1 (1)). Additionally, Member States have to notify national insolvency proceedings to which the Regulation applies and they are included in Annex A of the text (art. 2 (a)). In principle, it is difficult to argue that most hybrid procedures meet the definition of the Regulation and, actually, most of them are not included in Annex A[16]. Thus, hybrid procedures do not seem to be subject to the rules on jurisdiction of the IR, nor do they benefit from the rules on recognition of foreign proceedings of this instrument.

3.1.4. Conclusion

34. All the above has one main purpose: to demonstrate the legal uncertainty that surrounds the cross-border problems raised by hybrid procedures. The PIL regime governing out-of-the court arrangement is clear: the Rome I Regulation is applicable. The PIL regime governing formal insolvency proceedings is also clear: the IR applies. But the current EU law does not offer the market a clear and foreseeable answer on the PIL issues raised by hybrid procedures, i.e. on the jurisdiction to sanction a restructuring pre-insolvency arrangement, the applicable law and its recognition abroad. *The current regime is not satisfactory*.

35. This uncertainty jeopardizes their practical effectiveness. Since carrying out a pre-insolvency procedure calls for important expens-

15 See, *i.a.*, F. Garcimartín, *loc.cit.*, footnote 11 *passim*; or P. Mankowski, *loc.cit.*, footnote 11, p. 1210.

16 See, B. Wessels, “”What is an insolvency proceeding anyway?”, *Int.Insol.L.Rev.,* 4/2011 p. 491 *et seq.*; the inclusion of the French *“sauvegarde financière accélérée”* in Annex A of the IR is an exception and, actually, “rather confusing”, B. Wessels*, Ibid.* or L. Westpfahl/M. Knapp, *loc.cit,* footnote 11, p. 2037.

es on professional services, *ex ante* parties may be reluctant to embark on them if the legal framework in a cross-border scenario does not provide legal certainty; in particular, when there is a risk of minority creditors claiming abroad. Thus, parties forgo the opportunity of resorting to an institution that has proved to be very effective in solving the situation of debtors in financial difficulties.

36. Once the problem has been identified, the next step is to find a solution. From a *lege ferenda* perspective, hybrid procedures are functionally aimed at preventing formal insolvency proceedings and, accordingly, should have a PIL regime parallel to these proceedings. Two approaches are then possible. The simplest one would be just to extend the scope of application of the IR to hybrid procedures. The most complex one would be to lay down a special chapter in the IR or even a parallel EU regulation for such procedures, with a detailed regime on all PIL aspects.

37. The *first option* does not require big changes. The wording of article 1 (1) of the Regulation could be modified to include these types of procedures, and Member States should be required to identify the corresponding national procedures to be included in the Annex[17]. For example, the concept of "adjustment of debt", or other equivalent, could be incorporated into the definition of insolvency proceedings in the IR to express the idea that hybrid procedures are encompassed. When, exceptionally, an institution may fulfil different functions, such as the schemes of arrangement under English law, the order sanctioning the scheme should clarify whether they qualify as a pre-insolvency arrangement or not[18].
As a consequence of this option, and with regard to hybrid procedures, (i) the courts with jurisdiction to conduct and sanction a hybrid procedure are those of the Member State where the debtor has its COMI, (ii) the law applicable shall be the law of that country (=*lex fori concursus*), irrespective of the law governing the affected claims, i.e. credit facilities governed by a foreign law could be affected by the arrangement; and (iii), the effects of the order sanctioning the arrangement will be recognized in all other Member States.

17 As Prof. M. Virgos and I have argued, once a proceeding is included in the Annex, the other Member States must recognize it under the IR without reviewing whether the conditions set forth in article 1 are met or not, see M. Virgos/F. Garcimartín, *loc.cit.,* footnote 1, p. 29.

18 An English scheme of arrangement may be used as a pre-insolvency mechanism, but also to frame other non-insolvency functions such as a corporate restructuring (e.g. a merger). The IR would only apply in the former case. To avoid any doubts, the judge sanctioning the scheme should explicitly clarify its function and, therefore, whether it is subject to the IR or not.

38. Nevertheless, Article 5 IR imposes a limit to these effects. If the current text of this provision is kept, the arrangement would not affect the position of *secured creditors*, where the encumbered asset is located in a Member State different from that where the COMI of the debtor is located. Additionally, the cross-border effects of the *moratorium* will be limited by the possibility of opening territorial proceedings according to article 3.4 IR. Insofar as those provisions are kept, the universal effectiveness of hybrid procedures is very relative (but the same as the universal effectiveness of formal insolvency proceedings).

39. A *second* and more ambitious approach would be to elaborate a new PIL regime for hybrid procedures, inside or outside the IR, i.e. in an autonomous instrument. If Articles 5 and/or 3.4 IR pose a real problem for the effectiveness of such procedures, this second option would likely be worthwhile of exploring.

40. Note, however, that this option is linked to a more general problem of the IR. Although the IR applies to both winding-up (liquidation) and restructuring insolvency proceedings, most provisions were negotiated with a view only to winding-up proceedings[19]. Winding-up proceedings were *"the shadow under which the IR was drawn up"*[20]. In this context, Articles 5, 3.3 and 3.4 IR do not particularly pose a problem. When the insolvency proceedings are aimed at winding-up the assets of the debtor, the immunity of security interests (art. 5) or the opening of territorial proceedings (art. 3.3 and 3.4 IR) do not pose huge problems and may even facilitate the liquidation. This explains why secondary proceedings must be winding-up proceedings (art. 4.3 IR). Conversely, the justification of such provisions in the context of restructuring proceedings is more difficult. Under certain circumstances, the immunity of security interests envisaged by Article 5 IR or the limitation of secondary proceedings to winding-up proceedings might jeopardise the effectiveness of a restructuring of the debtor. And this is so irrespective of whether the restructure of the financial situation of the debtor takes place in a pre-insolvency scenario or in a formal insolvency scenario. Thus, any proposal to exclude or limit the application of those provisions for hybrid procedures would likely require a parallel amendment to exclude or limit its application in the context of restructuring (formal) insolvency proceedings.

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19 See, Virgos-Schmit Report, at para. 51.

20 M. Virgós/F. Garcimartín, *loc.cit.,* footnote 1, p. 28.

3.2. Netting arrangements

3.2.1. Introduction

41. With regard to close-out netting clauses, the diagnosis of the problem may also be easily summarized. Legal certainty on the enforceability of those clauses is a key element for financial transactions, both in domestic and in cross-border insolvencies. However, whereas the Directive on credit institutions contains an express conflict-of-law rule on this point (art. 25), the IR only envisages a rule for set-off (art. 6). The answer to the question of whether this rule encompasses netting or not is doubtful. The regime is, therefore, ambiguous in the IR and apparently inconsistent with the Directive.

3.2.2. The concept of close-out netting arrangements: an outline

42. Close-out netting is a contractual mechanism designed to protect a party *vis* à *vis* a counterparty default, in particular its insolvency. It thus reduces credit risk exposure. The way it works can be explained in simple terms. In financial transactions such as derivatives, both parties have multiple reciprocal outstanding obligations and, therefore, mutual claims and counterclaims. From the point of view of the party *in bonis*, i.e. the non-defaulting party, some of them may have a positive value and others a negative value. A close-out netting clause allows this party to settle all the outstanding transaction with a net amount. The mechanism can be broken down into three steps. First, the acceleration and early termination of all the transactions with the defaulting counterparty. Second, the mark-to-market valuation of each of the outstanding transactions, that normally implies the calculation of the replacement costs of each transaction. And third, the offsetting of such amounts so that only a final sum is owed.

Example. A and B have entered into several derivative transactions, multiple interest rate swaps for example. Numerous mutual payment obligations result from those transactions. If B defaults in one of them, a close-out netting arrangement allows A, i.e. the party *in bonis*, (i) to early terminate all transactions, (ii) to assess the value of each transaction (some of which may have a positive replacement value and others a negative replacement value), and (iii) to offset these amounts. Let us imagine that the parties entered into three transactions: 1, 2 and 3. Transactions 1 and 2 had a positive value for B of 8 (i.e. B was in-the-money) and transaction 3 had positive value for A of 10 (i.e. with regard to 3, A was in-the-money). In this simplified example, the reciprocal payment obligations are computed so as to result in a single net payment obligation of B to A: A only has to receive 2 from B, instead of paying 8 and asking B to pay back 10.

The close-out netting master clause can embrace not only payment obligations but also delivery obligations, such as claims to return collateral. Thus, it can also be used as a means to enforce collateral arrangement. In this case, the final amount is valued taking into account the obligation to deliver the assets provided as collateral[21].

Example. A has lend 100 to B, and B has provided shares of company X as collateral (by way of a pledge together with an appropriation right). The close-out netting arrangement allows A, should an event of default occur, to accelerate the obligation of B to pay back the 100, to assess the value of the shares and to offset the resulting amount. Thus, for example, if the shares´ value is 90, the final amount is a claim against B for 10 (obviously, A becomes the definitive owner of the shares).

Since, within the sphere of application of the Collateral Directive, the enforceability in insolvency of close-out netting collateral arrangements are sufficiently protected, I am not focusing on them but on the other types of arrangement (i.e., transactions outside such scope and *e.g.* derivative transaction as secured obligations).

43. In particular, in an insolvency scenario the economic function of close-out netting clauses is to reduce the credit risk of the party *in bonis*, since it limits its exposure to the close-out amount. The close-out netting arrangement eliminates the so called "cherry picking" risk, whereby a defaulting counterparty fails to make payment on its obligations but is legally entitled to collect on the obligations owed to him.

Example. In the first example, the risk for A if B were to become bankrupt is 2 rather than 10. In the second example, the risk for A if B were to become bankrupt is only 10 rather than 100. A will be qualified as an unsecured creditor (if there is no collateral) only for these amounts, instead of paying 8 (in the first example) or 90 (in the second) and being qualified as an unsecured creditor for 10 or 100, respectively. If the close-out amount were favorable to the insolvent party, this amount would be included in the insolvency estate.

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21 The Collateral Directive (Directive 2002/47/EC) describes close-out netting as a provision by which on the occurrence of an enforcement event, (i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by one obligation to pay such amount; and/or (ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party (Art. 2 (1) (n)).

44. Netting arrangements are very common in financial markets. Since it is usually argued that the enforceability of close-out netting arrangements contributes to the stability of financial systems, most legal systems have in general recognized the enforceability of such arrangements, both out of insolvency and in insolvency scenarios. But even if there is consensus on the principle, there may be notable differences as regards the parties that can benefit from those arrangements, the eligible financial contracts, the conditions and limitations under which early termination clauses can be triggered or the regime of actions to set aside[22]. Thus, identifying the applicable law is very important.

45. Furthermore, some jurisdictions have recently amended their legal systems to introduce special regulatory powers which entail a temporary stay or *moratorium* on the enforcement of netting arrangements[23]. The Basel Cross-border Bank Resolution Group has pointed out the rationale of such stay: unrestricted close-out netting as a result of a bank resolution might contribute a significant additional threat to the stability of the financial markets[24]. In the context of the financial crisis, the public authorities have come up with different mechanisms to reorganize credit institutions in financial difficulties. One of these mechanisms is the segregation and subsequent transfer of assets of a financial institution in difficulty to a solvent financial institution ("bridge institution"). Since such transfer of assets mainly includes financial transactions, it must be accompanied by a moratorium on close-out netting arrangements, irrespective of the terms of the agreement. The moratorium prevents the parties *in bonis* from triggering the close-out netting clause -i.e. these parties are "obliged" to maintain the financial transactions with the transferee institutions- and, therefore, it facilitates an orderly resolution by the authorities of the failing entity. Naturally, these limitations to the exercise of the termination rights are accompanied, in turn, by certain safeguards. These safeguards are designed to meet the needs of balancing two conflicting interests: on the one hand, the possibility of regulatory transfer and moratorium on netting and, on the other, avoiding the risk of undermining the practical reliability and legal certainty of netting arrangements. In particular the abovementioned Basel Group has identified four safeguards: the morato-

22 See, *i.a,.* and with further references, P. Paech, *Report on close-out netting,* Unidroit 2011 Study 78C- Doc. 2, at www.unidroit.org, p. 39 *et seq.*

23 See, e.g., Bank of International Settlements/Basel Committee on Banking Supervision, Reports and Recommendations of the Cross-border Bank Resolution Group, March 2010, at www.bis.org, Recommendation 9; EU Commission Bank Recovery and Resolution Working Document, January 2011, at www.ec.europe.eu, Sec. G-H.

24 *Ibid.,* pp. 40-42

rium should be restricted to a limited and clearly defined timeframe, the contracts should be transferred as a whole, the transfer can only be to a solvent transferee and the contractual rights are preserved in the event of any future default by the transferee. The details of whether and under what circumstances the moratorium can be imposed may also vary markedly from jurisdiction to jurisdiction.

3.2.3. Cross-border problem

46. In cross-border cases, a problem of conflict of laws arises when the *lex fori concursus* does not coincide with the law applicable to the netting agreement or *lex contractus*. In this case, *the key issue is whether the enforceability of the clause-out netting clause in an insolvency scenario is governed by the former or by the latter, i.e. by the lex fori concursus or by the law governing the netting agreement.*.

Example. In the first example of this section, let us imagine that A is a Spanish company which also has its COMI also in Spain. B is a Dutch bank, and the close-out netting clause is part of an ISDA Master Agreement governed by English Law (an ISDA Master Agreement is a standard master contract commonly used world-wide for framing derivative transactions; close-out netting clauses are a essential element of such agreements). If A were to become bankrupt, the question would be whether the effects of the insolvency on the arrangement are subject to Spanish Law, as *lex fori concursus*, or to English Law, as *lex contractus*. Since, for instance, the regime applicable to the enforceability of such clause may be different under Spanish and under English Insolvency Laws, this becomes a key question for the Dutch bank. In any case, as will be seen, the ranking of the net amount favorable to the party *in bonis* will be determined by the *lex fori concursus* (art. 4.2 (i) IR).

3.2.4. Diagnosis of the problem: the lack of parallelism between EU instruments

47. Under EU current law, the answer to that question is ambiguous. On the one hand, the Directive on credit institutions expressly envisages a special rule on netting. According to Article 25: *"Netting agreements shall be governed solely by the law of the contract which governs such agreement".* This rule establishes the application of the insolvency rules of the *lex contractus*, i.e. of the jurisdiction which laws have been chosen by the parties to the netting agreement (in the case at hand, English Law). This law will govern, *inter alia,* the enforceability of the close-out netting clause in an insolvency scenario. It also contains a special rule for set offs (art. 23), parallel to the rule of the IR (*infra*), and for repo agreements (art. 26).

Excursus. Note that article 25 only protects the close-out netting mechanism. It does not encompass other issues, such as the ranking of close-out amounts or the effectiveness of other contractual clauses such as flip provisions, non-petition, walkaway or two-way payment clauses. The ranking of the close-out amount is governed by the *lex fori concursus* (art. 10.2 (h) of the Directive and art. 4.2 (i) IR). The enforceability of flip provisions (which lowers a swap counterparty´s position in a payment waterfall upon the occurrence of an event of default, e.g. an insolvency, in respect of such counterparty) is also excluded from article 25 of the Directive and, therefore, governed by the *lex fori concursus*. The same holds for non-petition clauses or for the rights of the non-defaulting party to withhold payments. The nature of these contractual clauses is different from the nature of netting arrangements.

