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I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. *Increasing Legal Certainty in Cross-Border Corporate Insolvency*
- a) Problem and Regulatory Approach
1. The more international business becomes and the more companies have cross-border affiliations, the more insolvencies are relevant for an increasing number of States. A framework is needed. This is true for insolvencies of companies in particular and the Regulation was drafted for them primarily

that insolvency law really deals with the **final step in company law**¹ including, because of increased transnationality, in European company law, and that insolvency is the most important ground for termination. The European regime is mainly one of conflict of laws (see below II.–IV.); one key substantive law question is discussed at the end from a comparative law perspective (see below V.)

b) Universality, Territoriality, Far-Reaching Concentration

2. The basic models which can ideally be distinguished and which are realised to a different degree in different States can be described by the **three concepts** of universality, territoriality and – in between – far-reaching concentration. Neither (pure) universality nor (pure) territoriality were a reality in the important Member States.²

3. Insolvency proceedings are **universal** if the claims of all creditors and at the same time the assets of the debtor are included universally – at best worldwide, at the very least, Europe-wide. To admit all creditors is a precept which, in the EU, already flows from Art. 18 TFEU. ‘Universality’ in the EU for creditors is in fact named explicitly as a principle in Art. 39 of the EC Insolvency Proceedings Regulation (and also in the 21st Recital). Furthermore, the State in which the main or primary proceedings are opened wishes to seize all the assets of the debtor independently of where they are located; this is at least the approach in the three major Member States.³

¹ For instance Flynn, ‘Statutory liability for culpable mismanagement’, in: Rajak (ed.), *Insolvency Law: Theory & Practice* (1993), 135 (135 et seq.); Davies, (2006) 7 *EBOR* 301 (306 et seq.); Ehrlicke, in: Hommelhoff/Helms (eds.), *Neue Wege in die Europäische Privatgesellschaft – Rechts- und Steuerfragen in der Heidelberger Diskussion*, (2001), 17 (76–78); Eidenmüller, (2006) 7 *EBOR* 239 (251–254); K. Schmidt, ‘Das internationale Unternehmensrecht als Lehrmeister des internationalen Insolvenzrechts’, *Festschrift für Großfeld* 1999, 1031 (1037–1040); see also Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 6–8.

² Comparative law: Fletcher (ed.), *Cross-Border Insolvency – National and Comparative Studies, Reports Delivered at the XIII International Congress of Comparative Law* (1990), (1992); OECD, *Corporate Bankruptcy and Reorganisation Procedures in OECD and Central and Eastern European Countries* (France, United Kingdom et al.); Ziegel (ed.), *Current Developments in International and Comparative Corporate Insolvency Law*, (1994); abundant literature in German: Bauch, *Unternehmensinsolvenzen – Prophylaxe und Bewältigung in Frankreich, Darstellung und ökonomische Analyse von procédure d’alerte, Règlement amiable und Redressement et liquidation judiciaires*, (1997); Ehrlicke/Köster/Müller-Seils, ‘Neuerungen im englischen Unternehmensinsolvenzrecht durch den Enterprise Act 2002’, *NZI* 2003, 409; Gassert-Schumacher, *Privilegien in der Insolvenz*, (2002), especially 185–304 (France, United Kingdom, Austria); Jahn, *Insolvenzen in Europa*, (1998); Kamlah, *Die Anfechtung in der Insolvenz von Unternehmen*, 1995 (United Kingdom); Kindler/Nachmann (eds.), *Handbuch; Mönning, Betriebsabführung in der Insolvenz*, (1997), 93–147 (both country reports); and also references in the next N.

³ See, for instance, for France Menjucq, *Droit européen des sociétés*, 459–465 (also on the following). For Germany BGHZ 88, 147 (150); 95, 256 (264). For the United Kingdom Fletcher, *Insolvency*, 135 et

4. The latter, however, is not fully recognised in other States opening (secondary) proceedings on assets situated on their territory. The term **territoriality** thus primarily describes the extent to which these other States oppose the effects of the main proceedings if the liquidator (in these proceedings) wishes to seize assets situated in another State: seizure by the liquidator in the main proceedings can be accepted or refused or he may at least have consultation rights. Seizure can be refused only after secondary proceedings have been opened or already if they are possible, i.e. solely because an asset is situated in this other country.

5. In economic analysis, the **advantages** of the principle of universality have often been stressed: lower transaction costs, elimination of incentives for behaviour which is inefficient from an overall perspective (with ‘forum shopping’), and mainly the fact that the likelihood of successful rescue proceedings increases.⁴ If territoriality is strong, there is the fear that local creditors will obtain greater satisfaction than their share of all the debts would suggest.⁵ On the other hand, it may already be difficult for a creditor to lodge his claims in main proceedings, for instance, where the debtor has his seat, and at least to request the opening of such proceedings (see also the 18th and 19th Recitals). Moreover, insolvency law is intimately linked to substantive law, mainly securities; therefore the argument goes that, without harmonising this area of law, full or even far-reaching concentration is impossible.⁶

6. In France, Germany and the United Kingdom, for instance, secondary proceedings can be opened just because the asset is situated there.⁷ In the case of **far-reaching concentration**, the possibility of opening secondary proceedings is at least considerably restricted, and the liquidator in the main proceedings at least has the right, before secondary proceedings have been opened, to seize such assets and, after they have been opened, to be consulted and informed. This is

⁴ Bebchuk/Guzman, ‘An Economic Analysis of Transnational Bankruptcies’, 42 *Journal of Law & Economics* 775 (1999); Guzmán, ‘International Bankruptcy – In Defense of Universalism’, 98 *Michigan Law Review* 2177 (2000); Eidenmüller, ‘Grenzüberschreitende Insolvenzen im Spannungsfeld von Territorialität und Ubiquität des Rechts – Kommentar’, *Jahrbuch für Neue Politische Ökonomie* 18 (2000) 81 (87–90); see also 4th Recital; Strub, *EuZW* 1994, 424; and Opinion of the Economic and Social Committee, OJ 2000 C 75/1 (3 [3–4]); contra Hanisch, ZIP 1994, 1; and also v. Wilimowsky, WM 1997, 1461.

⁵ BGHZ 95, 256 (268); Fletcher, ‘General report’, in: id. (ed.), *Cross-border Insolvency: National and Comparative studies*, (1992), 269 (281 et seq.); Smid, *DZWIR* 1998, 432 (434).

⁶ 11th Recital; Kemper, ZIP 2001, 1609 (1609); and also Eidenmüller, *IPRax* 2001, 2 (6); Obank, (2002) 17 *BJBFL* 89 (90); in more detail Hanisch, ZIP 1994, 1; less positive, for instance, Paulus, ZIP 2002, 729 (729 et seq.); moreover local creditors, mainly tax authorities and social security: Menjucq, *Droit européen des sociétés*, 410 et seq.

⁷ For France Menjucq, *Droit européen des sociétés*, 465–467, 513–515. For Germany §554 para. 1 of the new Insolvenzordnung (N. 28). For the United Kingdom Fletcher, *Insolvency*, 135 et

the basic approach in the EC Insolvency Proceedings Regulation.⁸ It mainly determines where main proceedings must be opened, under which (restrictively defined) conditions secondary proceedings may be opened at all and which powers and duties of consultation the different liquidators have in this case.

2. *Legal Measures, in Particular the European Insolvency Proceedings Regulation*

a) *Regulatory Initiatives Worldwide and in the European Community*

*7. Regulatory initiatives dealing with the question of jurisdiction existed in the 1990s worldwide and in the Community. They led to a UNCITRAL Model Law (draft), adopted in 1997.⁹ The core connecting factor – where the ‘centre of a debtor’s main interests is situated’ – is similar to that for Art. 3(1) of the EC Insolvency Proceedings Regulation and also that in English, French and German law. Both legal measures mainly deal with the types of proceedings, competence, the applicable law and the question of recognition, the UNCITRAL Model Law to a larger extent also with substantive law (creditors’ rights).¹⁰ It is supported mainly by the US, American and Commonwealth States;¹¹ it will take some time to determine the weight of this model with respect to potential convergence worldwide.