48. The IR, on the other hand, *only* lays down a rule for set-offs. According to article 6, "*The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor´s claim"*. Article 6 complements Article 4, according to which *"the conditions under which set-offs may be invoked"* are subject to the *lex fori concursus*.

Excursus. The relationship between Articles 4 and 6 IR is explained as follows. Article 4 lays down the application of the *lex fori concursus* as the general rule, including the set-off rights. Thus, if insolvency proceedings are opened, it falls to the *lex fori concursus* to govern admissibility and conditions under which set-off can be exercised against a claim of the insolvent debtor. If the *lex fori concursus* allows for set-off, Article 4 should be applied in order to claim the set-off as provided by that law. Conversely, if the *lex fori concursus* does not allow for set-off, then Article 6 could be invoked. It constitutes an exception to the general application of the *lex fori concursus*, by permitting the set-off according to the conditions established by the –insolvency rules of- the law applicable to the insolvent debtor´s claim. The rationale of this exception is to protect the function of guarantee/security of the set-off right: the set-off right is governed by a law on which the creditor concerned can rely at the moment of contracting or incurring the claim[25]. It protects the legitimate expectations and certainty of transactions (recital 24): a contracting party should not face

25 See Virgos-Schmit report, at para. 109.

the prospect of owing a gross obligation where the contract, including its *lex contractus*, provides for set-off, i.e. a net obligation.

Example. In the first example, let us imagine that A is a Spanish company, with its COMI in Spain. B is a Dutch bank which provides credit to A. B relies on off-setting its claims against other counterclaim that A has against B. This counterclaim is governed by Dutch Law and under Dutch law such off-set is effective even in an insolvency scenario. Article 6 protects such expectations. If set-off is not effective under Spanish law as *lex fori concursus*, B could invoke Dutch law, including its insolvency rules, to offset the claims. Note that this solution also protects B *vis à vis* strategic movements of the COMI by A (from a pro-set off jurisdiction to an anti-set off jurisdiction).

49. There is, therefore, an apparent inconsistency between the Directive and the IR. The former lays down two special rules, one for netting arrangements and another one for set-off, whereas the latter only lays down a special rule for set-off. Since close-out netting involves elements in addition to mere set-off (in particular, the acceleration and termination of the outstanding obligations), the question regarding Article 6 IR is whether it also encompasses close-out netting agreements or not[26].

50. We have argued elsewhere that the IR should be construed broadly taking into account the Directive and, therefore, close-out netting should be included within the scope of Article 6[27]. Otherwise, the result would be truly paradoxical. In an arrangement between a credit institution and a company, the close-out netting arrangements would only be protected when the credit institution becomes bankrupt, as it is in this case that the Directive applies, but not when the company goes bankrupt, because the IR applies in this case. This result is absolutely inconsistent with the rationale of these provisions, *i.e.* protecting credit institutions *vis à vis* the insolvency of their counterparties.

Example. In the Example of the Spanish Company and the Dutch bank (para. 46), it would make little sense to consider that if the Spanish Company becomes bankrupt, the netting arrangement is not governed by English Insolvency Rules; but if it is the Bank which becomes bankrupt, it is. We end up granting more protection to non-financial parties than to financial parties.

26 See, *i.a.*, B. Wessels, *loc.cit.*, footnote 5, pp. 461-464.

27 M. Virgós/F. Garcimartín, *loc.cit.,* footnote 1, p. 119-120.

51. However, the question is arguable and, actually, there are lso views in favour of a narrow interpretation of Article 6, i.e. excluding close-out netting from its scope[28]. This ambiguity reduces legal certainty which implies a net cost for financial markets. It is usually argued that for financial markets it is essential to have a high degree of certainty on the enforceability of contractual set-off and nettings arrangements[29]. There is thus a need for legislative clarification. Either Article 6 IR is amended to make it clear that it applies to netting agreements or a rule parallel to article 25 of the Directive is added to the IR.

52. Having said that, a final point should also be analysed: whether the material-law limitations introduced for regulatory purposes, i.e. the moratorium on netting arrangements, would call for a reconsideration of the above conclusion. In principle, the decision to include those moratoria is a material-law policy issue. From a conflict-of-law perspective, however, there is a risk of forum shopping: such material-law policy may be frustrated if the parties were allowed to choose the law of another jurisdiction different from the one that has introduced the moratorium and which does not envisaged any limitation on the exercise of close-out netting clauses.

Example. Country A has introduced a moratorium preventing the triggering of close-out netting clauses under certain circumstances. A key element for the effectiveness of such moratorium is its application to *all* contracts. Nevertheless, it would be easy to evade that policy if (i) parties were allowed to choose the law of another jurisdiction that do not envisage such moratorium, for example Country B; and (ii) the law applicable to the effects of an intervention measure on those contracts was not the law of Country A, but that of Country B. Note that if an intervention qualifies as a reorganization measure governed by the Directive on credit institutions, article 25 could frustrate that measure and therefore render the bank resolution ineffective[30]. The question then is whether that special conflict-of-law rule for netting arrangements should be deleted or at least reconsidered.

53. The answer to such questions calls for a deeper analysis. Nevertheless, from a conflict of law perspective, two preliminary considerations can be made. Firstly, the effectiveness of bank resolution measures

28 See EFMLG, *Protection for bilateral insolvency set-off and netting agreements under EC Law,* 2004, at www.efmlg.org.

29 The references *ibid.* and in P. Paech, *loc.cit.*, footnote 22, *passim.*

30 For an in-depth analysis of the different practical scenarios, Paech, *loc.cit.*, footnote 22, pp. 50-58.

requires its application to all financial transactions, irrespective of whether they are governed by a national or by a foreign law. In principle, there are no reasons to justify the application of the moratoria only to national arrangements: a partial transfer may endanger the practical purpose of the rescue measures[31]. By the same token, as previously discussed, the non-application to foreign transactions would offer an easy escape route from the policy of bank resolution measures. Thus, it seems sensible to conclude that the effectiveness of a moratoria or temporary stay should also cover arrangements governed by a foreign law, i.e. regulatory transfers and moratoriums should have cross-border effects.

54. There are three possible ways to deal with this problem.

(i) Firstly, to lay down a harmonized material-law regime applicable within the EU. This harmonized regime would encompass not only the basic elements of netting, but also the transfer and moratorium mechanism. The harmonization will avoid the forum shopping risk within the EU, since in principle the rules wold be the same irrespective of the law applicable to the netting arrangement.

(ii) Secondly, to eliminate the special rules for netting arrangements (i.e. art. 25 of the Directive on credit institutions) and, therefore, to apply solely the *lex fori concursus.* This approach would also eliminate the forum shopping risk. The enforceability of close-out netting clauses upon the insolvency of the counterparty would not be determined by the *lex contractus*, but by the law of the country where the restructuring proceedings are opened (*lex fori concursus*).

(iii) Thirdly, to maintain the principle enshrined in Article 25 of the Directive, i.e. that the enforceability of the close-out netting clause is governed by the *lex contractus* (including its insolvency rules), but adding a qualified carve-out: the moratoria or temporary stay of such clauses is subject to the *lex fori concursus*. This approach entails a *depeçage*. The *lex fori concursus* would only apply to a particular aspect of the insolvency regime of close-out netting arrangements, i.e. if and under what conditions the enforcement of such clauses can be temporarily suspended. Furthermore, and in order to preserve the function that netting arrangements play in financial markets, the definition of the scope of this carve-out can be explicitly restricted, e.g. its application can be limited to the scenarios of restructuring of financial entities and upon the satisfaction of certain circumstances (time framework or status of the transferee, *i.a.*). In

31 P. Paech, *loc.cit,* footnote 22, p. 50.

short, the *depeçage* can be accompanied by a sort of "material minimum standards"[32]. This third approach would impede forum shopping strategies with regard to the moratoria rules.

§ 4. Final conclusions

55. The main conclusions of this paper can be summarized as follows:

(i) The first task of the EU legislation should be to complete the EU legal framework on cross-border insolvency with an instrument on investment undertakings.

(ii) Any amendment to the IR should be accompanied by the corresponding amendment in the Directives, insofar as the rule is the same in the three instruments, in order to maintain the internal consistency of the system.

(iii) The role of the IR as a general rule with regard to the Directives should be expressly set forth.

(iv) The impact of future amendment of the Brussels I Regulation on the IR should be carefully analysed, in particular the abolition of exequatur.

(v) The loophole as regards hybrid insolvency procedures should be filled-up and, therefore, their inclusion in the IR should be expressly envisaged.

(vi) Article 6 IR should be amended to make it clear that it applies to netting agreements or a rule parallel to current article 25 of the Directive on credit institutions should be added.

32 See, elaborating this idea, M. Virgós/F. Garcimartín, "Conditional Conflict of Laws Rules: A Proposal in the Area of Bank Resolution and Netting in Cross-border Scenarios", *Int´l Corporate Rescue,* (forthcoming).

THE REVIEW OF THE EU INSOLVENCY REGULATION – TIME TO RECOGNIZE THE TIES THAT BIND COMPANY LAW AND INSOLVENCY LAW?

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§ 1. Introduction

1. The EU Insolvency Regulation (hereafter EIR) is the product of a lengthy legislative process, launched in the sixties and culminating almost thirty years later - in 1995 - in the signing of the Convention on Insolvency Proceedings. This Convention never entered into force, however, because the UK refused to sign it. Fortunately, the project was revived in 1999 and in 2002, the EIR finally entered into force. All those who contributed to the drafting of the EIR cannot be praised enough for creating a legal instrument that has led to an enormous improvement in the handling of cross-border insolvencies within the EU. That said, the text of the EIR clearly is the result of difficult negotiations, leading to many a compromise[1]. Moreover, certain issues that were considered to be controversial have - understandably[2] - not been dealt with at all in the EIR.[3] Notable examples of such issues are: 1) cross-border insolvencies of groups of companies and 2) jurisdiction and applicable law with respect to claims made by office-holders in the interest of corporate creditors (e.g. director liability claims). These issues will be discussed in § 3 and § 4 of this paper.

2. A significant development in the area of EU company law that has taken place since the text of the EIR was finalized is the recognition by the European Court of Justice of the fact that Member States may not hinder companies possessing the nationality of another Member State in the exercise of the freedom of establishment by imposing measures of domestic law unless such measures apply in a non-discriminate manner, are justified by imperative requirements in the public interest, are suitable for securing the attainment of the objective which they pursue and do

1 To name but a few: art. 5 EIR (respecting security rights on assets located outside the state of opening of proceedings) and art. 13 EIR (allowing the parties to a transaction to choose a relatively lenient transaction avoidance regime to apply to the transaction)

2 See B. Wessels, The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation, ECL 2009, p 175 on the omission of group insolvencies in the EIR: "At the time, the decision to postpone 'group insolvencies' to a later date may have been considered both politically and practically prudent."

3 See European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006 (INI)

not go beyond what is necessary to attain it.[4] This means that the battle between Member States adhering to the *real seat theory* (the connecting factor for the applicable company law is the place where the company has its head office) and those adhering to the *incorporation theory* (the connecting factor is the registered office of the company) has been decided in favour of the latter: the practice of applying domestic provisions of company law to companies incorporated under the law of another Member State has to a large extent been outlawed by the ECJ. Where European law allows the founders of a company the freedom to choose the company law (of a Member State) applicable to their company, the same conclusion cannot be drawn with respect to the right to choose the applicable regime of insolvency law. According to art. 3(1) EIR, the decisive factor for jurisdiction to open main insolvency proceedings against a company - determining also the applicable insolvency law, see art. 4 EIR - is where the company has its centre of main interests (COMI). The COMI is presumed to be where the company has its registered office, but this presumption can be rebutted. This means that a company incorporated in a Member State may be faced with the application of insolvency law of another Member State if that is where its COMI is proved to be on the basis of objective factors ascertainable by third parties.[5] Thus, founders of companies are not free to choose the insolvency law regime applicable to their company.[6] It has been observed in literature that in the domain of insolvency law, the real seat theory still applies.[7] In § 2 of this paper I will discuss the question whether there are reasons to bring the connecting factor for the applicable insolvency law in line with the connecting factor for the applicable company law. In other words: should the insolvency forum and the applicable insolvency law be determined on the basis of the registered office instead of the COMI? This paper will be concluded with a summary of the recommendations made for revision of the EIR in § 5.

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4 ECJ 9 March 1999, Case C-212/97 (Centros), ECJ 5 November 2002, Case C-208/00 (Überseering); ECJ 30 September 2003, Case C-167/01 (Inspire Art) and ECJ 30 November 1995, Case C-55/94 (Gebhard).

5 ECJ 2 May 2006, Case C-341/04 (Eurofood) and ECJ 20 October 2011, Case C-396/09 (Interedil).

6 See L. Enriques and M. Gelter, Regulatory Competition in European Company Law and Creditor Protection, EBOR 7 (2006), p. 438: "What we do have is a rebuttable presumption that for companies and legal persons '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'. The rationale for this presumption is that a company's head office is usually situated where the company has its registered office. It is by no means evidence of the lawmaker's willingness to favour debtor's choice in insolvency matters."

7 See Moss, Fletcher and Isaacs (Eds.), *The EC Regulation on Insolvency Proceedings*, OUP, 2009, par. 3.12 and W.-G. Ringe, Forum Shopping under the EU Insolvency Regulation, *EBOR* 9 (2008), p. 611.

§ 2. Should the COMI concept as it applies to companies be revised?

2.1. Is the COMI as connecting factor for the applicable insolvency law compatible with the freedom of establishment enshrined in art. 49 and 54 TFEU?

3. It has been set out above that the real seat theory still applies when it comes to the question which provisions of insolvency law apply to a corporate debtor. This means that an English limited company with its COMI in the Netherlands will, in the event of opening of insolvency proceedings in the Netherlands, be faced with the application of Dutch law to not only the insolvency proceedings, but also to "its consequences" (art. 4 EIR). This raises the question whether the COMI approach can be reconciled with the freedom of establishment enshrined in art. 49 and 54 TFEU.

4. As Eidenmüller writes[8], this question is not as far-fetched as it may seem: if art. 49 and 54 TFEU must be understood as mandating the freedom to choose the applicable company law, then do they not also confer a right on companies to choose the applicable insolvency law? This question is answered affirmatively by Ringe, who submits that the application of domestic insolvency law to a foreign company - just like the application of domestic company law under the real seat theory - impedes the exercise of corporate freedom of establishment so that it makes the establishment in the other state less attractive.[9] He rejects the argument that insolvency law does not have an equal influence on the choice of establishment at the moment when the company wishes to establish itself in the host Member State because it only comes into play once the debtor is insolvent.[10] In his view the company, when taking the decision to establish itself in the host state, already needs to adjust to the different insolvency law and may take anticipatory measures. He also points out that, according to the ECJ in its judgment in the case Inspire Art[11], the impediment need not be concrete at the moment when the establishment decision is taken. He then arrives at the conclusion that the COMI approach does not accord with the freedom of establishment.

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8 Eidenmüller, EBOR 6 (2005), p. 445.

9 Ringe, *op. cit.*, p. 609-612.

10 This argument has been raised by J. Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, p. 44, available at www.ssrn.com

11 ECJ 30 September 2003, Case C-167/01 (Inspire Art)

5. I do not share Ringe's view. I agree with Eidenmüller, who has pointed out first of all, that even if art. 49 and 54 TFEU *did* confer a right to chose the applicable insolvency law, this would not mean that companies could opt for any insolvency regime that took their fancy. The market actor's choice of the applicable insolvency law would be linked to the company law chosen.[12] But, more importantly, I share Eidenmüller's view that many provisions of insolvency law aim to protect third parties (such as creditors) and promote certain public interests (such as the preservation of enterprises in the interest of the workforce). These third party and public interests may justify measures that restrict the freedom of establishment of companies in Europe. Because third party interests and certain public interests will be affected most strongly in the Member State where the debtor has its COMI, it cannot be said that art. 49 and 54 TFEU *mandate* that the COMI approach be relinquished.[13] That said, there is in my view another reason why the idea of relinquishing the COMI approach in favour of the place of incorporation should be considered. This reason will be discussed below.

2.2. The "fuzziness"[14] of the COMI concept and the need to achieve legal certainty and foreseeability.

6. Both the ECJ case law on the freedom of establishment of companies[15] and the enactment of the tenth Directive on Cross-Border Mergers[16] have been a tremendous boost for cross-border mobility within the EU. Now that companies are free to migrate within the EU, they do so.[17] This means that the presumption that the COMI coincides with the

12 Eidenmüller, *op. cit.*, p. 445.

13 Eidenmüller, *op. cit*., p. 446 and the same author, Abuse of the Law in the Context of European Insolvency Law, ECFR 2009, p. 12..

14 This term was coined by Eidenmüller (2005), *op. cit*..

15 See the cases mentioned in footnote 4 and ECJ 13 December 2005, Case C-411/03 (Sevic) and ECJ 16 December 2008, Case C-210/06 (Cartesio). See also the pending case Vale (C-378/10). The conclusion of the Advocate-General in this case was published on 15 December 2011.

16 Dir. 2005/56/EC on cross-border mergers of limited liability companies

17 For a telling analysis of foreign private limited company incorporations in the UK during the period 1997-2006, see: M. Becht, C. Mayer and H.F. Wagner, Where do Firms Incorporate? Deregulation and the Cost of Entry, available at www.ssrn.com This paper shows that the ECJ rulings had a dramatic effect: the number of private limited companies from all EU Member States incorporating in the EU per year has increased from 4,400 pre-Centros to 28,000 firms post-Centros.

registered office has declined in value.[18] The facilitation of cross-border mobility by EU free movement law and EU company law is likely to lead to an increasing number of cases where either the debtor or the creditor requesting the opening of insolvency proceedings may argue that the COMI is in another Member State than the state where the company is registered. This would not be a problem if the COMI was a clearly defined concept, but that is - unfortunately - not the case.

7. Art. 3(1) EIR itself contains no definition of the COMI. Recital 13 of the EIR gives some guidance by mandating that the COMI "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore *ascertainable to third parties*". This Recital has its origin in the authorative Virgós/Schmit report (1996), in which the rationale of this rule is explained as follows:

"Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated."

The ECJ seems to have found inspiration in these words. In its judgment in Eurofood[19] case, the ECJ holds that only factors which are both *objective and ascertainable to third parties* may be used to rebut the presumption laid down in art. 3(1) EIR:

"That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination by the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with art. 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply."

8. The ECJ further held that the mere fact that economic choices of a subsidiary company are or can be controlled by a parent company in another Member State is not enough to rebut the presumption. According to the ECJ one of the cases in which the presumption *can* be rebutted is

18 See F.M. Mucciarelli, Optimal Allocation of Law-Making Power over Bankruptcy Law in "Federal" and "Quasi-Federal" Legal Systems: is there a Case for Harmonizing or Unifying Bankruptcy Law in the EU?, p. 36-37 (available at www.ssrn.com) and M. Menjucq, EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies, ECFR 2008, p. 136-137.

19 ECJ 2 May 2006, Case C-341/04 (Eurofood).

that of a letterbox company not carrying out any business in the territory of the Member State of their registered office. The Eurofood judgment leaves us with the question how the COMI should be established if the debtor obviously is not a letterbox company (as it does carry out some business in the state of registration), but several objective factors ascertainable by third parties link the COMI to another Member State than that of the company's registered office.

9. If it is argued before the court that a corporate debtor's COMI is in a different state than that of its registered office, the following two questions need to be answered by the court: 1) which objective factors are relevant for the determination of the COMI; and 2) could the company's creditors on the basis of the selected factors legitimately expect the COMI to be in another Member State than the state of registration?

10 With respect to the first question it is submitted that only those factors which are ascertainable by the creditors are relevant. This means that purely internal factors – such as the location of board meetings – should not be taken into account when determining the COMI. It is further submitted that the emphasis placed by the ECJ on legal certainty and foreseeability of the insolvency forum and the applicable law means that the COMI should not be identified with 'head office' in the sense of the place where decisions on the management of a subsidiary company are taken (the so-called "mind of management"[20] approach). As Wessels has argued, the emphasis should not be on the "interior" of the ties based on corporate and contract law and the managerial and operational structure of a group.[21] I agree with Wessels that the correct approach to the COMI is "the contact with creditors" approach.

11. With respect to the question where the creditor could legitimately expect the insolvency proceedings to be opened: this may be relatively easy to answer in the case of a special purpose vehicle such as Eurofood, whose only relevant creditors were the holders of the notes it had issued and the Bank of America, that had managed Eurofood as a

20 This approach is also referred to as "head office functions test". See G. Moss and T. Smith, who advocate this test in G. Moss, I.F. Fletcher and S. Isaacs (Eds.), *The EC Regulation on Insolvency Proceedings*, p. 254-257.

21 B. Wessels, The Place of the Registered Office of a Company: a Cornerstone in the Application of the EC Insolvency Regulation, ECL 2006, p. 183-190. See also P. Wautelet, Some Considerations on the Center of Main Interests as Jurisdictional test under the European Insolvency Regulation, p. 96, available at www.ssrn.com.

trust company.[22] It will be much more difficult to establish the COMI in the case that there is a larger number of creditors, some sophisticated (financiers and large trade creditors), some less so (employees and smaller trade creditors), some representing large claims in terms of money, others representing relatively small claims. A fine example of such a case is Daisytek[23] , where, in deciding on the location of COMI of German and French subsidiaries of an English parent, the High Court in Leeds drew up a list of factors pointing to England. It then proceeded to establish whether on the basis of these factors England was ascertainable by the subsidiaries' creditors as the place where the subsidiaries conducted their business. The High Court focused on the expectations of the group's financiers and trade suppliers, which it deemed to be the most important group of creditors because they represented a majority of the claims in money value. Wautelet has noted that the German subsidiaries had local creditors, such as employees, who may have had completely different legitimate expectations about the place where insolvency proceedings against their employer might be opened.[24] According to Wautelet, one should tread carefully when reviewing third parties' expectations, which may be as diverse as the categories of creditors and are difficult to measure objectively.[25] Claims with respect to the location of the COMI based on expectations should be checked against objective facts, which may be found in various documents such as credit documentation. It is submitted that the warning issued by Wautelet against a subjective appreciation of the facts is problematic because an element of subjectivity in the assessment of what has been ascertained by third parties to be the COMI seems to be unavoidable.

12. If it is accepted - as has been submitted - that the location of the COMI depends to a large extent on the company's creditors' legitimate expectations, any lawyer will understand that the COMI is a concept that is bound to give rise to litigation. Any lawyer will also understand that it is a concept that can be manipulated because "even 'objective and ascertainable facts' can be changed and/or manipulated".[26] Leaving the lawyer's viewpoint and looking at COMI from the perspective of an economist, it

22 See S. Franken, Three Principles of Transnational Corporate Bankruptcy Law, ELJ 11 (2005), p. 253. See also P.Wautelet, *op. cit*., p. 102: "As the court of Parma rightly pointed out, most third parties in this case who had dealt with Eurofood were professionals such as institutional investors who had specific expertise on the goings and particulars of special purpose vehicles."

23 [2004] BPIR 30.

24 See P. Wautelet, *op. cit.*, p. 101-102. Wautelet raises the same argument with respect to the Rover case ([2005] EWHC 874, Ch), see p. 102.

25 The same argument is raised by S. Franken, *op. cit*., p. 252.

26 Eidenmülle (2009), *op. cit*., p. 5.

should be noted that the fact that the insolvency forum and the applicable insolvency law is difficult to predict may make it difficult to put a price on credit risks, which may lead to inefficient credit contracts.[27]

13. Having concluded that the COMI criterion is fuzzy and manipulable and that due to its fuzziness, it may lead to inefficient contracts, the question is whether something can be done to improve the criterion or whether an alternative criterion should be adopted.

14. The European Parliament recently made a recommendation to the EC Commission to go down the first road: improve the COMI criterion.[28] The recommendation reads as follows:

"The European Parliament considers that the Insolvency Regulation should include a definition of the term 'centre of main interest' formulated in such a way that a formal definition should be inserted, based on the wording of Recital 13, which is concerned with the objective possibility for third parties to ascertain it.

The European Parliament considers that the definition should take account of such features as the externally ascertainable principal transaction of business operations, the location of assets, the centre of the operational or production activities, the workplace of employees, etc." It is submitted that no matter which definition of COMI would be included in the EIR, the concept will always remain fuzzy, because in the end it is up to the national court to weigh the facts (having particular regard to third parties' legitimate expectations). A parallel can be drawn here with the concept of transfer of undertaking in Dir. 2001/23/EC. This is defined in art. 1(b) of the Directive as follows: "there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary". Just like COMI, the concept of transfer of undertaking is a concept of European Union law. In the end though, whether there has been a transfer of undertaking or not will depend on the outcome of the weighing of the facts of the case by the national court.

15. The conclusion at the end of the previous paragraph seems to be substantiated by the recent decision of the ECJ in the case of Interedil.[29]

27 Eidenmüller (2005), *op. cit.*, p. 430.

28 European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006 (INI)).

29 Judgment of 20 October 2011, C-396/09.

Interedil was a company incorporated in Italy, that moved its registered office to the UK in July 2001. It was removed from the Italian register of companies and entered in the UK register as a foreign company.[30] It seems that Interedil subsequently sold its business to the British group Canopus. According to Interedil, the title to properties which it owned in Italy were transferred to Windowmist Ltd. as part of the business transferred. Interedil claims that it was removed from the UK register of companies on 22 July 2002. On 28 of October 2003 Intesa, presumably one of Interedil's creditors, filed a petition with the Tribunale di Bari for the opening of bankruptcy proceedings against Interedil. Interedil challenged the jurisdiction of that court, arguing that as a result of the transfer of its registered office to the UK, only the UK courts had jurisdiction to open insolvency proceedings. On 13 December 2003 Interedil requested the Corte suprema di cassazione to give a ruling on the preliminary issue of jurisdiction. However, without waiting for this judgment, the Tribunale di Bari ordered Interedil to be wound up. On 18 June 2004 Interedil lodged an appeal against the winding-up before the Corte di cassazione suprema. On 20 May 2005 the Corte di cassazione rendered its judgment on the preliminary issue: it held that the Italian courts had jurisdiction because in this case the presumption laid down in art. 3(1) EIR could be rebutted on the basis of the facts, being that (i) Interedil retained some property in Italy, (ii) Interedil was party to lease agreements in respect of two hotel complexes, (iii) it was party to a contract concluded with a banking institution and (iv) that the Bari register of companies had not been notified of the transfer of the registered office. Then something remarkable happened: the Tribunale di Bari, doubting the validity of the Corte di Cassazione's finding - decided to stay the proceedings in order to refer questions to the ECJ for a preliminary ruling. In the first question the tribunal asks whether COMI is a concept of European Union law, and if so, how it should be defined and what factors are decisive in identifying the COMI. From the next two questions

30 It should be noted that the effect of the transfer of Interedil's registered office has not been a transformation of Interedil Srl into a (limited) company governed by English law. Interedil was registered in the UK as an overseas company. Such a registration is required under English law if an overseas company has a place of business or a branch in the UK through which it carries on business. English law does not recognize the transfer of the registered office with the effect of a cross-border transformation. It should further be noted that since 2003 removal from the Italian register has extinctive effect. If Interedil had been struck from the register after 2003, it would no longer have existed when it registered in the UK. In the pending case C-378/10 (Vale) an Italian company migrated to Hungary with the aim to transform itself into a Hungarian company. In the Advocate-General's opinion the fact that the Italian company no longer existed when it applied for registration in Hungary means that Hungary could refuse to register the new Hungarian company as the successor of the Italian company. This refusal did not constitute a violation of art. 49 and 54 TFEU. (Interedil was removed from the Italian register in 2001. I have not been able to find out what effect removal from the Italian register had prior to 2003.)

it is clear that the Tribunale is really expecting the ECJ to give the ultimate answer:
“2 Can the presumption laid down in Article 3(1) of the Regulation …, according to which “[i]n the case of a company… the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary”, be rebutted if it is established that the company carries on genuine business activity in a State other than that in which it has its registered office, or is it necessary, in order for the presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the State in which it has its registered office? ”

“3 If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, are these sufficient factors or considerations to rebut the presumption laid down in Article 3(1) of the regulation…that the place of the company’s “registered office” is the centre of its main interests and are such circumstances sufficient for the company to be regarded as having an establishment in that Member State within the meaning of Article 3(2) of the regulation?”

After confirming what is already known – that COMI is a concept of European Union law and must therefore be interpreted by reference to community law – the ECJ holds:

“For the purpose of determining a debtor company’s centre of main interests, the second sentence of Article 3(1) of Regulation No 1346/2000 must be interpreted as follows:

- a debtor company’s main centre of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors 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 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 management 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* (emphasis added by author) 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."

In my view this answer confirms the view taken in this paper, that although COMI is a concept of European Union law, it is highly fact-sensitive and national courts should therefore not expect too much guidance from the ECJ.

16. If the conclusion is that COMI is necessarily a fuzzy concept and no definition will be able to remedy this, then perhaps we should consider to do away with it, at least with respect to legal persons. The case for scrapping the COMI criterion with respect to legal persons becomes stronger if one takes into account yet another drawback of the COMI criterion: it may lead to the application of diverging insolvency and company laws. The possible discrepancies between the applicable insolvency law and the applicable company law is not only undesirable from a lawyer's perspective. From an economic point of view, discrepancies between the applicable insolvency law and company should be avoided because they may lead to increased bankruptcy costs.[31]

17. Art. 3(1) EIR could be amended so as to provide that the court of the Member State where a legal person has its registered office has jurisdiction to open insolvency proceedings against that legal person. This criterion scores more points than COMI when it comes to legal certainty and foreseeability of the insolvency risk. Tying the insolvency forum and thus the applicable insolvency law to the place of the registered office further ensures a "Gleichlauf" of the applicable insolvency law and company law, avoiding discrepancies. These reasons[32] have led quite a number of authors to advocate that *de lege ferenda* the jurisdiction to open insolvency proceedings (and thus the applicable insolvency law) should solely

31 Eidenmüller (2005), **op. cit**., p. 431.

32 Some authors (Ringe, op. cit., p.613 and M. Szydło, Prevention of Forum Shopping in European Insolvency Law, EBOR 11 (2010), p. 271) further raise the argument that the application of COMI insolvency law on a company incorporated in another Member State would violate art. 49 and 54 TFEU and that therefore art. 3(1) EIR needs to be changed. Above, in nr. 5, I rejected this argument.

depend on the location of the registered office of a legal person.[33]

18. An interesting proposal has been submitted by Mucciarelli, who has also suggested to replace the COMI with the registered office as choice-of-law and choice-of-forum criterion. However, he has proposed to grant to Member States the power to protect local interests, by carving out from general insolvency law a number of rules with redistributive impact, such as the pecking order, claims priorities and the prerequisites of claw-back actions. These issues should be governed by the law of the state of the COMI, regardless of the location of the registered office.[34] It is submitted that this proposal should not be adopted for two reasons. First, it may not be so easy to determine which rules of insolvency law have redistributive effect. According to Mucciarelli, director liability provisions should be governed by the law of the registered office. It could, however, equally be argued that, being liability provisions, these rules have a redistributive nature and should therefore be governed by the law of the COMI. Second, as noted by Mucciarelli himself, courts will be asked to apply foreign law as a consequence of his proposal. Mucciarelli qualifies those who worry that the extensive application of foreign laws by national courts would not be a realistic task for domestic judges of Member States as pessimists, whose view would be an obstacle to any further development of the European integration. According to Mucciarelli, the process of European integration requires Member States' courts to consider the application of the law of other Member States as a part of their everyday job, rather than as an exception. Although I am very much in favour of European integration, at least with respect to systems of private law, I am afraid that I do not share Muciarelli's optimism. I think many judges in the EU are not prepared for the task he proposes to place on their shoulders.