*8. In the Community (again) a failed project for a Convention under Art. 293 EC (no longer in TFEU) was the forerunner for the Regulation adopted, in this case, the European Convention on Insolvency Proceedings, an initiative which dates back to the 1960s. It was eventually signed in 1995;¹² it has also been supported Europe-wide as being very convincing from a policy perspective. The dispute about BSE was mainly responsible for opposition on the part of the United Kingdom and subsequent failure. However, since virtually identical rules are integrated into the Insolvency Proceedings Regulation the extensive report on the Convention which is a documentation of the intentions of the drafters is also a nearly authentic interpretation of the current law.¹³

b) *European Insolvency Proceedings Regulation*

9. Finally, when negotiations seemed hopeless, the Community opted for a Regulation on the basis of Art. 61(c)), 65(a), 67 EC (now Art. 81(2)(c) TFEU). As the policy issues had been widely and fully discussed, the legislative procedure did not take long. On the initiative of Finland and Germany late in 1999,¹⁴ the EU legislature – without amendments – adopted the EC *Insolvency Proceedings Regulation* as early as 29 May 2000,¹⁵ although in accordance with its Art. 47, it entered into force only on 31 May 2002: for all insolvency proceedings first opened after that date (Art. 43).¹⁶ The Regulation applies to all Member States except Denmark (32nd, 33rd Recitals) – as between the Member States, replacing here also Conventions ratified previously (see in more detail Art. 44).

10. The Regulation (largely) determines: (1) the jurisdiction for the main proceedings which, in principle, have universal effect; (2) the admissibility of and jurisdiction for ancillary, mainly secondary proceedings, the powers existing in these proceedings and the repercussions on the main proceedings (see below II.); (3) the question of the law applicable to the proceedings; (4) substantive law questions, albeit only to a very limited extent (see below III.); and (5) core questions of recognition and cooperation (see below IV.).

3. *Scope of Application of the European Insolvency Proceedings Regulation*

a) *Insolvency Proceedings (Art. 1(1))*

11. The first question of which types of proceedings are covered is easy to answer. In this respect, Art. 1(1) states in an abstract way that the debtor has to be divested (at least partially)¹⁷ and that he has to be insolvent. Moreover, all possible proceedings are listed (exhaustively) in Annex A, which resolves all

⁸ Balz, 70 *American Bankruptcy Law Journal* 485, 496 (1996).

⁹ United Nations Commission on International Trade Law (UNCITRAL), Draft Model Legislative Provisions on Cross-Border Insolvency of 30.5.1997, *United Nations General Assembly Official Record* 12–30.5.1997, 52nd session, Suppl. No 17 (A/52/17); www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf.

¹⁰ On this approach Fletcher, *Insolvency*, 323–363 (also reproducing the act); Prior, (1998) 14 (*Tolley's Insolvency Law & Practice* 215).

¹¹ Mexico, United States, Canada, South Africa, see Eidenmüller, *IPRax* 2001, 2 (3).

¹² Reported in: Fletcher, *Insolvency*, 387; Virgós, ‘The 1995 European Community Convention on Insolvency Proceedings – an Insider’s View’, *Forum Internationale* No 25, 3/1998, 41 (1995 version); and German version in ZIP 1981, 547, 673, 791 (1980 version); ZIP 1996, 976.

¹³ Reported in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings 11900/1/95 REV* (Insolvency Service of the Department of Trade and Industry, London

¹⁴ Opinions of 2000 C 75/1 (Economic and Social Committee); 2000 C 346/80 (European Parliament).

¹⁵ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1. On the admissibility of a Regulation (EU competence and choice of instrument) and moreover, also in this context, on the high technicality which would have led to sub-optimal results had there been only harmonisation: Bütter, (2002) 2 *JCLS* 213 (213 et seq.); Eidenmüller, *IPRax* 2001, 2 (3 et seq., 14); Kemper, ZIP 2001, 1609 (1610); Omar, (2000) *Insolvency L.J.*, 211 (211 et seq.).

¹⁶ The prevailing view is that no proceedings – primary or secondary – may have been opened before this time: No 303 et seq. of the explanatory report, reproduced in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); agreeing Eidenmüller, *IPRax* 2001, 2 (2); Obank, (2002) 17 *BJBFL* 89 (90, esp. footnote 13).

¹⁷ His dispositions are made dependent on ratification: Balz, 70 *American Bankruptcy Law*

questions in a positive and negative way.¹⁸ For this, a distinction is made between the whole range of insolvency proceedings (Annex A) and the sub-group of insolvency proceedings aimed only at liquidation, not also at rescue (Annex B). This is important for the admissibility of ancillary, mainly secondary proceedings (Art. 27 sentence 2 and also Art. 36 et seq.). What does not matter in principle is the person of the debtor; though it is **mainly limited liability companies**, natural persons, consumers and professionals are also covered (9th Recital). However, the Regulation only deals with this question in a permissive way and really refers it to the law of the Member States (Art. 4(2)(a)), which, for instance, in **many Romance countries opens insolvency proceedings only for enterprises**.¹⁹

b) Exceptions and Limits of the Principle of Concentration (Art. 1(2) and Art. 3)

*12. The Insolvency Proceedings Regulation does **not apply to providers of financial services** (Art. 1(2); 9th Recital). An unmodified application, which was the fear, would have had considerable adverse effects on the whole financial sector or at least parts of it because, for instance, of domino effects.²⁰ Therefore, credit institutions,²¹ insurance undertakings²² and investment funds were taken out (and are now regulated separately). In this context, one has to examine Art. 9, which (independently of whether the parties concerned are credit institutions) refers to the law under which payment or settlement

systems operate for the rights and obligations of the parties in these systems, mainly for the question of whether a transaction can still be revoked.²³

13. The regulatory approach seems **problematic** in two other aspects of the (substantive and territorial) scope of application, which are **paramount for EU Company Law**.

14. While the aim of far-reaching concentration has been largely attained for individual legal persons, the same is not true for **cross-border groups of companies**.²⁴ Art. 3(1) refers to the 'centre of a debtor's main interests', i.e. of one individual legal person, not a group of legal persons. And in addition, an establishment within the meaning of Art. 3(2), 27, where (solely) secondary proceedings can be opened, is conceived by most authors only as a branch, not a subsidiary.²⁵ This would mean that a coordinated administration of insolvencies of groups of companies is not furthered – and this is the most important case of a cross-border insolvency (of enterprises).²⁶ Unless, as suggested in the early phase in some sources, mainly in the UK, the 'centre of a debtor's main interests' in the case of a subsidiary can be in the State where the parent company has its seat (see above §35 N. 24). According to the case law of the ECJ, namely the seminal judgment *Eurofood IFSC Ltd.*, the contrary is, however, the rule. This point and the problems arising – probably the single-most disputed problem area of the regulation as a whole – have to be taken up when the centre of main interests (Art. 3(1)) and also ancillary proceedings are discussed (see below §35 para. 17 et seq.).

15. The aim of far-reaching concentration was likewise difficult to attain **with respect to the relationship with third countries**, which are not bound by the Regulation. After quite controversial discussions, the EU legislature renounced a

¹⁸ Kemper, ZIP 2001, 1609 (1611). The definition in Art. 1(1) is that given by the ECJ case 133/78 *Gourdain* [1979] ECR 733 (743 para. 3). The criteria contained in Art. 1(1) of the Regulation have to be applied on a case-by-case basis to the individual case (and then determine the application of the Regulation) only in situations where a type of proceedings contained in the list can be carried on also without sequestration of the assets: No 48 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); Balz, 70 *American Bankruptcy Law Journal* 485, 502 (1996); Eidenmüller, *IPRax* 2001, 2 (4); also Menjucq, *Droit européen des sociétés*, 406.

¹⁹ In France Art. 1844–8 et seq. Code Civil (Company Law), Code de Commerce Art. L. 2371–2373/1.