19. My intermediary conclusion is that there are strong arguments that plead in favour of scrapping COMI as a determinant of insolvency jurisdiction and applicable insolvency law and replacing it with the registered office. It can, however, not be ignored that some arguments against such a change of art. 3(1) EIR have also been raised.

33 See J. Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition, p. 45, available at www.ssrn.com , Eidenmüller (2005), *op. cit.*, p. 44, Eidenmüller (2009), *op. cit*., p. 25, Ringe, *op. cit*., p. 614, T.M. Bos, Forumshopping in een Europese insolventie, in: B.E. Reinhartz a.o. (Eds), *Derden in het privaatrecht,* The Hague: Boom Juridische Uitgevers, 2008, p. 212, S.M. van den Braak, Migratie in het zicht van insolventie: het COMI nader beschouwd, TvI (Tijdschrift voor Insolventierecht) 2010, p. 133, and Szydło, op. cit., p. 272.

34 Mucciarelli, *op. cit*., p. 36-37.

20. The first of these objections is that in the case that the company carries out its business in another Member State than that where it is registered, creditors in that state will have to pursue their claims in the Member State where the company is registered. They will be faced with an unfamiliar legal system, (in most cases) a language that is not their own and may have to incur travel costs. Moreover, the interests of some creditors may be protected less well in the foreign insolvency law than in the domestic insolvency law. This will not be so much of a problem for powerful, sophisticated ('adjusting') creditors, such as financiers. Because they know in advance which insolvency law will apply, they can assess the risk they run under the foreign system and price the contract with the company accordingly (or take additional measures to protect their interests). This kind of self-help is not available to less powerful, 'non-adjusting' creditors (e.g. employees). For these creditors, however, the consequences of main proceedings in a foreign court applying foreign law can be mitigated by the possibility offered by art. 3(2) EIR to request the opening of secondary insolvency proceedings. This means they will not have to lodge their claims in foreign proceedings, where proceeding will be conducted in a foreign language and on the basis of foreign law. Importantly, by requesting the opening of secondary proceedings, non-adjusting creditors can ensure that domestic priority rules protecting their interests are applied.[35]
When discussing the protection of creditors, it cannot be ignored that tying jurisdiction to the registered office instead of the centre of main interests may lead to more cases of forum shopping. Because the suggested change to art. 3(1) EIR means that it will no longer be necessary to ensure that the COMI is shifted together with the registered office, it is to be expected that more debtor companies will resort to forum shopping if they see a reason to do so. Currently, obstacles may still exist under national law that prevent a company from transferring its registered office to another Member State without being wound up and having to incorporate a new company under the host Member State's law. The general opinion is that the case law of the ECJ on art. 49 and 54 TFEU does not afford to companies the right to move their registered office from the national legal system of their Home State to that of another Member State, that is, to change their nationality and submit themselves to the legal regime of a new Home State.36 That said, it is possible to effectuate a transfer of the registered office through a cross-border merger on the basis of the 10th Directive. Moreover, it seems inevitable that in the not too distant future,

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35 Armour, *op. cit.*, p. 47.

36 See the Report of the Reflection Group on the Future of European Company law of 5 April 2011, p. 18. This report is available at http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

the EU will adopt secondary legislation facilitating a cross-border transfer of the registered office. The recent (and expected) developments in European company law give rise to the question to what extent the registered office may be shifted in order to shop for another insolvency forum. When answering this question, it seems that the starting point should be that companies may - in principle - make use of their right to free movement (by transferring their registered office) pursuant to art. 49 and 54 TFEU in order to have insolvency proceedings opened in another Member State. Case law on art. 49 and 54 TFEU shows that companies may use the freedom of establishment to take advantage of more favourable legislation.[37] Currently, the EIR does not provide that the Home State retains jurisdiction to open main proceedings during a certain transitionary period after the effectuation of a transfer of the COMI. This means that, currently, a shift of the registered office immediately triggers the presumption of art. 3(1) EIR that the COMI is in the Host State: there is no waiting period.[38] It is submitted, that such a waiting period should not be introduced if the suggested change of linking jurisdiction exclusively to the registered office is made. The problem inherent in a waiting period is that it will not always have the effect of preventing *abuse* of the freedom of establishment. It may also prevent a company from seeking jurisdiction of a foreign court for perfectly legitimate reasons, for example because the foreign insolvency proceedings offer better possibilities for the company to implement a debt-equity swap. It is submitted that abuse of transfer of the registered office can be prevented in two ways. First of all, the secondary legislation on cross-border transfer of the registered office to be adopted in the future should provide for measures protecting the company's creditors. Second, courts may deny a company the right to transfer its registered office in case of abuse of the freedom of establishment. Such abuse may - for example - be established by the court if the registered office is transferred to evade the application of a liability provision of the Home State's law.[39]

21. The second objection that has been raised against tying insolvency jurisdiction and applicable insolvency law to the registered office is that it would make it harder to maximize value in case of insolvency of several members of a cross-border group of companies. Handling of the vari-

37 See ECJ 9 March 1999, Case C-212/97 (Centros) and ECJ 30 September 2003, Case C-167/01 (Inspire Art).

38 See nr. 47 – 48 of the conclusion of the Advocate-General in the Interedil case (C-396/09).

39 See nr. 72 of the conclusion of the Advocate-General in the Interedil case (C-396/09). The A-G's statements in this case concern the transfer of the COMI, but they would be equally applicable if the EIR would link jurisdiction to open main proceedings to the registered office and the question to be answered was in which cases a transfer of the registered office can be held to be fraudulent.

ous insolvencies by a single court applying a single regime of insolvency law could only be achieved if all group companies would (re)incorporate in the same Member State. The question is whether the COMI criterion really leads to more optimal results. There are two ways in which parties can under current law (try) to achieve a concentration in the same court of insolvency proceedings with respect to several members of a cross-border group.

21.1. The first way is to argue that the COMIs of the foreign subsidiaries are located in the Member State where the parent has its COMI. In the past, especially UK courts have been willing to accept – on the basis of the 'head office functions' or 'mind of management' approach - that the foreign subsidiaries' COMIs coincided with its parent's COMI in the UK.[40] In the Eurofood case, however, the ECJ has dealt a blow to this practice by deciding that the fact that the economic choices of a subsidiary company are or can be controlled by a parent company in another Member State is not enough to rebut the presumption contained in art. 3(1) EIR. If a subsidiary carries out business in the Member where it was incorporated, it will - post-Eurofood - be quite difficult to convince the court that its COMI is actually in another Member State, where its parent company is located. That this conclusion may also be drawn for the UK is sustained by the fact that in July 2009, in Re Stanford, Judge Lewison explicitly rejected the 'head office functions' test[41], a decision that was confirmed by the Court of Appeal.[42]

21.2. If parties foresee that they will not be able to convince the court that the foreign subsidiaries' COMIs are located in the Member State of the parent's COMI, they can resort to a second technique. They may try to relocate the subsidiary's COMI to the Member State where the parent has its COMI. This technique was employed in the cases of Schefenacker, Deutsche Nickel and Hans Brochier[43], though not so much in order to achieve procedural consolidation of proceedings at the COMI of a UK par-

40 This approach has been criticized by several authors. For criticism by Wessels (2006), *ibid*. For further criticism see Eidenmüller (2009), *op. cit*., p. 24, where he discusses the approach taken by the UK courts in the Daisytek and Rover cases: "Whilst the attempt to coordinate multiple proceedings by giving one single court jurisdiction over them is laudable, the 'mind of management' theory clearly violates the ascertainability criterion stated in recital 13 of the regulation. To be sure, maximizing the net assets available for distribution to the creditors is the paramount goal of the EIR. Nevertheless, in pursuing this objective one is bound to the COMI criterion stipulated by the EIR. The 'mind of management' theory by far overstretches the interpretative leeway given by art. 3 para 1 EIR."

41 [2009] EWHC 1441, Ch.

42 25 February 2010, EWCA Civ 137.

43 For a description of these three cases see Ringe, *op. cit*., p. 585-588.

ent, but in order to be able to benefit from the UK company voluntary arrangement (CVA) in order to push through a debt-equity swap.[44] The magical trick used was to transform the German company into a partnership, one of the two partners of which would be a UK company. Upon withdrawal of the German partner, by operation of § 738(1) of the German Civil Code, all assets and liabilities were automatically transferred to the remaining partner, the UK company, which could then request the opening of insolvency proceedings in the UK. In essence, the technique used in these cases is no less than a cross-border transformation, whereby - in the first place - the *registered office* is transferred to another Member State. The Hans Brochier case shows that parties have to take great care that not just the registered office, but also the entire *COMI* is transferred to the Member State where the opening of proceedings is to be requested. In this case the trick of transformation failed to work its magic because it could not be established that Hans Brochier's COMI had also been transferred to the UK. It should be noted that the three cases mentioned date from before the entry into force of the Directive on Cross-Border Mergers. This Directive can now – as has been mentioned above in section 20 - be used to effectuate a transfer of the registered office. But if this method is used, care still has to be taken to also transfer the COMI. This will be different if art. 3(1) EIR is amended to the effect that jurisdiction to open main proceedings is tied exclusively to the registered office. It has been pointed out above in section 20. that in that case it will be easier to achieve a change of the insolvency forum and applicable insolvency law in the sense that only the registered office needs to be transferred.

22. Assuming that parties either succeed in convincing the court that the various insolvency proceedings against different group members should be handled by a single court or in shifting subsidiaries' COMIs to the Member State where the parent is located, this does not mean that there will be no proceedings in the Member States where the subsidiaries carry out activities. Art. 3(2) EIR enables local creditors to request the opening of secondary proceedings on the basis that the subsidiary has an establishment in their Member State. This may thwart the coordination efforts by the office holders in the Member State of the 'group COMI', especially because secondary proceedings can only be liquidation proce-

44 In the PIN Group case a COMI shift was used to facilitate the restructuring of a group by concentrating the proceedings over all of the group's subsidiaries in the Member State where the parent was. For a discussion of this case see Eidenmüller (2009), op. cit., p. 17. In this case, the COMI shift was accepted by the Amtsgericht Cologne because it was in the interest of all creditors of the PIN group (19 February 2008 [2008] *Zeitschrift für Wirtschaftsrecht* 423).

dures.[45] If no secondary proceedings are opened by local creditors (because local creditors can be convinced that this is not a good idea[46]), the 'group COMI' approach (or shifting of subsidiaries' COMIs to the parent's home Member State) may still not lead to an optimal administration of the insolvency of a multinational group. The reason for this is that, as the foreign subsidiaries' assets will typically be located outside the Member State of the group COMI, art. 5 and 7 EIR - respecting security interests and reservations of title with respect to assets located outside the state of opening of insolvency proceedings - may frustrate the scenario worked out by the office holders in the COMI proceedings.[47] They may actually have to request the opening of secondary proceedings - and a moratorium - to prevent those creditors who can invoke art. 5 and/or art. 7 EIR from having immediate recourse against these assets. This would have the drawback that such proceedings can only be liquidation proceedings, so that if a rescue is envisaged, office holders may be forced to opt for the opening of main rescue type proceedings in the Member State where important assets are located, relinquishing the envisaged solution of coordinating the proceedings in one Member State.

23. It is submitted that the arguments raised against the registered office as the sole determinant of insolvency jurisdiction (and applicable insolvency law) over companies and legal persons are not strong enough to outweigh the benefits: legal certainty and foreseeability and 'Gleichlauf' of applicable insolvency law and company law. I therefore recommend that the rebuttable presumption contained in art. 3(1) EIR be changed into an irrebuttable presumption.

§ 3. Should the EU legislate on cross-border group insolvencies?

3.1. The EIR and group insolvencies: a clash between law on the books and law in action

24. The EIR is based on the principle that separate main proceedings should be opened with respect to each separate legal entity belong-

45 See Tollenaar, Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation, *TvI* (Tijdschrift voor Insolventierecht) 2010, p. 95.

46 See Tollenaar, *ibid*., mentioning – amongst other cases in which different techniques were used to fend off secondary proceedings - the Collins & Aikman case [2006] EWHC (Ch), in which the office holder in the main proceedings succeed in preventing the opening of secondary proceedings by representing that they would respect local priorities and treat local creditors as if secondary proceedings were opened. Tollenaar points out that such a representation would not be permitted under German law and that it is uncertain whether it would be in conformity with Dutch law.

47 See Menjucq, *op. cit*., p. 139 and Tollenaar, *op.cit.*, p. 96.

ing to a group of companies. Reference can be made to n. 76 of the Virgós/ Schmit report:

"The Convention offers no rule for groups of affiliated companies (parent-subsidiary schemes). The general rule to open or to consolidate proceedings against any of the related companies as a principal or jointly liable debtor is that jurisdiction must exist according to the Convention for each of the concerned debtors with a separate legal entity. Naturally, the drawing up of a European norm on associated companies may affect this answer."

This was written in 1996, when there was perhaps still some prospect of European rules on groups of companies to be drafted in the near future (although the draft 9th Directive on Groups of Companies had been withdrawn in 1990). At the time of writing of this paper, only the most incorrigible of optimists would have hopes for European rules on groups of companies to be implemented anywhere soon. To be sure, the Reflection Group on the Future of EU Company Law has made some recommendations on groups of companies in its report of 5 April 2011.[48] Only one of those, however, is of some - albeit remote - relevance for the topic of group insolvency. The Group recommends that the EU Commission consider, subject to evidence that it would benefit to take action at the EU level, to adopt a recommendation recognizing the interest of the group. Close reading of this recommendation suggests that the Group does not see an immediate cause for action in this area. Moreover, even if a recommendation on the recognition of the group interest were adopted, such a recommendation would not be sufficient basis for a court to allow the proceedings of several group companies with COMIs in different Member States to be coordinated by consolidating them in one court. This would require an amendment of the EIR itself.