²⁰ See 9th Recital; positive (if, as in the case of financial institutions, the principle of universality is carried through with fewer compromises [next N.]): Strub, *EuZW* 1994, 424; critical however Eidenmüller, *IPRax* 2001, 2 (4 et seq.); Kemper, ZIP 2001, 1609 (1611); Wimmer, *ZInsO* 2001, 97 (102 et seq.); see also Wood, (2003) 23 *BuS.L.Rev.*, 230 (230); Obank, (2002) 17 *BJBFL*-89 (90); Burbidge, (2002) 27 *ELR* 589 (593).

²¹ Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ 2001 L 125/15 (carrying through the principle of universality without compromises; for transposition see references below N. 28); also Directive 96/10/EC of the European Parliament and of the Council of 21 March 1996 amending Directive 89/647/EEC as regards recognition of contractual netting by the competent authorities, OJ 1996 L 85/17. On these legal measures see, for instance, Galanti, 'The new EC law on bank crisis', (2002) 11 *International Insolvency Review*, 49; Hasselbach, 'Insolvenzprivilegien für Kreditinstitute bei Zahlungssystemen?', ZIP 1997, 1491.

²² Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, OJ 2001 L 110/28 (for transposi-

²³ For this area see Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems, OJ 1998 L 166/45; and 27th Recital; Pitt, 'Improving the legal basis for settlement finality', (2003) 18 *BJBFL* 341; Kemper, ZIP 2001, 1609 (1617); Sealy, 'The Settlement Finality Directive – points in issue', (2000) 2 *CJFLR* 221.

²⁴ On this issue (mostly very critical): No 76 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); Balz, ZIP 1996, 948 (949); Burbidge, (2002) 27 *ELR* 589 (593 et seq.); Dawson, (2003) *Insolvency L.J.*, 226 (esp. 233) (with reference to the first relevant cases before UK courts); Paulus, ZIP 2002, 729 (730); differing Eidenmüller, *IPRax* 2001, 2 (4).

²⁵ From the early statements see: Burbidge, (2002) 27 *ELR* 589 (594); Ehrlicke, 'Verfahrens koordinierung bei grenzüberschreitenden Unternehmensinsolvenzen', in: *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht*, (2001), 337 (340); Eidenmüller, *IPRax* 2001, 2 (4); Menjucq, *Droit européen des sociétés*, 514 et seq. (same opinion already in the 1st ed. 2001); expressing doubts Gottwald, *Grenzüberschreitende Insolvenzen – Europäische und weltweite Tendenzen und Lösungen*, (1997), 21–23.

²⁶ Moss/Paulus, *Insolvency Intelligence* 9 No. 1 (2006) 1 ('Urgent Reform' with proposals);

harmonisation of this relationship: the Regulation only applies if the 'centre of a debtor's main interests' is located in the Union (14th Recital), and even then only insofar as a delimitation of powers against other Member States is concerned.²⁷ This does not preclude some Member States, Germany as well, from introducing the model of the Regulation also as their autonomous law on cross-border (corporate) insolvencies worldwide.²⁸

II. MAIN PROCEEDINGS AND ANCILLARY PROCEEDINGS – ADMISSIBILITY AND JURISDICTION (ART. 3)

16. In the Insolvency Proceedings Regulation, the decision made was for far-reaching concentration, not universality – at least as between the Member States.²⁹ A distinction is made between **main proceedings (Art. 2(1)) and two types of ancillary proceedings.**

1. Main Proceedings

17. International jurisdiction³⁰ for the main proceedings is where the 'centre of a debtor's main interests is situated' (so-called COMI), in the case of limited liability companies, typically the siège statutaire (Art. 3(1)). The two core questions are how 'siège statutaire' is to be understood and how the presumption of its locality can be rebutted; the latter question can be asked in particular in relation to groups of companies. Despite the wording which would seem to

indicate that mere registration is decisive for establishing the 'siège statutaire', Recital 13 points in the other direction, because it points to the place where the debtor effectively and regularly administers his interests. Therefore, the largely prevailing view is that 'siège statutaire' is mostly equivalent to 'real seat' in the sense of the real seat theory in private international law, namely place of the headquarters.³¹ This is typically refined in the sense that the decisive factor is not so much the physical location of the headquarters, but where the key functions, the headquarter functions, are typically executed.³² There are some alternative doctrines, namely Wessels' theory that the relationship to the (bulk of the) creditors is decisive because this is the only factor which is really ascertainable for them.³³ In fact the lead decision by the ECJ – in the Eurofood case – heavily relied upon the 13th Recital and the authentic interpretation by the Virgós/Schmidt Report. This report specifies that decisive factors – for rebutting the presumption, as in the Eurofood case, but already for establishing the presumption – have to be 'objective' and 'ascertainable' by third parties.³⁴ While it is not completely clear for whom these facts have to be ascertainable, the 'typical creditors' or an 'independent objective observer' would seem to be the most plausible options.³⁵ In my opinion, the 13th Recital (being part of the Act) is

³¹ In this sense namely Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.80–8.87 (with rather uniform case law in this sense from the Member States compared in this book at para. 8.85); Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 25a. In the sense also the large majority of national courts' case law, see lists in: Wessels (2009) 6 *ECL* 169 (169–171); Uhlenbruck, *Insolvenzrecht*, (13th ed. 2010), 'EulensVO Art. 3 para. 12–33. This majority view also points to a passage in the Virgós/Schmidt Report in which it is said that the 'place of registration' is typically also where the headquarters are placed and that 'siège statutaire' is used as a short formula for this situation (including the place of headquarters). See No 75 of the explanatory report, in: Virgós/Schmidt, *Report on the EC Convention on Insolvency Proceedings* (above N. 13).

³² See references last N. See in more detail on the distinction: Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.81; extensive references for the different understandings in the literature of the Eurofood decision in this respect in: J. Schmidt, in: Wessels/Omar (eds.) *European Insolvency Regulation*, 19 (21 et seq.).

³³ Wessels (2009) 6 *ECL* 169 (172–174) (there as well description of the other theories); in favour of really applying the statutory seat: Eidenmüller, *ZHR* 169 (2005) 528; Szydło, (2009) 10 *EBOR* 253; extensively on the concept also: McCormack, *CLJ* 2009, 169 (186–190); Szydło, *EBLR* (2009), 747 (761–766). Doubting the compatibility (at least of the prevailing interpretation) of the COMI with the freedom of establishment: Ringe, *EBOR* 9 (2008), 579 (608–616).

³⁴ ECJ case C–341/04 *Eurofood IFSC Ltd.* [2006] ECR I–3813 (para. 34); noted Bachner, (2006) 3 *ECFR* 310; Bariati, *RabelsZ* 73 (2009) 629 (646–652) (with particular discussion of SPVs); Duursma-Keppinger, *ZIP* 2007, 896; Knof/Mock, *ZIP* 2006, 911; Mankowski, *BB* 2006, 1753; Wessels, (2006) 3 *ECL* 183; see No 75 of the explanatory report, in: Virgós/Schmidt, *Report on the EC Convention on Insolvency Proceedings* (above N. 13). For lists of the numerous national decisions following this case and refining its approach (not always in a uniform way), see references above N. 31.

³⁵ See for this question (creditors): Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 22a; Szydło, *EBLR* (2009), 747 (766). It does not really make sense to think that the court could be

²⁷ Dawson, (2003) *Insolvency L.J.*, 226 (esp. 227 et seq.); Eidenmüller, *IPRax* 2001, 2 (5, 8–14); Omar, (2002) *Insolvency L.J.*, 122 (126 et seq.); Paulus, *ZIP* 2002, 729 (729) (critical). See also Art. 3(2) of the Regulation.

²⁸ See *BT-Drucks.* 12/7303, 117; Balz, *ZIP* 1996, 948 (955); Eidenmüller, *IPRax* 2001, 2 (3); Wimmer, *ZInsO* 2001, 97 (103). After some hesitation, with the Gesetz zur Neuordnung des Internationalen Insolvenzrechts vom 14.3.2003, BGBl. 2003 I, 345 (now §§335–358 InsO), the German legislature mostly took over the regime of the Regulation also for third country relationships (most important exception: no automatic recognition of the decision to open proceedings). Alternatively, a State can adopt the UNCITRAL Model Law, for instance in the United Kingdom, where at least the possibility for this has been created: see Prior, 'The international implications of the recent Insolvency Bill 2000', (2000) 16 (*Tolley's Insolvency Law & Practice* 108; see now: Insolvency Act 1986 (Amendment) Regulations 2002, SI 2002/1037; Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, SI 2002/1240 and Insolvency (Amendment) Rules 2002, SI 2002/1307).