25. Why does not the EIR contain rules on group insolvencies? One of the drafters of the 1996 Convention on Insolvency Proceedings gives the following explanation:

"The Member States of the EU have widely divergent views on the legal consequences of parent-subsidiary relationships, especially on the liability of the parent for debts incurred by the subsidiary and the possibility of piercing the corporate veil. Most countries tend to protect a subsidiary against a spill-over of the insolvency of the parent and many rate the interest of the subsidiary to survive above the parent's interest. Therefore,

48 Available at http://ec.europa.eu/internal_market/company/modern/index_en.htm

joint insolvency proceedings, administered by a single court and/or liquidator, let alone consolidated parent-subsidiary proceedings, are not possible in most jurisdictions. Separate insolvency proceedings of two legal but related entities incorporated in different jurisdictions would, as such, in the thinking of most European jurisdictions, not raise issues of international bankruptcy law.

For all these reasons, the Convention has no specific rules on parent-subsidiary relationships in the case of the insolvency of both entities. It deals only with the cross-border effects of proceedings concerning a single legal entity which may have assets or creditors outside the jurisdiction where it is registered, headquartered, or incorporated. If an EU Member State, however, has jurisdiction over two affiliated entities, it is, of course, free to consolidate the respective insolvency proceedings and have them treated as one main proceeding by other European jurisdictions also."[49]

26. When reading this explanation one should bear in mind that this was written before legislatures and insolvency practitioners in the EU became more susceptible to the idea that insolvency proceedings should also be geared towards the rescue of the company (or (part of) its business). Preserving economic value by restoring a company to profitable trading if possible (e.g. by effectuating a debt/equity swap) or – where this is not possible – realizing a going concern sale of (part of) the business of a corporate debtor is now very high on the agendas of legislatures and practitioners across the EU. This change of perspective with respect to the aims of insolvency law means that the lack of a solution for cross-border group insolvencies in the EIR has become more acute.

27. Practitioners and courts have naturally sought ways to achieve an optimal result when dealing with the administration of a group insolvency. It has already been discussed that an extensive interpretation of the COMI standard has been advocated by practitioners and applied by some courts to enable the consolidation in one court of insolvency proceedings with respect to various companies belonging to an international group. It has also been mentioned that this practice seems to have been curbed by the ECJ's Eurofood judgment. If the interpretation of Eurofood submitted in this paper is correct, there seems to be little room for creative use of the COMI criterion to achieve procedural consolidation of insolvency proceedings relating to different members of a cross-border group of companies. Moreover, secondary proceedings opened in Mem-

49 M. Balz, The European Convention on Insolvency Proceedings, 70 *AMBKRLJ* 485, at p. 503-504.

ber States where subsidiaries carry out economic activities can frustrate the 'group COMI' approach, as can the carve-out from the main proceedings effectuated by art. 5 and 7 EIR. There is thus every reason to discuss the question whether the EIR should be reformed in order to facilitate an optimal administration of a group insolvency.

3.2. Should the EIR be amended to enable procedural consolidation (Group COMI approach) or should a revision of the EIR be restricted to the introduction of provisions improving the coordination of concurrent proceedings?

28. In the past, various proposals have been submitted with respect to the regulation of cross-border insolvencies of groups within the EU. Several of these will be discussed, after which some recommendations will be made.

29. The first option is not to revise the EIR with a view to facilitating the handling of cross-border insolvencies of groups. Menjucq has expressed his fear "that a discussion with 27 Member States will not lead to the adoption of an improved Regulation". He therefore advocates leaving this matter to national case law (supervised by the ECJ).[50] It is submitted that this option should not be considered as there seems to be a case for – at the least – adopting an express provision in the EIR obliging the various office holders and courts involved in the cross-border insolvency of a group to cooperate with each other. In the absence of such a provision efforts to coordinate proceedings will remain dependent on the goodwill of the parties involved. That said, Menjucq's warning should be heeded: drafting a legal text is an extremely difficult (and probably also slow) process when 27 Member States with different interests and opinions are involved. A proposal for legislation should therefore not be too ambitious.

30.1 A second option would be to amend the text of art. 3(1) EIR to the extent that it would tie the insolvency jurisdiction with respect to subsidiary companies to:

a) (proposed by Moss[51]) - *where the head office functions are carried out in another Member State and that other Member State is ascertainable to prospective creditors as the place where such head office functions are carried out - the place where the head office functions are carried out* or b)

50 See for example Menjucq, *op. cit*., p. 147.

51 G. Moss and C.G. Paulus, The European Insolvency Regulation – The Case for Urgent Reform, *Insolvency Intelligence* 2006, p. 2.

(proposed by Paulus[52]) - *in case of an economic unit - the place where the head office functions of the debtor are carried out, provided that place is ascertainable by prospective creditors as the place where such head-office functions are carried out.*

This proposal – if adopted – would lead to a codification of the group COMI approach described *supra* in n. **21.1**. The drawbacks attached to this approach are not solved by codifying it, so this proposal need not be discussed in more depth.

30.2 Moss and Paulus point out that the place of the COMI as proposed by them may be subject to factual or other controversy. To prevent such controversy from frustrating an attempt to deal with the insolvency of a group as a whole they have made two further proposals:

1) *if it is established that relevant companies belong to a group and that the reconstruction, rescue or insolvency proceedings would more beneficially be conducted for the group as a whole, this option should be available to the Member State which has the centre of main interests of the top company in the group and 2) where other Member States have opened main proceedings first in relation to a group company, an amendment to the regulation could provide that the liquidator of the parent company could apply to a court which has opened main proceedings in respect of a subsidiary to convert those main proceedings into secondary proceedings and to agree to the opening of main proceedings in the Member State where the parent has its centre of main interests.*
Again, these are proposals based on the idea that the various main proceedings in respect of group companies should be concentrated in a court of the Member State where the parent has its COMI. The proposals do not include a solution for the problem of carve-outs from the main proceedings that may occur due to the opening of secondary proceedings or due to art. 5 and 7 EIR. It is therefore submitted that these proposals should be rejected.

31. In its Resolution of 15 November 2011, the European Parliament makes recommendations on the insolvency of groups of companies. The EP recommends two different regimes, one applicable to decentralized groups, based on cooperation and coordination between courts, between courts and insolvency representatives and between insolvency representatives. This regime will be discussed below in n. **35**. The other regime proposed by the EP reads as follows:

52 Moss and Paulus, *ibid*.

1. *Whenever the functional/ownership structure allows it* (emphasis added by author), the following approach should apply:

A. Proceedings should be opened in the Member State where the operational headquarters of the group are located. Recognition of the opening of the proceedings should be automatic.
B. The opening of the main proceedings should result in a stay of the proceedings opened in another Member State against other group members.
C. A single insolvency practitioner should be appointed.
D. In every Member State in which ancillary proceedings are opened, a committee should be set up to defend and represent the interests of local creditors and employees.
E. If it is impossible to determine which assets belong to which debtor, or to assess inter-company claims, recourse should exceptionally be had to the aggregation of estates (*this recommendation will be discussed below, in n. **38**, LL*).

This is a regime based on the group COMI approach, resembling the proposals discussed above, but with the difference that the European Parliament recommends that the opening of main proceedings in the Member State of the group COMI should result in a stay of proceedings opened other Member States against other group members. This raises the question of the duration of this stay and which law should be applicable to it: the recommendation is silent on this matter. The European Parliament further recommends a single insolvency practitioner to be appointed. Taking into account that this regime allows for secondary (the recommendation speaks of ancillary) proceedings to be opened, this recommendation seems unrealistic. What is missing is a provision requiring the insolvency practitioner administering the main proceedings to seek the assistance of a local insolvency practitioner qualified to act as such according to the applicable rules of the Member States where secondary proceedings are opened.[53] It could be the task of this local representative to see to it that the interests of local creditors and employees are safeguarded, making the appointment of a committee as proposed under D superfluous. What is also missing in this recommendation is a provision on conflicts of interests which may occur if a single office holder is appointed in the insolvencies of different companies.[54] The biggest problem of this recommendation, however, is the phrase highlighted in italics: what is this supposed to mean? In its place, one would have expected some kind of definition of what qualifies as a centralized group. The fact that a definition is missing

53 See Tollenaar, *op.cit.*, p. 101-102 on the need for the assistance of a local office-holder.
54 See Tollenaar, *ibid*.

can be interpreted as meaning that the drafters of the recommendation could not agree on a definition or had no idea how to define this. This is understandable, because the corporate group is a phenomenon that can take very different shapes, making it very difficult to draw a clear line between centralized and decentralized groups. It is submitted that this recommendation is fundamentally flawed because it is based on a distinction that is too vague to offer legal certainty. A regime based on this recommendation therefore stands little chance of being accepted by the Council. Another objection that may be raised against the proposal is that it links jurisdiction to the operational headquarters of a group, which may not always be easy to locate (and may therefore not be ascertainable to third parties). Finally, it is doubtful whether main proceedings of foreign insolvent subsidiaries should always be opened in the Member State of the operational headquarters of the group, even if the parent company itself is not insolvent. In short, there are compelling reasons why the Commission should not act upon this recommendation.

32. The intermediary conclusion is that any regime in respect of group insolvencies to be adopted in the EIR should not be based on the group COMI approach. In the following sections two proposals will be discussed that are geared towards facilitating the coordination of concurrent main – and possibly also secondary proceedings – in respect of different members of the same multinational group.

33. Only a year after the EIR came into force Van Galen launched his proposal[55], which is based on the EIR as it currently reads and would require a limited number of amendments to the EIR. In the event that a subsidiary and its ultimate parent both enter into insolvency proceedings, Van Galen proposes to give the liquidator of the parent company powers similar to those that the liquidator in main proceedings has vis-à-vis secondary proceedings. He defines a parent company as 1) a company that has its centre of main interests in a Member State and 2) has a majority of the shareholders' voting rights in the subsidiary, adding that this definition needs refinement. It is submitted that instead of a legally oriented definition, based on a majority of voting rights, an economically oriented definition should be used, based on (i) the parent actually exercising a dominant influence over the subsidiary or (ii) parent and subsidiary being managed on a unified basis by the parent company[56]. This may be more

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55 R. van Galen, The European Insolvency Regulation and Groups of Companies, *TvI* (Tijdschrift voor Insolventierecht) 2004/13, also available at www.iiiglobal.org

56 These are the definitions laid down in art. 1(2) (a) and (b) of the Seventh Directive on Consolidated Accounts (83/349/EEC).

fuzzy, but is more in line with the purpose of enabling the coordination of insolvencies of different legal entities that are economically linked to each other. The key element in van Galen's proposal is that the parent company's office holder would have the right to (i) propose a plan with respect to the subsidiary (cf. art. 34 EIR) and (ii) request the court in the subsidiary's main proceedings to suspend any right to propose a plan with respect to that subsidiary. Van Galen submits that the plan proposed by the parent company's office holder should not be governed by national law, but by rules adopted in the EIR. Taking inspiration from the German Insolvenzplan and Chapter 11 U.S.B.C., he proposes voting on the plan by classes of shareholders and the possibility of cram-down of the plan by the court. Creditors should not be able to sink the plan by voting against it, if the benefits they receive under the plan (i) are greater than what tey would have received if the subsidiary was completely wound up and (ii) are fair in relation to the benefits to be received by creditors of the other group companies involved in the plan, taking into account the relative strength of their respective positions. Van Galen's proposal is creative and well thought through, but having in mind the warning issued by Menjucq, I think that the key element is too ambitious, considering that national laws on reorganization plans) still vary widely (e.g. with respect to voting procedures). It will be quite difficult to get a qualified majority in the Council to vote in favour of this proposal.

34. A less ambitious proposal has been submitted by Tollenaar. Like van Galen, he rejects the group COMI approach and looks for a solution in appointing an office holder who can exercize his powers with respect to all the insolvent members of the group, the so-called group office holder. This is not necessarily the office holder appointed in the insolvency of the ultimate parent company in the group, as this may only have been established for tax purposes. The company that delivers the group office holder should be the company carrying out the head office functions of the group (in Europe), or at least the company where most information and personnel charged with the management is available. Tollenaar seems to have found inspiration for this proposal in the document drafted by Working Group V of Uncitral. Recommendations 251 and 252 of the Legislative Guide on Insolvency law read as follows[57]:

57 For the latest version (19-23 April 2010) of the recommendations and explanatory notes, see Uncitral Legislative Guide on Insolvency Law – Part three, Treatment of enterprise groups in insolvency – III: addressing the insolvency of enterprise groups: international issues, A/CN.9/WG.V/WP.92?add.1, available at http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html

251. The insolvency law should permit the court, in appropriate cases, to coordinate with foreign courts with respect to the appointment of a single or the same insolvency representative to administer insolvency proceedings concerning members of the same enterprise group in different States, *provided that the insolvency representative is qualified to be appointed in each of the relevant States* (emphasis added by author). To the extent required by [the insolvency] [applicable] law, the insolvency representative would be subject to the supervision of each of the appointing courts.

252. The insolvency law should specify measures to address any conflict of interest that might arise when a single or the same insolvency representative is appointed to administer insolvency proceedings with respect to two or more enterprise group members in different States. Such measures may include the appointment of one or more additional insolvency representatives.

The phrase emphasized in italics indicates an issue that has been solved in a more practical way by Tollenaar. Rather than looking for – as the Dutch expression goes – a five legged sheep (an office holder qualified – and able - to act as such in several jurisdictions), Tollenaar requires the group office holder to retain a local representative, who should have the right to veto decisions in which the group office holder has an evident conflict of interest. Such decisions should be submitted to the local court for determination. Tollenaar does not propose provisions enabling the adoption of a reorganization plan covering all group members subject to insolvency proceedings. He does, however, recommend that the group office holder be given the right to request the opening of insolvency proceedings against technically insolvent subsidiaries. An issue that needs further consideration, as admitted by Tollenaar, is how to determine which companies belong to the group and which do not. He suggests that the criterion should not just be based on (the possibility of control) through a majority of the votes or the right to appoint (a majority of) the directors but on contractual means by which control can be exercised. This would for example facilitate the restructuring of a franchise organization. I have suggested above to adopt the economically oriented criteria laid down in art. 1(2)(a) and (b) of the 7th Directive on consolidated accounts.

35. Finally, before making recommendations, a brief look at the regime that should apply to decentralised groups according to the EP's resolution of 15 November 2011. The first issue with this regime is how to decide what is a decentralised group. It has already been submitted that creating different regimes should be rejected if the determination of the applicable regime is based on an extremely vague criterion. Looking at the substance of the proposed regime applicable to decentralized groups, the European Parliament - like Tollenaar - seems to have found inspiration in the Uncitral Legislative Guide. For the most notable feature of the recommendation is the adoption of:

"Rules allowing and promoting the appointment of a common liquidator for all proceedings, *to be nominated by the courts involved* (emphasis added by author) and assisted by local representatives *forming a steering committee* (emphasis added by author); and rules laying down the procedures governing cooperation between members of the steering committee."

The recommendation leaves unanswered how the courts involved should decide who will be appointed as group office holder. It is submitted that – as Tollenaar has suggested – this should be the office holder of the company carrying out the head office functions (in Europe). The EP does not clarify how the proposed steering committee should operate. Is the aim of this committee to enable the local representatives to represent the interests of local creditors? Will local representatives be given the right to veto decisions if the group office holder has a conflict of interest, as has been suggested by Tollenaar? I think this is an important issue that needs to be regulated.