²⁹ This is still different in the 1980 draft for a Convention, references above N. 12; on this see Hanisch, *ZIP* 1994, 1; Kemper, *ZIP* 2001, 1609 (1609); criticising the withdrawal from a strict principle of universality: Eidenmüller, *IPRax* 2001, 2 (5); Paulus, *ZIP* 2002, 729 (729 et seq.). See also Bütter, (2002) 2 *JCLS* 213 (217 et seq.); Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 150.

³⁰ The Insolvency Proceedings Regulation regulates only which State is competent, not how that State distributes (local) competence within its territory: 15th Recital; Kennett, 'Current Developments in Private International Law', (2001) 50 *ICLQ* 187 (191); Kemper, *ZIP* 2001,

still more important and typically structures which are visible in the world, albeit not to all third parties, provide a basis on which to make forecasts (by creditors who want to file a demand) and on which international jurisdiction can be based. This speaks in favour of the majority view because headquarters' functions are really 'administration' of the interests of the company in the sense of the 13th Recital. There is clearly an element of stability to be considered in all this ('regularly').³⁶ When it then comes to the **rebuttal of the presumption**, the same criteria apply. In other words, the headquarter function would seem to be the most important criterion, but is only one among others which, if overwhelmingly strong, can point in another direction. The core criteria which all have to be weighed are the following: where the key decisions are implemented in the organisation (related already to headquarter functions, but potentially slightly different)³⁷ and where the assets and persons (undertakings) are situated,³⁸ potentially also where the clients are mainly served.³⁹ As long as a company carries on its business in the territory where its registered office is situated or at least some considerable part of it, the ECJ, already assumed that its centre of main interests is indeed in that Member State.⁴⁰ Conversely, insolvency proceedings for Centros Ltd., despite its siège statutaire in the UK, would have to be opened in Denmark because all criteria were met there. This would have been the case even if the couple had taken their decisions in England and the headquarters had not also been in Denmark (as was the case).

18. The Centros case – where the branch was opened in Denmark – is not yet a group of companies case, but comes close to it: Groups of companies are in fact a situation where rebuttal of the presumption – for the establishment of the COMI of the subsidiary – is most discussed. It has often been lamented that the Insolvency Regulation still starts from the assumption that companies typically are independent and that it does not develop a concept of group insolvency – with the consequence that a range of separate proceedings would have to be

opened, without coordination and minor chances for rescue.⁴¹ The ECJ, in its Eurofood case, dismissed the 'mind of management' theory then prevailing in some national discussions as being too subjective; the presumption cannot be rebutted merely because the subsidiary's management is ready to follow orders from the parent company. On the other hand, there are so many different forms that groups of companies can take that all really turns on the specific facts. If the group is highly integrated, the subsidiaries mainly serve as profit centres, but the core decisions are taken by the parent company, the largely prevailing view now deduced from Eurofood is that the presumption would be rebutted.⁴² If conversely, the subsidiary basically takes its decisions and assumes the headquarter functions, unless there is an overwhelming set of factors pointing in another direction, then the lesson to be derived from Eurofood would seem to be that such a company will have its own independent COMI and proceedings. It may well be that in this case, the synergies possible in joint proceedings would also be less important than in a more intensely integrated group and that therefore the scheme is more plausible than conventional wisdom would tell.

19. The definition of COMI is the core question. Questions relating to the time for which the COMI is to be ascertained are, however, also highly disputed. There are mainly three questions. First, the ECJ has had the chance to specify that whenever the COMI was in a certain state at the moment of filing the demand, for the purposes of Art. 3(1), it remained in that state even though the facts may have changed by the time the court handed down its decision on whether to open proceedings or not.⁴³ While the court pointed to the fact that the Regulation wanted to avoid forum shopping (4th Recital), the facts where such

⁴¹ In this sense: Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 30; Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.88; Moss/Paulus, *Insolvency Intelligence* 9 No. 1 (2006) 1; Szydło, *EBLR* (2009), 747 (761–766); also No. 76 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); advocating a broader perception as well Mevorach, *EBOR* 8 (2007) 179; emphasising more the fact that the Regulation has been negotiated in a situation where groups were not so important yet (questionable) and that a substantive law harmonisation – potentially taking into account global trends or even collaboratively with them – would be an attractive alternative (highly plausible): Wessels (2009) 6 *ECL* 169 (175 et seq.); further developing this idea: Wessels, (2011) 8 *ECL* 27.

⁴² In this sense: Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.89 et seq. (with concurring case law from several Member States); Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 30b; Deyda, *Konzern im europäischen internationalen Insolvenzrecht*, 46 et seq. (both focusing on 'economic cohesion' of the group); rather seeing the main divide between English courts (still 'mind of management' theory) and continental courts: Szydło, *EBLR* (2009), 747 (762–764). On the high variety of group designs, from an insolvency law perspective, and for the high variety of solutions proposed *de lege ferenda*: Wessels (2009) 6 *ECL* 169 (173–175).

⁴³ ECJ case C-1/04 *Staubitz-Schreiber*, [2006] ECR I-701; noted Bariati, *Rebels* 73 (2009) 629 (634–639); Duursma-Kepplinger, *ZIP* 2007, 896; Kindler, *IPRax* 2006, 114; Petkovich, (2006)

'ascertainable' would not have any importance (the court can only decide on what is proved and then it is also ascertainable for the court).

³⁶ In this sense: Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.75–8.77 and 8.108 et seq.

³⁷ This is the criterion of the seat theory in German conflict of laws rules: BGHZ 97, 269 (272); further references above in §7 N. 5.

³⁸ Crystal, (2002) 23 *The Company Lawyer*, 359. Similar for the Convention (above N. 12), which had the same wording: Kemper, in: Kübler/Prütting (eds.), *InsO*, (looseleaf 5/2010), Art. 102 EGIInsO para. 82; more cautious Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 20a.

³⁹ For references in this sense, see above N. 33. For catalogues of criteria see Herchen, *ZInsO* 2004, 825 (827 et seq.).

⁴⁰ In this sense: ECJ case C-444/07 *Sad Rejonowy Gdansk-Polnoc*, [2010] ECR I-0000; (not yet reported); noted J. Schmidt *EWIR* Art. 25 EuInsVO 1/10. The opposite is a mere letter box company which does not have its COMI in the letter box's country: ECJ case C-341/04 *Eurofood IFSC Ltd.* [2006] ECR I-3813 (para. 15); Moss/Smith in: Moss/Fletcher/

that this was not really the question. The debtor herself insisted on having the country from which she had departed remain competent. She did not want to go elsewhere for 'forum shopping'; to the contrary. Therefore, it seems fair to assume that the perpetuation of the forum in a case where the facts change after filing the demand does not depend on bad faith from the side of any party concerned – in other words, the intention to 'forum shop', good or bad, is irrelevant in this situation.⁴⁴ More problematic is the phase before filing the demand, namely situations in which the **relevant factors are changed shortly before** or even with the intention of filing the demand in the country to which the factors point now ('country of immigration'). Contrary to what the formula of 'forum shopping' would seem to indicate,⁴⁵ it has to be admitted that creditors also often welcome such a change – because there is then in turn a change to a law which is more adapted to rescue or more efficient otherwise.⁴⁶ The preferred approach here would seem to be to resolve these cases within the notion of COMI – which requires an element of stability (last para.) – and sometimes by applying the concept of fraudulent behaviour / abuse of rights. In fact, it has been noted that one can hardly speak of a situation where the debtor 'regularly' administers his interests in a place to which he has just recently moved. But, on the other hand, in some cases the courts have admitted such regularity already after four weeks.⁴⁷ Therefore, creditors who fear a case of forum shopping are well advised to take steps to secure the old forum as quickly as possible.⁴⁸ The exception of fraud – which is the 'instrument of last resort' once the facts have changed and a certain

time has lapsed – is to be applied very exceptionally indeed.⁴⁹ The question first discussed above has to be distinguished from a third one where again time comes in. This is the **race between different courts** when different demands have been filed.⁵⁰ As the concept of COMI is very open and not concisely defined by the ECJ, different national courts interpret this concept differently – and do so in good faith, as the ECJ case law is so scant. The only aspect, however, which is often forgotten, is that they do so mostly without referring such a question of doubt to the ECJ (as they should!). In this case, given the criterion of 'priority' (22nd Recital, last phrase), the question is which court is competent, the one where the demand was filed first or the one which first handed down a positive decision. As this question is also disputed,⁵¹ the latter would thus far in fact seem to impose itself – as long as and until the ECJ has not decided differently on the merits. This is because of the recognition scheme (without exequatur), which does not make recognition (the duty to recognize) depend on the merits, not even on a second-guessing of this court's competence. Therefore, the first court decision handed down has to be recognised by all others.

20. Finally, in main proceedings, which must always be of the type listed in Annex A (Art. 1(1)), **insolvency** has always to be examined (Art. 1(1) again). There are **no further requirements** under the Insolvency Proceedings Regulation, but there are potentially under the applicable national law (Art. 4(2)).

2. Ancillary Proceedings: Secondary and Territorial Proceedings

*21. Besides main proceedings there are two possible types of ancillary proceedings. The first, when main proceedings are already opened, is **secondary proceedings under Art. 3(2) and (3), which are possible whenever international jurisdiction is given, i.e. whenever the company (enterprise) has an 'establishment' in the other State concerned.**⁵²

⁴⁹ Art. 25(3) and 26 are the only basis in the Regulation for an exception, but would not seem to capture the case; see on these rules which again apply only very exceptionally J. Schmidt, in: Wessels/Omar (eds.) *European Insolvency Regulation*, 19 (29–33); one can, of course, point to the 4th recital. The ECJ has, however, also accepted bad faith exceptions based on national law in other instances of applying EU secondary law as long as this did not counter the effect utile of this act. See §8 N. 63. For fraudulent transfer of COMI see, for instance, Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.106 (more easily in Third Country cases); and extensively: Eidenmüller, *ECFR* 2009, 1.

⁵⁰ On this dilemma see, for instance, McCormack, *CLJ* 2009, 169; Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.92; Winkler, 'From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action', (2008) 26 *Berkeley Journal of International Law*, 352 (369).

⁵¹ For this problem see Bariati, *RechtsZ* 73 (2009) 629 (641 et seq.) (opting for the moment of the decision to open proceedings); not entirely clear: ECJ case C-341/04 *Eurofood IFSC Ltd.* [2006] ECR I-3813 (para. 49). The recital referred to speaks indeed of 'decision'.

⁵² Definition in Art. 2(h). In tendency for a broad interpretation No 71 et seq. of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N.

⁴⁴ In this sense probably also Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 15 Virgós/Garcimartin, *European Insolvency Regulation*, 49 et seq (although all referring also to the forum shopping argument).

⁴⁵ 'Verpönt' ('a shame') according to Paulus, *Europäische Insolvenzverordnung*, Art. 3 para 16b; similar Eidenmüller, *ECFR* 2009, 1 passim (both authors not really subscribing to such bashing). On the competition of legislatures aspect see, among others, McCormack, *CLJ* 2009, 169; Ringe, *EBOR* 9 (2008), 579 (600–608), and monograph by Lach, *Europäische Insolvenzverordnung*.

⁴⁶ In this sense also Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.101–103; Marshall/Pardimala, 'Changing COMI Prior to Insolvency is Fair Game', (2007) 4 *International Corporate Rescue*, 318; insisting on this aspect perhaps even too heavily (as if there were only positive cases of forum shopping): Ringe, *EBOR* 9 (2008), 579 (600–608), see also there 595–600 for a survey on core advantages of different regimes.

⁴⁷ For this approach of solving the question: Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.103 et seq. (with national case law), stressing the relevance of fundamental freedoms in this respect Paulus, *Europäische Insolvenzverordnung*, Art. 3 para. 4, but more restrictive para. 16b (four weeks long enough probably only in case of rescue); in principle, of course, it is agreed by all authors that moving the COMI must be possible, McCormack, *CLJ* 2009, 169 (191 et seq.); for ECJ case law: Bariati, *RechtsZ* 73 (2009) 629 (634–639); see also Marshall/Pardimala, (2007) 4 *International Corporate Rescue*, 318. In the PIN case, only four weeks had lapsed before the court thought that the COMI had moved, see: District Court Cologne, *ZIP* 2008, 423.

⁴⁸ For measures which creditors can take, see Mankowski, 'Gläubigerstrategien zur Fixierung

This is the sole requirement. However, jurisdiction based on the location of the asset as such, as was the law for instance in the United Kingdom and Germany (above §35 para. 6), is excluded. The decision that the debtor is insolvent, taken in the main proceedings, has to be accepted without further examination (Art. 27). Secondary proceedings may only be winding-up proceedings within the meaning of Annex B (Art. 3(3) and Art. 27);⁵³ the liquidator in the main proceedings can, however, combine both proceedings in one rescue proceedings (details in Art. 34; 20th Recital). Moreover, secondary proceedings are limited to the assets situated in the State of the establishment (Art. 3(2) and Art. 27; definition Art. 2(g)).

*22. Territorial proceedings under Art. 3(2) and (4) are opened when there are no main proceedings as of yet. Again the 'centre of a debtor's main interests' is elsewhere. Because insolvency has not yet been established in main proceedings, however, this now has to be done in the territorial proceedings. Nor need these proceedings be (only) winding-up proceedings (see, however, Art. 37). International jurisdiction and the reach of the proceedings are regulated as in the case of secondary proceedings: again an establishment in this State is needed, again only assets situated in the State of the establishment can be reached (Art. 3(2), which applies to all ancillary proceedings). And territorial proceedings can be converted into secondary proceedings when main proceedings are opened (Art. 37; 17th Recital). There are two additional requirements in this type of proceedings: the main proceedings (under the national law of the possible State of main proceedings) must either be inadmissible or the territorial proceedings must have been requested by a creditor with registered seat, etc. in this State or with a claim arising from operation of the establishment of the debtor in this State (Art. 3(4)(a) and (b)).

III. APPLICABLE LAW AND SOME SUBSTANTIVE LAW RULES (CORE QUESTIONS)

1. Applicable Law (Art. 4–15)

a) Lex Concursus as Principle (Art. 4)

23. In principle, the law of the State where the proceedings take place applies to all legal questions raised by the proceedings (so-called *lex concursus*). This applies both to main proceedings and to ancillary proceedings;⁵⁴ all proceedings

because it rather sets an upper limit of duration and organisational complexity: ECJ case 33/74 *von Binsbergen* [1974] ECR 1299 (1309 para. 13) and case C-55/94 *Gebhard* [1995] ECR I-4165 (4194 et seq. para. 22–27); Kruse, *Sitzverlegung von Kapitalgesellschaften innerhalb der EG – Vereinbarkeit der einschlägigen Regelungen des deutschen Sach- und Kollisionsrechts mit dem EG-Vertrag*, (1997), 55–57. In detail on ancillary, mainly secondary, proceedings Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.138–8.160; Wessels, *International Insolvency Law*, 346–353; Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 155–162; Wimmer, *ZIP* 1998, 982.