36. Having analysed several proposals that have been submitted to facilitate the coordination of insolvency proceedings in respect of companies belonging to a multinational group, I recommend that the EIR be amended to include the possibility to have a group office holder appointed. To facilitate the task of the group office holder, art. 3(3) and art. 27 EIR should be amended to the effect that secondary proceedings must not be winding-up proceedings. Moreover, although this proposal may be too controversial to make it through the Council, an amendment of art. 5 (and 7) EIR to the effect that assets located outside the Member State of opening of proceedings would no longer be immune to a stay in those proceedings should be considered.[58]

37. Should the recommendation made in n. 36 not be viable, then at least rules for mandatory cooperation between courts, between courts and insolvency representatives and between insolvency representatives involved in the different proceedings involving members of the same mul-

58 See N. Tollenaar, Proposal for Reform: Improving the ability to rescue multinational Enterprises under the European Insolvency Regulation, *IILR* 2011, p. 260.

tinational group should be included in the EIR. The adoption of such rules has been recommended by the European Parliament in its resolution of 5 November 2011. Reference can further be made to recommendation 240-245 and 246-250 of the Uncitral Legislative Guide.

3.2.1 Should provisions on substantive consolidation be included in the EIR?

38. The European Parliament has recommended that the option of substantive consolidation (treating the various insolvent estates of companies belonging to a group as one) should be available in the exceptional circumstance that it is impossible to determine which assets belong to which debtor, or to assess inter-company claims. The first question that arises is to what extent the assets must have been commingled to warrant substantive consolidation. The recommendation raises some doubt because it seems to imply that substantive consolidation is possible if (some?) inter-company claims cannot be assessed. It is important that it should be clear that substantive consolidation can only be applied in exceptional circumstances. If this is not clarified, there is no chance of this recommendation being adopted. Further issues with this recommendation are that it is not clear which court should decide on the substantive consolidation. This is an issue that is difficult to resolve.[59] Another issue that may need to be addressed is whether the court should be able to mitigate any negative effects the consolidation may have on the position of certain creditors.[60] Looking at these thorny issues and bearing in mind that the phenomenon of substantive consolidation is unfamiliar to the national laws of most Member States, it seems that this recommendation is too ambitious. It is submitted that the European legislature should not legislate on substantive consolidation but concentrate on provisions that may help to coordinate group insolvencies in more ordinary circumstances.

39. It should be noted that very recently the ECJ rendered judgment in a case about a French provision allowing substantive consolidation.[61] In this case, the liquidator of a French company, Médiasucre International, had applied to have the liquidation proceedings extended to the Italian parent company, Rastelli Davide pursuant to art. L 621-2 of the Code de Commerce, that provides:

59 Van Galen, *op. cit.*, p. 65.

60 Van Galen, *ibid.*.

61 ECJ 15 December 2011, Case C-191/10 (Rastelli).

"The opened insolvency proceedings may be extended to one or more other persons if their assets are intermingled with those of the debtor or when the legal entity is a sham."

After the Marseille Commercial Court had declined jurisdiction because Rastelli had neither a registered office nor a place of business in France, the court of appeal overruled this decision, holding that the lower court had jurisdiction. Rastelli appealed against this decision, claiming that it contravenes art. 3 EIR. The Cour de Cassation referred the following questions to the ECJ:

Where a court in a Member State opens the main insolvency proceedings in respect of a debtor, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, does Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings preclude the application by that court, of a rule of national law conferring upon it jurisdiction to join to those proceedings a company whose seat is in another Member State solely on the basis of a finding that the property of the debtor and the property of that company have been intermingled? If the action for joinder falls to be categorized as the opening of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seised is conditional on the proof that the company to be joined has the centre of main interests in that Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?

The ECJ gives a negative answer to both questions. First, it holds that a court of a Member State that has opened main insolvency proceedings against a company can under a rule of its national law join to those proceedings a second company whose registered office is in another Member State only if it is established that the COMI of that second company is situated in the first Member State. The ECJ rejects the contention made by the liquidator that the joinder does not have the effect of opening new proceedings. Second, the ECJ holds that the mere finding that the property of two companies had been intermixed is not sufficient to establish that the COMI of the foreign parent company to be joined in the main proceedings against the subsidiary is also situated in the Member State of opening of those proceedings. This judgment confirms that cross-border substantive consolidation will only be possible within the EU if an express provision allowing this is introduced in the EIR. Cross-border substantive consolidation involving companies registered in other Member States cannot be based on art. 4(1) EIR, bypassing the issue of which court has jurisdiction to open main proceedings against the company to be joined in the proceedings.

§ 4. Should the EU clarify jurisdiction and applicable law with respect to Gourdain/Nadler claims?

4.1. Claims protecting corporate creditors: why they need to be considered when reforming the EIR

40. It has been pointed out in the introduction of this paper that some aspects of cross-border insolvencies have deliberately not been regulated in the EIR because they were considered to be too controversial. After having discussed the lack of provisions in respect of group insolvencies I now turn to the issues of jurisdiction and applicable law in respect of claims deriving directly from and closely linked to insolvency proceedings. Such claims are commonly known as *Gourdain/Nadler*-claims, because in this case the ECJ held that such claims were excluded from the scope of what is now the Brussels I-Regulation on the recognition and Enforcement of Civil Judgments.[62] I will concentrate on those claims that can be brought by the office holder in the interest of the company's creditors, claims that may have a hybrid character: part company law, part insolvency law.

41. The hybrid character of claims protecting corporate creditors has led to an interesting development. In reaction to the case law of the ECJ on freedom of establishment of companies within the EU mentioned above, Member States can deploy the tactic of 'relabelling' creditor protecting provisions. Provisions that were formerly regarded as company law provisions may be transformed into insolvency law provisions[63] in an attempt to avoid the consequences of the free movement case law. The idea behind the tactic of 'insolvencification'[64] is that creditor protecting provisions will - as part of the lex concursus - apply to a foreign incorporated company in case insolvency proceedings are opened in respect of this company in the Member State where it has its COMI.

Example: § 39 j° 135 of the German InsO provide for the subordination of shareholder loans in the event of insolvency of the company. § 39 InsO was introduced in November 2008 as part of the Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG). In the explanatory memorandum to this act, the German legislator takes the view that the new provisions can be applied to foreign companies pur-

62 ECJ 22 februari 1979, Case C-133/74 (Gourdain/Nadler).

63 Germany: MoMiG.

64 Term coined by Enriques and Gelter, *op. cit.*.

suant to art. 3(1) and 4 of the EIR. In 2011 the German Bundesgerichtshof followed this reasoning in a case between the office holder in the German insolvency proceedings opened against a Luxemburg SA and its majority shareholder, that had financed the SA with shareholder loans to the amount of almost €80 million. The BGH held that – pursuant to art. 4 EIR - this claim is governed by the lex concursus.[65] Interestingly, The BGH held the same in respect of the predecessor of § 39, the claim based on § 32a GmbHG, in spite of the fact that the latter was part of the German Act on Private Limited Companies.

42. It should be noted that it is doubtful whether the strategy of insolvencification will always prove to be successful. As Enriques and Gelter[66] point out, provisions of insolvency law will also be subjected to the Gebhard test[67], whenever they are held to have a more than indirect and uncertain impact upon the exercise of freedom of establishment. The mere fact that such provisions will typically apply in a non-discriminatory manner (unlike provisions that target pseudo-foreign companies) does not mean that they will pass the Gebhard test because the other criteria must also be met. No matter how a provision is characterised, it will have to pass the tests of suitability and necessity.[68] Or in the words of Ringe: "All provisions that somehow impede the free choice of establishment of an individual or a company in another Member State could potentially infringe the freedom of establishment. This could apply to tax law, social security law or even procedural law. The important idea is that EC law does not care about the formal category of the law that restricts its fundamental freedoms."[69] In the judgment mentioned above, the German Bundesgerichtshof - again following the Explanatory memorandum to the MoMiG - held that the application - pursuant to art. 4 EIR - to a foreign company of German provisions mandating the subordination of shareholder loans in insolvency did not violate art. 49 and 54 TFEU. It remains to be seen whether this is correct.[70] To conclude this discussion of insolvencification from a perspective of free movement law, I would like to point out that difficult discussions about the compatibility of a particular insolvency law

65 BGH 21 July 2011 – IX ZR 185/10, available at http://www.bundesgerichtshof.de/DE/Entscheidungen/entscheidungen_node.html

66 *op. cit,* p. 450

67 ECJ 30 November 1995, Case C-55/94 (Gebhard).

68 See E. Kieninger, The Law Applicable to Corporations in the EC, *RabelsZ* 2009, 614-615.

69 *op. cit*., p. 609

70 Serious doubt as to whether the German provision on shareholder loans meet the Gebhard test has also been expressed by M. Vanmeenen en A. Van Hoe, Shareholders' loans at the crossroads between corporate and insolvency law: impact on the freedom of establishment on national law, *IILR* 2011, p. 468-478.

provision with the Gebhard criteria can be avoided by tying insolvency jurisdiction - and thus the applicable law - to the registered office of the company.[71]

43. Before a court can apply the lex concursus to a claim brought by an office holder on behalf of corporate creditors, it will first have to decide whether it has jurisdiction. On a literal interpretation, art. 3 EIR only regulates which court has jurisdiction to open (main and secondary) insolvency proceedings. The regulation is silent on the issue of jurisdiction with respect to *Gourdain/Nadler* claims. In 2009 the ECJ broke that silence in the case of *Seagon v. Deko Marty*.[72] In this judgment the ECJ held that the courts[73] of Member States having jurisdiction to open proceedings on the basis of art. 3(1) EIR also have jurisdiction to hear and determine actions that derive directly from insolvency proceedings and are closely linked to them. This judgment can be relied on by office holders to claim jurisdiction of the courts of the Member State in which insolvency proceedings have been opened in respect of claims protecting corporate creditors, provided that these derive directly from insolvency proceedings and are closely linked to them. It will be argued, though, that the ECJ's judgment raises several issues that need clarification.

4.2. Jurisdiction with respect to claims brought by office-holders in the interest of of company creditors

4.2.1. Which claims protecting corporate creditors qualify as claims that derive directly from and are closely linked to insolvency proceedings?

44. The Deko Marty case concerned an action of a liquidator to have a transaction set aside. Such an action will typically be found in Member States' insolvency laws, as transaction avoidance is an issue that is not only relevant for the protection of *corporate* creditors. Other provisions protecting creditors do, however, exclusively apply to corporate debtors. Among these there are provisions that apply irrespective of the insolvency of the corporate debtor, such as for example provisions regulating distributions to shareholders, e.g. those based on the capital maintenance system laid down in the Second Company Law Directive. On the other hand, we also find provisions specifically protecting corporate creditors that are triggered by the company's insolvency. These are the hybrid provisions

71 See Vanmeenen and Van Hoe, *op. cit.* p. 477.

72 ECJ 12 February 2009, Case C-339/07 (Seagon/Deko Marty).

73 This is not necessarily the court that has opened the insolvency proceedings. Which particular court has jurisdiction in respect of a Deko Marty claim will depend on national civil procedure law.

that inhabit the "no man's land" between insolvency law and company law. A fine example is art. 2:248 DCC. This provision is part of Book 2 of the Dutch Civil Code, which regulates companies, but the claim only arises when the company has been declared bankrupt. Is art. 2:248 DCC a claim that derives directly from and is closely linked to insolvency proceedings? Unfortunately, the Deko Marty judgment does not give any guidance as to which criteria are decisive in answering this question.

45. Can guidance be found in the judgment of the ECJ in the case Gourdain/Nadler?[74] In this case the ECJ decided that the French counterpart of art. 2:248 DCC, the action en comblement du passif[75], is excluded from the scope of the (then) Convention on Recognition and Enforcement of Civil Judgments. The ECJ based its decision on the following arguments:

1. The action en comblement du passif is part of the French Insolvency Act;
2. Only the court having opened insolvency proceedings has jurisdiction to hear the claim;
3. The action can only be brought by the liquidator on behalf of the general body of creditors;
4. The action derogates from the general rules on liability and it creates a presumption of liability in respect of the de iure or de facto directors that can only be rebutted by proving that they managed the company with all the requisite energy and diligence;
5. The limitation period runs from the date when the final list of creditors is drawn up and is suspended for the duration of any scheme of arrangement which may have been entered into and begins to run again if such a scheme is terminated or declared void;
6. The compensation must be paid to the estate;
7. The court can open insolvency proceedings against directors who fail to pay the compensation without having to check whether they fulfill the criteria for being declared bankrupt.

The first argument mentioned by the ECJ, the location of the statutory provision serving as a basis for the claim, is in itself not relevant for the question whether the claim falls within the jurisdiction rule of art. 3 EIR.[76]

74 ECJ 22.2.1979, C-133/78.

75 Then: art. 99 Loi 67-563 of 15 July 1967, now: art. L. 624-3 Code de Commerce.

76 See Virgós and Garcimartín, *The European Insolvency Regulation*, Kluwer Law International, 2004, p. 61, footnote 101.

It is submitted that particularly relevant criteria mentioned in the ECJ's list are that the claim can only be brought by the liquidator on behalf of the general body of creditors and that the compensation must be paid to the estate. It is submitted that it should not be decisive whether only the court having opened has jurisdiction to hear the claim. This could also be another court, what should matter is that the claim only arises once insolvency proceedings are opened. In other words: the claim is not conceivable outside insolvency.[77] If this submission is correct, art. 2:248 DCC, although it is part of Dutch company law, qualifies as a claim directly deriving from and closely linked to insolvency.[78] A similar conclusion could be drawn in respect of a wrongful trading claim based on s 214 of the UK Insolvency Act.[79] Applying the abovementioned criteria to German provisions protecting corporate creditors leads to the following conclusion. Claims protecting corporate creditors that fall within the scope of the Deko Marty jurisdiction are: 1) the director liability claim based on § 64 (I) GmbHG for late filing ("Insolvenzverschleppung")[80] 2) the director liability claim based on § 64 (II) GmbHG for payments made by directors after the moment of overindebtedness (Überschuldung) or cessation of payments (Zahlungsunfähigkeit)[81] and 3) the claim based on § 39 j° § 135 InsO, mentioned in n**.** 41.

46. Examples of Dutch provisions that do not give rise to claims falling within the jurisdiction of art. 3 EIR are director liability claims based on art. 2:9 DCC[82], claims based on provisions of capital maintenance law (e.g. art. 2:207c DCC) and claims based on the provision governing representation of the company in case of conflict of interests (see art. 2:256 DCC). With respect to claims against directors or shareholders based on art. 6:162 DCC (negligence), a distinction must be made between claims on behalf of the general body of creditors that – according to case-law

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77 Virgós and Garcimartín, *op. cit*., p. 61.

78 This conclusion is also drawn by Van den Braak, *op. cit*., p. 233 and Tollenaar, Bestuurdersaansprakelijkheid en IPR, *FIP* (Tijdschrift Financiering, Zekerheden en Insolventierechtspraak) 2009, p. 177.

79 The same applies to s. 213 IA (fraudulent trading) and s 212 IA (misfeasance).

80 This conclusion can be drawn with respect to the claim for Quotenschaden (the damage consisting of the difference in payouts to creditors that are actually made and that would have been made in case of timely filing) that must be brought by the liquidator. It is not clear if the same can be concluded for claims based on § 64 (I) GmbH j° § 823 BGB (the general tort provision) made by 'new' creditors, who have entered into agreements with the company after the moment of Überschuldung or Zahlungsunfähigkeit.