⁵³ This would affect the main proceeding as little as possible: Obank, (2002) 17 *BJBFL* 89 (90); Kemper, *ZIP* 2001, 1609 (1612).

follow their own law. The same is true in principle for substantive law questions.⁵⁵ Art. 4(2) contains a long list of examples for which this connecting factor must be used. For some, however, it has to be taken into account that there are numerous exceptions in Art. 5–15, and it is necessary to look back and forth (even several times): for instance, Art. 4(2)(c) (see Art. 14), Art. 4(2)(d) (see Art. 6), Art. 4(2)(e) (see Art. 8–10), Art. 4(2)(f) (see Art. 15) and Art. 4(2)(m) (see Art. 13), to which Art. 5(4), 6(2) and 7(3) refer back. All references made are, as per usual in international acts on the conflict of laws, to substantive law directly (no *renvoi*, above §7 para. 8).⁵⁶

24. There are nevertheless considerable exceptions from this principle (Art. 5–15, below b)–d)) because other connecting factors seem much more meaningful in these cases and therefore the interest of honouring the closest possible link outweighs the interest of the simplicity of the procedure.⁵⁷ In many cases, the substantive law component is more important than the procedural side, and therefore application of the *lex fori* (the law of the forum of the procedure) is questionable.⁵⁸ The exceptions fall into three main categories.⁵⁹ Again, reference is made to substantive law directly (no *renvoi*).⁶⁰

b) Exception: Potential Securities for Creditors (Art. 5–7)

25. Rights in rem, mainly securities, are governed, as is normal under conflict of laws, by the law where the asset is situated (*lex rei sitae*) – but only if the asset at the time of the opening of the insolvency proceedings was situated in a State other than that of the main proceedings (see on this question Art. 2(g)) and probably also only if the rights had already existed at the time.⁶¹ This applies to

⁵⁵ 23rd Recital; Kemper, *ZIP* 2001, 1609 (1615).

⁵⁶ Balz, 70 *American Bankruptcy Law Journal* 485, 507 (1996).

⁵⁷ On the relevance of the (general) principle of the closest connecting factor also in international insolvency law see Gottwald (above N. 25), 31; see also Israel, *European Cross-Border Insolvency Regulation*, 277; rather stressing also the interest to reduce complexity: Virgós/Garcimartín, *European Insolvency Regulation*, 91 et seq.

⁵⁸ Bütter, (2002) 2 *JCLS* 213 (220 et seq.); Obank, (2002) 17 *BJBFL* 89 (91); Kemper, *ZIP* 2001, 1609 (1611, 1615); Menjuq, *Droit européen des sociétés*, 550; and also Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 171–189.

⁵⁹ These do not include: Art. 11 (property rights of the debtor in land which have to be registered) and Art. 12, which does not contain an exception anyhow but rather states that intellectual property rights based on Community law can be liquidated only in main (primary) proceedings. This refers to: Luxembourg agreement 89/695/EEC of 15 December 1989 relating to Community patents, OJ 1989 L 401/1; Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, OJ 2009 L 78/1; and Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ 1994, L 227/1.

⁶⁰ Balz, 70 *American Bankruptcy Law Journal* 485, 507 (1996).

⁶¹ For the former see, for instance, Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 176 et seq.; Kemper, *ZIP* 2001, 1609 (1616); Menjuq, *Droit européen des sociétés*, 550. For the latter, for instance, Omar, (2002) *Insolvency L.J.*, 42 (51); Huber, *ZZP* 114 (2001)

all rights in rem, with respect to all corporeal or non-corporeal assets and independently of any powers this right conveys (see the broad description in Art. 5(2), which nevertheless contains only examples). It seems as if specific securities were covered which are not usual in other Member States, such as the English floating charge (Art. 5(1), in parenthesis)⁶² or the German protected (because already registered) right to acquire a right in rem with respect to immovables ('Vormerkung', Art. 5(3)).⁶³ As these rights follow other laws, it is important that liquidators of the main proceedings have the power to open secondary proceedings in another State so as to ensure that the rights are included in proceedings (25th Recital).⁶⁴ If all else fails, the duty applies that at least the surplus not needed for satisfaction has to be returned (Art. 20(1), also Art. 35).

26. The set-off, with its guarantee function, shall be honoured in principle (26th Recital). The reference made to the lex concursus in Art. 4(2)(d) is therefore substantially altered by Art. 6. This rule guarantees that the creditor has the right of set-off under the law which governs the claim of the insolvent debtor (typically the law of the creditor because he is the debtor of that claim, see Art. 4(1) and (2) of the Rome I Regulation on the law applicable to contractual obligations). Again, however, the possibility of a set-off must have existed already at the time of the opening of the proceedings (materialisation of both obligations; that of the creditor must probably also have fallen due already).⁶⁵

27. A rule similar to that for rights in rem also applies to the reservation of title (Art. 7), but the exception will seldom apply, as in most cases the asset will not be placed outside the State of the main proceedings because, in these cases, the asset will typically be situated at the 'centre of a debtor's main interests'.⁶⁶

⁶² This refers to an inventory or other compendium of assets which can change; the prohibition on disposal is made dependent on the realisation of certain events (so-called crystallisation) which then transform the floating charge into a fixed loan; well known in the United Kingdom, Ireland, also Sweden and Finland: Balz, 70 *American Bankruptcy Law Journal* 485, N. 98 (1996); Büttner, (2002) 2 *JCLS* 213 (228–242); applying Art. 5(1) to this case: No 104 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); Balz, *ibid.*; Moss/Smith in: Moss/Fletcher/Isaacs, *EC Regulation on Insolvency Proceedings*, para. 8.191; Paulus, ZIP 2002, 729 (735); Wimmer, *ZInsO* 2001, 97 (98 et seq., 100).
⁶³ Subjecting this case to Art. 5: Fritz/Bähr, *DZWIR* 2001, 221 (227); Kemper, ZIP 2001, 1609 (1611, 1616).

⁶⁴ *Critical v. Wilimowsky*, EWS 1997, 295; also *id.*, WM 1997, 1461 (the question of whether an asset is part of the proceedings, should be decided by the law of the main proceedings; the lex causae should be taken into account only with respect to distribution).

⁶⁵ For the former: No 110 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (N. 13); Burbidge, (2002) 27 *ELR* 589 (598 et seq.); Kemper, ZIP 2001, 1609 (1617); Virgós/Garcimartín, *European Insolvency Regulation*, 117 (specifying that finally the competent national law decides). For the latter, for instance in German Law: §95 sentence 3 InsO. This is justified under German Law that before, there is not yet firm confidence created in the possibility of a set-off (this is also what 26th Recital seems to require).

c) Exception: Potentially Privileged Contracts (Art. 8–10)

*28. With respect to three types of contracts, the question of whether they are treated preferentially in insolvency is decided by the law applicable to them (in deviation from Art. 4(2)(e)): contracts on the use or acquisition of land (Art. 8); contracts in payment and settlement systems (Art. 9, see also above §35 para. 12); and contracts of employment (Art. 10; see also Art. 8 of the Rome I Regulation), but here only as to whether the contract continues, not with respect to preferential status in insolvency for pay still owed (28th Recital).

d) Exception: Potential Rule on Detrimental Acts and Consequences of Sequestration (Art. 13–15)

*29. It is highly disputed whether detrimental acts (and rules which allow the challenging of such transactions) are subject to the law applicable to this transaction or to the lex concursus. The former opens up possibilities of circumvention (choice of a law where such acts cannot be challenged), while the latter reduces the protection of bona fide purchasers, i.e. the public (confidence in the validity under applicable law).⁶⁷ The Regulation allows a considerable exception from the principle that the lex concursus applies (Art. 4(2)(m)), in Art. 13: the partner in the transaction can prove (probably independently of good faith) that, according to the lex causae, this transaction would have been valid and could no longer be challenged.⁶⁸

*30. For the consequences of sequestration (divestment and possibly third party effects), Art. 14 and 15 again render applicable any law other than the lex concursus in two cases: transfer of land and certain assets subject to registration (ships and securities, in deviation from Art. 4(2)(c)) and pending law suits (in deviation from Art. 4(2)(f)).

2. Some Substantive Law

31. There is also some substantive law unification,⁶⁹ mainly to support the principle of concentration, namely, the liquidator of the main proceedings has rights to request the opening of proceedings (Art. 29(a), contrary to the case under many national laws such as German law). All creditors must be admitted

⁶⁷ On both interests: Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 186 et seq.; Fritz/Bähr, *DZWIR* 2001, 221 (226 et seq.); Huber, *ZZP* 114 (2001) 133 (151 et seq.); Kemper, ZIP 2001, 1609 (1618); also 24th recital.