81 These include payments to *shareholders* that *cause* the company's overindebtedness or cessation of payments.

82 See Amsterdam Court of Appeal 16 September 2008, JOR 2008/30 with comment Wessels and Tollenaar (2009), *op. cit*. , 177.

of the Dutch Hoge Raad[83] – may be brought by the liquidator and claims that can only be brought by individual creditors. The former have become known as *Peeters/Gatzen* claims, after the case in which the Hoge Raad first decided that the liquidator has standing to bring such a claim.[84] In 2008 the Amsterdam Court of Appeal decided in the Jomed case that the jurisdiction with respect to Peeters/Gatzen claims can be based on art. 3(1) EIR.[85] Tollenaar approves of this decision[86], but Van den Braak has expressed some doubt[87], because under current law, the liquidator's right to bring a Peeters/Gatzen claim is not exclusive: creditors may also sue. The lack of exclusivity of the liquidator's claim is also noted by Wessels in his comment on the Jomed judgment. For this reason and because of the fact that no special provision on limitation applies, he submits that jurisdiction in respect of the claim by the liquidator based on negligence should be determined on the basis of art. 5(3) of the Brussels I Regulation. On this issue, I tend to agree with Tollenaar because the Dutch Supreme Court has founded the right of the liquidator to bring this claim on art. 68 of the Dutch Bankruptcy Code (describing the general task of a liquidator: to administer and to liquidate the estate) and has made it clear that the proceeds belong to the insolvent estate. It should further be noted that this claim can be brought in the same cases in which an avoidance claim can be brought. The difference is that instead of avoiding the transaction, the liquidator chooses to sue the parties involved in the transaction for negligently causing harm to the debtor's creditors. The Dutch Bankruptcy Code explicitly provides that only the liquidator is entitled to bring an avoidance claim once insolvency proceedings have been opened. The Dutch Supreme Court has refrained from holding – in a similar vein – that the liquidator has exclusive standing to bring the Peeters/Gatzen-claim because it held that this would violate art. 1 of the first Protocol to the ECHR. This decision has, however, been criticized.[88]

47. Although the Gourdain/Nadler judgment may offer guidance as to which claims fall within the jurisdiction of the court that has opened

83 See HR 14 January 1983, NJ 1983, 597 (Peeters/Gatzen), HR 21 December 2001, RvdW 2002, 7 (Lunderstädt/De Kok) and HR 16 September 2005, NJ 2006 (Bannenberg q.q./De Bont).

84 See previous footnote.

85 Amsterdam Court of Appeal 16 September 2008, JOR 2008/330 with comment Wessels.

86 Tollenaar (2009), *op. cit.*, p. 177.

87 Van den Braak, *op. cit.,* p. 234. This was written before the Court of Appeal rendered its judgment in the Jomed case.

88 See F.M.J. Verstijlen, De onrechtmatige daadsvordering wegens de benadeling van schuldeisers binnen faillissement: één voor allen én ieder voor zich, *WPNR* (Weekblad voor Privaatrecht, Notariaat en Registratie) 2002, p. 617-624.

insolvency proceedings (considering that there should be no loopholes between the EIR and the Brussels I Regulation), it still leaves doubt (for example in respect of the requirement that the standing of the liquidator must be exclusive). It is therefore recommended to clarify this issue in the text of the EIR by way of an amendment to art. 3 EIR.

4.2.1. Should the Deko Marty jurisdiction be an exclusive jurisdiction?

48. Although the ECJ does not explicitly say that only the courts of the Member State in which insolvency proceedings have been opened have exclusive jurisdiction in respect of Deko Marty claims, this could be inferred from the critical remarks made by the ECJ in respect of forum shopping and the restrictive interpretation suggested with reference to art. 25(1) EIR. The ECJ did not – at least not expressly – follow the Advocate-General's opinion in which it was submitted that jurisdiction for deciding actions in the context of insolvency to set a transaction aside is not exclusive, but that such an action may be brought in any Member State, as is stated in the first sentence of art. 18(2) EIR.[89] In comments on the Deko Marty case, several authors have also submitted that the courts of the Member State in which insolvency proceedings have been opened should not have exclusive jurisdiction to hear Deko Marty claims.[90] They doubt whether it is efficient that the office holder may only sue in the Member State where the insolvency proceedings were opened and that the bringing of such actions outside this state on the basis of domestic jurisdiction provisions is precluded.

49. Bariatti advocates a more flexible approach, leaving the decision where to sue to the office holder, according to the circumstances of the case. She notes that in a given case it might well be that the recovery of assets to the benefit of the proceedings turns out to be more effective or swift if the action is brought at the domicile of the defendant rather than in the Member State where the insolvency proceedings were opened. Like the Advocate-General, she finds exclusive jurisdiction hard to reconcile with art. 18(2) EIR, that provides that the liquidator of the secondary (territorial) proceedings "may claim in any other Member State through the courts or out of court, that moveable property was removed from the territory of the State of opening of proceedings to the territory of that other Member State after the opening of insolvency proceedings. He

89 See nrs. 65-68 of the A-G's conclusion.

90 See S. Bariatti, Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation, *RabelsZ* 2009, p. 657 Tollenaar, (2009) *op. cit*., p. 177 and T.M. Bos, De verhouding tussen de EEX-Verordening (Brussel I) en de Insolventieverordening, *WPNR* (Weekblad voor Privaatrecht, Notariaat en Registratie) 2011, p. 555.

may also bring an action to set aside which is in the interest of the creditors." According to Bariatti, this means that a liquidator in secondary proceedings may bring an action for avoidance in another Member State than the State in which insolvency proceedings have been opened[91], whereas the liquidator in the main proceedings cannot do so according to the Deko Marty judgment (he is restricted to the insolvency forum) and is therefore "worse off".[92]

50. Tollenaar also advocates a more flexible approach.[93] He specifically notes that exclusive jurisdiction of the courts of the Member State where insolvency proceedings were opened prevents the liquidator from combining insolvency-related claims with a claim already brought before the *forum rei* (such as for example a non-insolvency-related director liability claim[94] against a director domiciled outside the Member State where the insolvency proceedings against the company have been opened). Exclusive jurisdiction for the courts of the Member State having opened proceedings may lead to the undesirable consequence of having to split up claims between different courts. Therefore Tollenaar submits that the jurisdiction acknowledged in Deko Marty is not exclusive but alternative. The mere fact that the courts of the Member State of the insolvency proceedings are competent does not mean that the 'natural forum' of the defendant's domicile (forum rei) is eliminated. According to Tollenaar, the question of whether the jurisdiction of the forum concursus is exclusive is primarily an issue of interpretation of the EIR on which the ECJ has not expressed its view unequivocally.

51. Both Bariatti's and Tollenaar's reasons for advocating a flexible approach are convincing, but - as has been mentioned earlier - it is possible that the ECJ does not wish to leave any room for courts taking jurisdiction in respect of Deko Marty claims on the basis of domestic jurisdiction provisions: the ECJ stresses that concentrating all insolvency-

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91 Bariatti (*op. cit.*, p. 655) rightly points out that the EIR leaves unanswered which court has jurisdiction to adjudicate an avoidance claim brought by the liquidator in the secondary proceedings. Virgós and Garcimartín (*op. cit.*, p. 64) suggest the following solution: "given that that jurisdiction cannot stem (ex hypothesis) from the same article on which the court of opening based its jurisdiction, the reference to any other Member State necessarily presupposes the applicability of other rules; and in particular, the applicability of Regulation 44/2001 on Civil Jurisdiction and Enforcement. In this respect the interpretation of Article 1.2 of the latter Regulation must be corrected in order to re-accommodate this type of actions and its rules should establish international jurisdiction."

92 Bariatti, *op. cit.*, p. 657.

93 Tollenaar (2009), *op. cit.*, p. 177.

94 See section 2.3 for a discussion of the question of which claims qualify as Deko Marty-claims.

related actions in the Member State where insolvency proceedings were opened is consistent with the aim of improving the effectiveness and efficiency of cross-border insolvency proceedings and in line with the objective to prevent forum shopping. However, Tollenaar and Bariatti do have a point. It is not necessarily the case that cross-border (corporate) insolvencies can be handled more effectively and efficiently by concentrating all insolvency-related claims before the courts of the Member State in which the insolvency proceedings were opened.

52. It should be noted that, with their plea for a flexible approach, Bariatti and Tollenaar follow in the footsteps of Virgós and Garcimartín.[95] These authors have pointed out that an exception to exclusive jurisdiction of the courts of the Member State where insolvency proceedings were opened is already established in Art. 18(2) EIR, which has been mentioned above. Secondly, they believe that it would be counterproductive to establish the exclusive jurisdiction of the courts of opening in strict terms with regard to assets or persons located in non-Member States. There is no guarantee that such states will recognize a judgment rendered by a court of opening within the EU. To solve this problem the case would have to be brought before the court of the non-Member State. But in that case, if enforcement within the EU would be sought, recognition and enforcement would probably be refused because the judgment was not rendered by the court having jurisdiction on the basis of art. 3(1) EIR. Thirdly, Virgós and Garcimartín note that exclusive jurisdiction for the courts of the Member State where insolvency proceedings were opened may also be inconvenient in intra-Community situations. They specifically mention the case that the liquidator wishes to bring a counterclaim based on transactions avoidance before the same court of another Member State (other than the court of opening) where a creditor is suing on the basis of a non-insolvency claim. This would be precluded by an exclusive jurisdiction rule. Virgós and Garcimartín state that an exclusive jurisdiction for the courts of the Member State where insolvency proceedings were opened may result in an unnecessary increase in the administrative costs of the system of cross-border insolvency. First, if the applicable law is not the lex concursus (see for example art. 9 EIR), foreign law has to be proved and the risk of error increases. Second, it may be more efficient to bring an action directly in the State where enforcement will be sought (because in that case the costs of recognition and enforcement will not have to be added to the costs of the proceedings in the State of opening).

95 Virgós/Garcimartín, *op. cit*, p. 63-66.

53. After this discussion, all that remains of the efficiency argument raised by the ECJ is the fact that claims that derive directly from and are closely linked to insolvency proceedings are likely to be governed by the lex concursus: in order to promote synchronicity ('Gleichlauf') of the competent court and the applicable law, it makes sense to concentrate insolvency-related claims in the Member State in which insolvency proceedings have been opened. That said, for the reasons set out above, it seems preferable to leave the choice where to sue to the office-holder, even if this leads to some forum shopping. Forum shopping is not necessarily undesirable. It can be in the interest of the general body of creditors. It should be for the office holder to decide in which forum he can best serve those interests. I therefore recommend that the EIR is amended to clarify that the Deko Marty jurisdiction is not an exclusive jurisdiction.

54. It should be noted that the Landgericht Essen has referred preliminary questions to the ECJ as to the scope of the Deko Marty jurisdiction in case the office holder has brought an avoidance claim coupled with a claim independent of insolvency proceedings which is based on company law.[96] In this case the latter claim was based on old case law on shareholder loans (the so-called Rechtsprechungsregeln based on capital maintenance law), that has become obsolete in 2008, when a new regime on shareholder loans entered into force (see above, n. **41**). The questions referred to the court are the following:

Does the Court adhere in principle to its case-law in *Seagon* v *Deko* (Case C-339/07 [2009] ECR I-00767) to the effect that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction under Article 3(1) of Council Regulation No 1346/2000 of 29 May 2000 on insolvency proceedings (1) to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State even where, in addition to a claim arising from the right to seek to have a transaction set aside by virtue of insolvency, the claims pursued are primarily claims arising from rules on the maintenance of capital laid down in national company law which, from an economic point of view, are directed at the same assets as, or assets additional to, those pursued by the claim arising from the right to seek to have a transaction set aside by virtue of insolvency and which are independent of the opening of insolvency proceedings?

96 Case C-494/10 (Bähr v HIDD Hamburg-Bramfeld).

If question 1 is to be answered in the negative: Does an action to set a transaction aside by virtue of insolvency the subject-matter of which is concurrently and primarily a claim independent of insolvency proceedings which is pursued by the liquidator on the basis of company law and which, from an economic point of view, is directed at the same or additional assets, fall within the scope of the exception *ratione materiae* provided for in Article 1(2)(b) of Regulation No 44/2001, (2) or is international jurisdiction to decide such an action determined in accordance with Regulation No 44/2001, in derogation from the judgment of the Court in *Seagon* v *Deko*?

4.2.3. Deko Marty and multiple proceedings

55. The regime of the EIR allows for concurrent insolvency proceedings being opened against the same debtor. The courts of the Member State of the COMI have exclusive jurisdiction to open main proceedings and their judgments must be recognized in other Member States (art. 16 EIR), but secondary proceedings may be opened in any Member State where the debtor has an establishment. This is defined in art. 2(h) EIR as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods. A problem that has not been solved by the Deko Marty judgment is that jurisdiction conflicts may arise with respect to insolvency-related claims if secondary proceedings are opened.[97]

Example. Main insolvency proceedings have been opened in the Netherlands against a subsidiary company having both its registered office and its COMI in the Netherlands. Because the company has an establishment in England, insolvency proceedings have also been opened there on the basis of art. 3(2) EIR. According to the ECJ's decision in the Deko Marty case, a Dutch court will have jurisdiction to hear the claim based on art. 2:248 DCC brought by the Dutch liquidator against the German parent company, that qualifies as a shadow director. What if the English liquidator also decides to bring a claim based on s 214 IA against the German parent company? Can he do so, considering that art. 27 EIR provides that the effects of secondary proceedings are restricted to the assets *of the debtor* situated within the territory of the state of opening of secondary proceedings? Is the claim based on s 214 IA an asset *of the debtor* located in England?

97 M.L. Lennarts, Toepassing van art. 2:248 BW en art. 5 WCC na inwerkingtreding van de Europese Insolventieverordening, *TvI* (Tijdschrift voor Insolventierecht) 2001, p. 179 et seq.

56. With respect to the claim based on art. 2:248 DCC Tollenaar submits that this is not a claim vested in the debtor, but a claim belonging to the insolvent estate.[98] The same can be assumed for the claim based on s 214 IA.[99] According to Tollenaar, a literal interpretation of the EIR would lead to the conclusion that claims brought on behalf of the insolvent estate fall exclusively within the scope of the main proceedings. This would mean that – in my example – no action based on s 214 IA could be brought by the English liquidator because this claim is not an asset of the insolvent debtor. Tollenaar, however, submits that 'assets of the debtor' must be understood 'assets belonging to the insolvent estate'. If this interpretation is correct, the liquidator in the secondary proceedings can bring a director liability claim against a director domiciled in the state of opening of secondary proceedings (considering that art. 2(g) EIR provides that claims must be located in the Member State within the territory of which the third party required to meet them has the centre of his main interests). If the director is domiciled outside the state of opening of secondary proceedings, only the liquidator in the main proceedings has the right to bring the claim. This would mean that, in my example, only the Dutch liquidator has standing to bring a claim against the German parent company. Although it would be logical to conclude that in that case the Dutch courts would have jurisdiction to hear the claim, I believe that Tollenaar's analysis founded on art. 27 EIR is too thin a basis for this conclusion. It would be preferable if an amendment were made to the EIR in order to clarify which court has jurisdiction to hear an insolvency-related director liability claim in case of concurrent proceedings. It is submitted that this should be a court of the state in which main proceedings have been opened. This has the benefit of concentrating insolvency-related director liability claims against several members of the same board in one court and being able to apply the same law (the lex concursus of the main proceedings) to these claims. Another advantage – compared to the regime advocated by Tollenaar – is that the defendant of an insolvency-related director liability claim cannot change the forum and the applicable law by moving his COMI.

4.3. Applicable law with respect to claims brought by office-holders in the interest of the general body of company creditors

57. Art. 4 EIR contains a non-exhaustive list of issues that are governed by the lex societatis. This raises the question of which claims protecting company creditors are governed by insolvency law. This question has become more pressing due to the phenomenon of 'insolvencification',

98 Tollenaar (2009), *op. cit*., p. 178.

99 See Re Oasis Merchandising Ltd [1998] Ch. 170.

which has been discussed above in n. **41**. In the event that the COMI is retained as the determining factor for insolvency jurisdiction applicable insolvency law, it seems inevitable that the ECJ will be asked to answer questions about the exact scope of art. 4 EIR. To enhance legal certainty, it is recommended to clarify in the text of art. 4 EIR which criteria must be met for a claim to be considered an insolvency claim.

§ 5. Recommendations

The rebuttable presumption contained in art. 3(1) EIR should be changed into an irrebuttable presumption.

The EIR should be amended to include the possibility to have a group office holder appointed. To facilitate the task of the group office holder, art. 3(3) and art. 27 EIR should be amended to the effect that secondary proceedings must not be winding-up proceedings. Moreover, an amendment of art. 5 (and 7) EIR to the effect that assets located outside the Member State of opening of proceedings would no longer be immune to a stay in those proceedings should be considered.

Should recommendation 2. not be viable, then at least rules for mandatory cooperation between courts, between courts and insolvency representatives and between insolvency representatives involved in the different proceedings involving members of the same multinational group should be included in the EIR.

The European legislature should not legislate on substantive consolidation but concentrate on provisions that may help to coordinate group insolvencies in more ordinary circumstances.

Although the Gourdain/Nadler judgment may offers guidance as to which claims fall within the jurisdiction of the court that has opened insolvency proceedings, it still leaves doubt. It is therefore submitted that it would be beneficial to clarify this issue in the text of the EIR by way of an amendment to art. 3 EIR.

The EIR should be amended to clarify that the Deko Marty jurisdiction is not an exclusive jurisdiction. An amendment should be made to the EIR in order to clarify which court has jurisdiction to hear an insolvency-related director liability claim in case of concurrent proceedings.

It is submitted that this should be a court of the state in which main proceedings have been opened. To enhance legal certainty, it is recommended to clarify in the text of art. 4 EIR which criteria must be met for a claim to be considered an insolvency claim.

REPORT OF THE FIRST ANNUAL MEETING OF THE NETHERLANDS ASSOCIATION FOR COMPARATIVE AND INTERNATIONAL INSOLVENCY LAW

Niels Pannevis[1]

Before June this year the European Commission is to report on the application of the European Insolvency Regulation[2] (hereafter: EIR). This report shall, if needed, be accompanied by a proposal for adaptation of the EIR. In its resolution[3] of 15 November 2011 the European Parliament made various recommendations on the direction the EIR should be headed.
In this context the recently founded Netherlands Association for Comparative and International Insolvency Law (NACIIL, in Dutch: *Nederlandse Vereniging voor Rechtsvergelijkend en Internationaal Insolventierecht,* or *NVRII)* decided to contribute to this process by organizing its first annual meeting last December 8th on the topic of desirable changes to the EIR.
The main part of the programme consisted of the presentation and discussion of the reports prepared by prof. Lennarts (Professor of Corporate Law at Utrecht University, and Professor of Comparative Corporate Law at the University of Groningen) and prof. Garcimartín (Professor of Private International Law at the University Autónoma of Madrid and Counsel of Linklaters Madrid). The meeting was chaired by prof. Veder (Utrecht University and RESOR N.V.). What follows is a summary of the reports and the discussion. These will also be published in their entirety.

Gaps & parallelism

Prof. Garcimartín's contribution revolved around the parallelism and the gaps between the various European insolvency instruments[4]. On this theme he made three opening remarks before exploring the subjects of hybrid procedures and close-out netting.

As a first remark Garcimartín noted that the European insolvency framework exhibits a gap when it comes to investment firms, as was illustrated by the Spanish *Lehman* case. When asked for a solution by dr. Andre Berends (Ministry of Finance), Garcimartín set out that due to their particular nature investment firms would require a separate directive or an ex-

1 With thanks to prof. Veder for commenting an earlier draft.

2 Regulation 1346/2000 on insolvency proceedings.

3 European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law, P7_TA-PROV(2011)0484.

4 The EIR, Directive 2001/24/EC on the reorganization and winding up of credit institutions, and Directive 2001/17/EC on the reorganization and winding up of insurance undertakings.

tension of the Directive on credit institutions to such firms, with punctual adjustments. Extending the applicability of the EIR to include investment firms until such time as a separate directive is in place, as proposed by prof. Veder, was considered a second-best solution for this problem albeit an attractive one because of its quick and easy introduction.

Secondly, Garcimartín insisted on the consistency of and parallelism between the various European instruments including the Brussels I Regulation[5.] As a part of this, it should be made clear that the EIR is the general and default rule that is to be applied when other instruments for any special kind of insolvency are lacking.

Also, Garcimartín called for self-restraint in reforming the EIR, given its complicated original development.

Hybrid procedures

The first major topic to be addressed was that of hybrid procedures, such as the English scheme of arrangement. Current European international private law is not well suited to deal with these procedures.
With regard to the current law Garcimartín explained the reasoning in Spain is mainly one of exclusion. Since neither the EIR nor the Brussels I regulation apply to hybrid procedures, and the application of national private international law is not desirable, one should apply the Rome I Regulation[6.]

Lucas Kortmann (RESOR N.V.) raised the issue of hybrid procedures that can be executed both within and outside of insolvency. In Garcimartín's view these should only be recognized under the current EIR whenever they are a part of a formal insolvency procedure that has already been opened and is included in the annexe.

Regarding *lege ferenda* Garcimartín proposed hybrid arrangements should fall within the EIR. A judge opening hybrid procedures would have to declare whether these are to be considered insolvency proceedings, much like a judge in the current situation has to mark a proceeding he opens a principal or a territorial proceeding. Incorporating hybrid procedures within the EIR would increase the problems surrounding the immunity of security rights as laid down by article 5 EIR. Prof. Wessels (Leiden Univer-

5 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6 Regulation 593/2008 on the law applicable to contractual obligations.

sity) proposed three possible ways to adapt (the interpretation of) article 5 EIR. However, Garcimartín argued one could maintain article 5 as an immunity rule but only for liquidation proceedings.

In reorganizations and hybrid proceedings article 5 is and would be more problematic. For this, Garcimartín considered two possible solutions. Either article 5 EIR is maintained as a conflict of law rule, so that it leaves consequences of the insolvency procedure to the law of the Member State where the asset is located, or it should be replaced by a rule of substantive law. One should however be sceptical about both the possibility to reach agreement on such a rule of substantive law, and the European Commission's competence to make such rules.

Netting arrangements

The second major topic Garcimartín addressed was netting and set-off. Whereas the Directive on Credit Institutions contains conflict of law rules for both netting contracts and set-off, the EIR only stipulates a rule for the latter. This creates undesirable outcomes in the case where the *lex fori concursus* and the *lex causa* of the netting agreement do not coincide. Garcimartín proposed to amend the EIR so as to either declare article 6 EIR applicable to netting agreements, or to introduce a rule parallel to article 25 of the banking directive.

Ruud Hermans (De Brauw Blackstone Westbroek) drew attention to both the practical and the possible future legal limitations[7] on netting within the context of a bank recovery. Garcimartín agrees with the Dutch and other EU lawmakers that netting should somehow be limited in such a context. However this needs action at the conflict of laws level. In the current situation article 25 of the banking directive effectively prevents the restriction of triggering netting arrangements.

Garcimartín considered three ways to amend private international law in order to deal with limitations on the triggering of netting arrangements in a bank recovery. One could devize a harmonized material law regime, eliminate the special rules for netting arrangements, or include a dépeçage into article 25 of the banking directive so as to subject the moratorium to the *lex concursus.*

7 For example, the Dutch legislator is working to change the Act on Financial Supervision. Parliamentary Papers ('Kamerstukken') 2011/12, 33059, nr. 2, p. 20. Specifically art. 3:267f.

COMI-criterion

The other half of the meeting was dedicated to the presentation and discussion of prof. Lennarts' report. She approached the topic from a somewhat different angle, focussing on the intersection of company law and insolvency law.

Lennarts firstly discussed the COMI-criterion. Although she does not think the case law on the freedom of establishment[8] necessitates the abolition of this criterion, it should still be relinquished. The COMI-criterion is too fuzzy and offers too little predictability. Instead, jurisdiction to open insolvency proceedings should be tied to the registered office. That is, the rebuttable presumption of article 3 EIR should be made irrebuttable, thus aligning the applicable corporate and insolvency law.

Furthermore, neither the fact that without the COMI-criterion creditors will have to pursue their debtor to a different legal system, nor the imagined ease of the COMI approach when dealing with groups of companies were considered reasons to maintain this rule.

In response, Berends pointed out that most countries will be reluctant to give up jurisdiction on companies whose COMI is within their borders.

Cross-border group insolvencies

The second topic Lennarts discussed was the lack of provisions regarding the insolvency of international groups of companies. After concluding that action is needed in this area, Lennarts considered various ways to deal with this issue. The main challenge is to find the balance between the efficiency of a single centralized insolvency procedure and the independence of the separate legal entities.

Several previously suggested arrangements, such as those by Moss and Paulus[9], and the European Parliament[10], boil down to a group-COMI approach, in which the COMI of subsidiary group companies is placed at the location of the top holding company. In Lennarts' view this is not a preferable approach due to, inter alia, the abovementioned fuzziness of the CO-

8 ECJ 30 November 1995, Case C-55/94 (Gebhard), ECJ 9 March 1999, Case C-21/97 (Centros), ECJ 5 November 2002, Case C-208/00 (Überseering) and ECJ 30 September 2003, Case C-167/01 (Inspire Art).

9 G. Moss en C.G. Paulus, 'The European Insolvency Regulation – The Case for Urgent Reform', Insolvency Intelligence 2006, p. 2.

10 Abovementioned resolution of November 15th 2011.

MI-criterion as such and the Eurofood-case[11]. Moreover, she considered Van Galen's proposal[12], at the core of which lies the right of the parent company's liquidator to propose a restructuring plan for the subsidiary, too ambitious. She stressed to tread carefully in formulating ambitions to change or expand the EIR.

Instead Lennarts supports the plan proposed by Nico Tollenaar[13], in which a single so-called group office holder is appointed, who can exercise his powers with respect to any member of the group. The group office holder need not be qualified to be appointed in each of the relevant States. Instead, he needs to retain local representatives with the right to veto decisions in which the group office holder has an evident conflict of interest. This would also open up the possibility to go to court over such a conflict. Lennarts proposed to amend articles 3, 5, 7 and 27 EIR in order to facilitate the group office holder. Should this prove to be unviable, then at least the EIR should be expanded with mandatory rules for cooperation between different courts and different liquidators of the same multinational group. From his experience as a judge, Mr. Boerma (Judge at the District Court Breda) also called for including in the EIR an obligation for judges to communicate.

This leaves the question, as posed by dr. Tekstra (Blauw Tekstra Uding), in whose interest the various liquidation officers have to act. In Lennarts' view the position of the group office holder is based on the notion of a shared group interest and some sort of consolidation. However, the conflicts between creditors and different legal entities will turn into conflicts of national interest. This might be a politically sensitive issue and a threat to this proposal.

A step beyond the group regime would be to include provisions on substantive consolidation in the EIR. The European Parliament has suggested[14] this for some exceptional cases. However, the questions surrounding jurisdiction, creditor protection, and the absence of such legislation in most member states, led Lennarts to the conclusion that one should now focus on coordinating group insolvencies rather than substantive consolidation.

11 ECJ 2 May 2006, Case C-341/04 (Eurofood).

12 R. van Galen, 'The European Insolvency Regulation and Groups of Companies', TvI 2004, 13.

13 N. W. A. Tollenaar, 'Proposal for Reform: Improving the ability to rescue multinational Enterprises under the European Insolvency Regulation', IILR 2011, p. 260. See also N.W.A. Tollenaar, 'Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation', TvI 2010, 14.

14 Abovementioned resolution of November 15th 2011, under 3.1.E.

She pointed out that the ECJ recently ruled[15] against the cross-border application of a French rule of substantive consolidation.

Gourdain/Nadler-claims

The last topic covered by Lennarts was that of the jurisdiction and applicable law to claims deriving directly from, and closely linked to insolvency proceedings, also known as *Gourdain/Nadler*[16]-claims. The decision to apply the *lex concursus* to these claims has led to 'insolvencification' of provisions, i.e. states trying to extend the application of provisions to foreign companies by relabeling them as provisions of insolvency law.

Lennarts argued that the criteria to decide whether a claim is related closely to the insolvency are unclear and incomplete. The *Deko Marty*[17] case provides no guidance, and the reasoning in *Gourdain/Nadler* omits several factors. The main question should be whether a particular claim also exists outside of insolvency. Therefore article 3 EIR should be amended to clarify this issue.

Furthermore, Lennarts proposed that the jurisdiction of the court that opened the insolvency proceeding over these insolvency related claims should be alternative rather than exclusive. Although the *Deko Marty* case seems to suggest exclusivity, Lennarts thinks this is not very efficient or effective.

However, in the recent case of *Polymer et al*[18], brought up by Kortmann, the English High Court stated it is common ground that the jurisdiction based on *Deko Marty* is not exclusive. Then, after accepting jurisdiction, the English court considered itself a *forum non conveniens* to rule on the applicable Dutch insolvency law. Lennarts was not very considerate of this, arguing there is no room for *forum non conveniens* argumentation within the EU.

15 ECJ 15 December 2011, Case C-191/10 (Rastelli).

16 ECJ 22 February 1979, Case C-133/78 (Gourdain/Nadler).

17 ECJ 12 February 2009, Case C-339/7 (Deko Marty).

18 High Court London 17 November 2011, Polymer Vision R&D Ltd et al. v Van Dooren, [2011] EWHC 2951 (Comm).

Lastly, Lennarts submitted the EIR should be amended so as to clarify who has the right to bring an insolvency-related claim in the case of multiple insolvency proceedings.

Lucas Kortmann extrapolated this by focussing on the tension between alternative jurisdiction for insolvency related claims, whilst in the case of multiple insolvency proceedings the jurisdiction would lie at the court of the main proceedings. According to Lennarts a secondary proceeding would not regularly be opened long enough before the main proceedings for the secondary liquidator to bring a claim, but she acknowledged the problem at hand.

Restrained overhaul

One can conclude the evaluation of the EIR puts legal scholars between a rock and a hard place. On the one hand, the memory of the laborious process in which the EIR came to being calls for restraint in amending the EIR. On the other hand developments in both the law in the books and legal practice reveal gaps and shortcomings. This periodic evaluation provides a perfect moment to repair the EIR.

It can only be hoped that the European lawmakers navigate successfully between these Scylla and Charybdis. The NACIIL certainly has done its part, meanwhile organizing a well-attended and thought-provoking seminar.

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