⁶⁸ For the challenge of detrimental acts see ECJ case C-339/07 *Deko Marty Belgium*, [2009] ECR I-00767; Virgós/Garcimartín, *European Insolvency Regulation*, 134–137; Mangano, *ECFR* 2008, 119; Wessels, *International Insolvency Law*, 412–418; for this proposition Balz, ZIP 1996, 948 (951); Kemper, ZIP 2001, 1609 (1618); and as well (both critical) Eidenmüller, *IPRax* 2001, 2 (7); Paulus, ZIP 2002, 729 (735). Certainly, within the lex causae then, good faith will typically play a role; comparative law survey on Art. 13 (country reports) in *ECL* 2009, 27 et seqq.

⁶⁹ In this sense apparently also: Obank, (2002) 17 *BI/BFL* 89 (90 et seq.); opposite Eidenmüller,

to all proceedings (Art. 32(1), 39), and here tax and social security authorities, as the most important public law creditors, have also been explicitly included, which is unusual in traditional insolvency law.⁷⁰ There is also intensive regulation of the key questions of how to inform the creditors and how they can lodge their claims (Art. 40–42)⁷¹ and also whether a **person still honouring obligations to the debtor** after insolvency proceedings have been opened is thereby discharged (Art. 24).

IV. RECOGNITION AND COOPERATION

1. Recognition

- a) Automatic Recognition of All Decisions in the Insolvency Proceedings in Principle

32. The centrepiece of the Insolvency Proceedings Regulation is automatic recognition without exequatur.⁷² First, the **opening of the proceedings** (Art. 16 et seq.), and their characterisation as the main proceedings, have to be recognised, thus precluding other main proceedings. Disputes about jurisdiction (where the ‘centre of a debtor’s main interests’ is, Art. 3(1)) are decided by the principle of priority: the opening of main proceedings has to be recognised in all other Member States.⁷³

33. The other decisions taken by the court in the course of the proceedings and for their closure (Art. 25(1) first subparagraph) also have to be automatically recognised. This also includes decisions taken by a court other than that competent for the insolvency proceedings ‘relating to preservation measures’ (Art. 25(1) third subparagraph). The ECJ has clearly stated that, outside the realm

⁷⁰ On this change see Balz, ZIP 1996, 948 (955); and extensively: Burbidge, (2002) 27 *ELR* 589 (607 et seq.).

⁷¹ On these questions see Obank, (2002) 17 *BJBFL* 89 (92); Kemper, ZIP 2001, 1609 (1618 et seq.); Paulus, ZIP 2002, 729 (733).

⁷² 21st Recital; ECJ case C-294/02 *AMI Semiconductor*, [2005] ECR I-2175; noted Bariati, *LabelsZ* 73 (2009) 629 (640 et seq.); moreover Balz, 70 *American Bankruptcy Law Journal* 485, 496 (1996); Menjuq, *Droit européen des sociétés*, 552; Huber, ZEP 114 (2001) 133 (149, a simplified exequatur exists only for some single measures of execution); Kemper, ZIP 2001, 1609 (1613 et seq.). This is the tendency also in the Brussels system of recognition and execution of foreign judgments, see in more detail Hess, *Europäisches Zivilverfahrensrecht* (2010), 330 et seq. ‘Aktuelle Perspektiven der europäischen Prozessrechtsangleichung’, *JZ* 2001, 573 (578). For the conditions of exequatur under national law in France, Germany and the United Kingdom see, for instance, Menjuq, *Droit européen des sociétés*, 470–478; Reinhart, in: *MünchKommInsO*, Art. 102 EG–InsO para. 275–377; Smart, *Cross-Border Insolvency*, 181–183. 22nd Recital; Bütter, (2002) 2 *JCLS* 213 (219); Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 189; Kemper, ZIP 2001, 1609 (1613). See on the practical impact of

of the ordre public exceptions (Art. 25(3), 26), the realm of the regular exceptions named in Art. 5–15 and within the secondary proceedings under Art. 4, no action whatsoever can be taken in a state other than the state of primary proceedings.⁷⁴

b) Exceptions and Preliminary Proceedings

*34. There are exceptions due to the **ordre public reservation** contained in Art. 26, which refers to a national legal order but the exercise of which, as otherwise as well, is probably controlled by EU law principles.⁷⁵ One key question will be that of recognising securities (Art. 5–7) and decisions in this respect.

*35. There had been slight additional uncertainties in the insolvency proceedings owing to the way in which **preliminary reference was arranged** in Art. (ex-168(1) EC: only the court which (in these particular proceedings)⁷⁶ is of last instance was allowed to refer a question to the ECJ (and probably had to do so).⁷⁷ The TFEU now applies the general regime on preliminary reference. The ECJ has to interpret all terms which are used in the Regulation in a uniform way, i.e. terms for which national law is not competent under Art. 4 and also Art. 5–15, particularly the term ‘centre of a debtor’s main interests’. Some authors hold that preliminary reference is questionable anyway, given the mechanism of automatic recognition and the need for rapid liquidation and decision.⁷⁸

2. Coordination

a) Liquidator

36. Automatic recognition is a concept which applies in principle only for court decisions. Decisions taken by the liquidator do, however, enjoy similar privileges. This is important only for the liquidator in the **main proceedings**, as secondary proceedings only cover assets in the same country. The principle is that he has the powers conferred upon him by his own law (Art. 18(1) first sentence), but can also avail himself of those available in the State where the asset is located – and has to do so for enforcement measures, for which he has to request administrative assistance in that country (Art. 18(2)). Among his powers is also the right to seize assets owned by the debtor abroad (Art. 18(1) second sentence).⁷⁹

⁷⁴ In this sense: ECJ case C-444/07 *Sad Rejonowy Gdansk-Polnoc*, [2010] ECR 0000; (not yet reported). Other proceedings are void.

⁷⁵ No 205 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); Kemper, ZIP 2001, 1609 (1614); also Leible/Staudinger, KTS 2000, 533 (566–568); apparently differing: Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 192.

⁷⁶ Hess, ‘Die “Europäisierung” des internationalen Zivilprozessrechts durch den Amsterdamer Vertrag – Chancen und Gefahren’, *NJW* 2000, 23 (28).

⁷⁷ Eidenmüller, *IPRax* 2001, 2 (7) (with further references).

⁷⁸ Dawson, (2003) *Insolvency L.J.*, 226 (esp. 233); Leible/Staudinger, KTS 2000, 533 (572 et seq.); opposite Eidenmüller, *IPRax* 2001, 2 (7 et seq.).

⁷⁹ On all this see Kemper, in: Kübler/Prütting (above N. 38), Art. 102 EGInsO para. 140;

37. The powers of liquidators in main proceedings and in ancillary proceedings have to be coordinated in two ways, with respect to **competence** and **cooperation** proper. The liquidator in ancillary proceedings has, in principle, preferential competence for the liquidation of assets situated in his State. Therefore, he can even call back those assets which the liquidator of the main proceedings has – even if lawfully – seized (Art. 18(2)). Conversely, however, the **liquidator of the main proceedings should be able to steer all proceedings**. Therefore, he can also give instructions regarding the ancillary proceedings if he considers this necessary, for instance for rescue (Art. 34).⁸⁰ He can also stay ancillary proceedings twice for three months unless these proceedings manifestly do not affect the interests of the main proceedings (Art. 33). Cooperation proper is then inspired by the duty to give each other all material information (on one's own initiative)⁸¹ and – more generally – to cooperate in good faith (Art. 31).⁸²

b) Creditors

38. Likewise, the interests of creditors are coordinated. **Each creditor** can lodge his claims in any proceedings (Art. 32(1), 39). He has a right to receive the information personally needed (with a warning also in his own language) whenever he is a known creditor (Art. 40(1), 42(1)), and he can again lodge his claims in his own language (subject, however, to potential later translation and with a warning that this is a lodgement of claims, in the language of the proceedings; see Art. 41, 42(2)). National law cannot require more information from a creditor wishing to lodge his claims than the Regulation prescribes.⁸³ Standard forms are spelt out. Any liquidator, for the creditors having lodged their claims with him, can lodge these claims also in other proceedings (Art. 32(2)) – and, using his discretion in the interest of these creditors, sometimes even must do so.⁸⁴

39. In any proceedings, creditors can **obtain satisfaction** only if they have lodged their claims there. On the other hand, satisfaction received in other proceedings is credited, and further sums are paid to them only when other

ZIP 2002, 729 (733); Strub, *EuZW* 1996, 71 (72 et seq.); Torremans, *Cross Border Insolvency in EU, English and Belgian Law*, 163–171.

⁸⁰ On this possibility see Obank, (2002) 17 *BJBFL* 89 (91); Kemper, *ZIP* 2001, 1609 (1618 et seq.); Menjucq, *Droit européen des sociétés*, 423 et seq.; Strub, *EuZW* 1996, 71 (73).

⁸¹ See on this duty Obank, (2002) 17 *BJBFL* 89 (90); Omar, (2000) *Insolvency L.J.*, 211 (214 et seq.); Balz, *ZIP* 1996, 948 (954); Kemper, *ZIP* 2001, 1609 (1618).

⁸² On this duty see Obank, (2002) 17 *BJBFL* 89 (90); Fritz/Bähr, *DZWIR* 2001, 221 (232); Kemper, *ZIP* 2001, 1609 (1618).

⁸³ No 273 of the explanatory report, in: Virgós/Schmit, *Report on the EC Convention on Insolvency Proceedings* (above N. 13); Kemper, *ZIP* 2001, 1609 (1620).

⁸⁴ On this choice (considering the costs and, on the other hand, the chances of obtaining more

creditors of the same class who have lodged their claims in these proceedings have obtained satisfaction to the same extent (Art. 20(2)).⁸⁵

V. DUTY TO HANDLE CRISIS ACTIVELY?

40. The Insolvency Proceedings Regulation contains substantive law only marginally. Company law-related harmonisation is, however, discussed also for substantive law in one area: **manager liability** if they take rescue measures or request the opening of insolvency proceedings too late. While it is true that the Forum Europaeum Konzernrecht first discussed this question in the context of insolvencies of groups of companies (the normal form of organisation),⁸⁶ this is a form of liability which has to apply more generally, including for individual companies. Harmonisation would again have to apply – since creditor interests are in the foreground – to all limited liability companies.⁸⁷

41. The key question is at which point an increased duty of the management to act applies. In German law, this is the duty to request the opening of insolvency proceedings as soon as insolvency can no longer be avoided; while insolvency is reached earlier under the concept of inability to meet one's debts (for limited

⁸⁵ On the technical problems which are quite important see Westbrook, 'Universal Participation in Transnational Bankruptcies, *Festschrift für Goode* 1997, 419 (424–434); see also 21st Recital; on equal treatment of creditors as the basic principle see Menjucq, *Droit européen des sociétés*, 425–427.

⁸⁶ Forum Europaeum Konzernrecht, 'Corporate Group Law for Europe', *EBOR* 1 (2000), 165 (245–258); in favour of more regulation on insolvency of groups: Windbichler, 'Corporate Group Law for Europe' – Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law', (2000) 1 *EBOR* 265 (280 et seq.); Arbeitsgruppe Europäisches Gesellschaftsrecht, *ZIP* 2003, 863 (874); strongly advocating the introduction of a wrongful trading concept at the EU level (more important than capital maintenance): Mühlbert, (2006) 7 *EBOR* 357 (377–408); and again Hopt, *ZHR* 171 (2007) 199 (225–231); in this sense also from the perspective of insolvency lawyers discussing the regulation: Wessel *ECL* 2009, 169 (175 et seq.) who would opt for (substantive law) harmonisation of just some questions related to insolvency, namely in group situations, thus supplementing the regulation focused on questions of jurisdiction and conflict of laws; further developing this idea, Wessels, (2011) 8 *ECL* 27; in detail see the monographs of: Strauß, *Insolvenzbezogene Geschäftsleiterhaftung in Europa*, (2001) (on all legal systems considered here); and also Ehrlicke, *Das abhängige Konzernunternehmen in der Insolvenz – Wege zur Vergrößerung der Haftungsmasse rechtsvergleichende Analyse*, (1998); and Zahn, *Geschäftsleiterhaftung und Gläubigerschutz bei Kapitalgesellschaften in Frankreich*, (1986), 107–125; for figures see above §31 para. 8. Country reports in: Sørensen (ed.), *Directors' Liabilities in Case of Insolvency*, (1999); on the United Kingdom for instance: Sealy, 'Personal Liability of Directors and Officers for Debts of Insolvent Corporations: A Jurisdictional Perspective (England)', in: Ziegel (ed.), *International and Comparative Corporate Insolvency Law*, 485.

⁸⁷ In this sense indeed the proposals of the Forum Europaeum, *EBOR* 1 (2000), 165 (185); see above §31 para. 17 et seq.; on the good amount of harmonisation more generally above §3

liability companies) than under the general concept of over-indebtedness, the other two major Member States are still more demanding. In the United Kingdom, members of the board are liable if in a crisis, i.e. when it is evident that without vigorous corrections the company will be insolvent, they fail either to take firm action to rescue the company or to request the opening of insolvency proceedings right away – if then insolvency really ensues.⁸⁸ The reason is that, from this moment, ‘business as usual’ is seen as speculation with other people’s money, i.e. assets which are reserved for the satisfaction of creditors (‘wrongful trading’). Their situation may no longer be worsened unless their chances are also bettered by taking firm action to rescue the company. In France, the same principle applies (so-called ‘action en insuffisance d’actif’), except that apart from a belated request to open insolvency proceedings, other violations of managers’ duties are also penalised in insolvency proceedings.⁸⁹ The introduction of such a duty to act and choose between the two alternatives at a rather early stage is proposed as a rule at the EU level with particular conviction by German authors.⁹⁰

42. This duty – here the duty to take positive action in the company’s time of crisis – is extended to the **management of the parent company** if it acts in fact as if it had the decision-making power of the management of the subsidiary.⁹¹ The criteria are similar to those which, in Germany, would be the basis for the assumption that there is a so-called *de facto* qualified group relationship:⁹² the main question is whether influence on the management of the subsidiary is systematically exercised.

⁸⁸ Bachner, (2004) 5 *EBOR* 293; Davies, *Gower’s Company Law*, 215–228; Farrar/Hannigan, *Company Law*, 844–848; Fleischer, ‘Neue Entwicklungen im englischen Konzernrecht – vergleichende Notizen im Lichte der Empfehlungen des Forum Europaeum Konzernrecht’, *AG* 1998, 350 (355–358); Forum Europaeum, *EBOR* 1 (2000), 165 (246–249); Roth, *Unternehmerisches Ermessen und Haftung des Vorstands – Handlungsspielräume und Haftungsrisiken insbesondere in der wirtschaftlichen Krise*, (2001), 186–197.

⁸⁹ Corzian/Viandier/Deboissy, *Sociétés*, para. 1503; Forum Europaeum, *EBOR* 1 (2000), 165 (249–251); Roth (preceding N.), 197–206. Saint-Alary-Houin, *Droit des entreprises en difficulté*, 4th edn. (2001), 714–722 (with enforcement). Comparative law (also Germany, Belgium and the Netherlands): Boschma/Lennarts, ‘Wrongful Trading in a Comparative Perspective’, in: Wouters/Schneider (eds.), *Current Issues of Cross-Border Establishment of Companies in the European Union*, (1995), 201.

⁹⁰ References above N. 86.

⁹¹ In the United Kingdom the so-called shadow director, in France the so-called directeur de fait: see (besides the references above N. 87 et seq.) Muscat, *The Liability of the Holding Company for the Debts of its Insolvent Subsidiary*, (1996); Dedessus-Le-Moustier, ‘La responsabilité du dirigeant de fait’, *Revue des Sociétés* 1997, 499; Lübbing, *Ein einheitliches Konzernrecht für Europa*, (2000), 181–222; Marquardt/Hau, ‘Risiken für Muttergesellschaften nach französischem Insolvenz- und Haftungsrecht’, *RfW* 1998, 441. From a comparative law perspective, this concept can be found quite often: in Germany, §117 para. 7 n° 1 AktG blocks its use.

§36. OTHER REASONS FOR THE WINDING UP OF COMPANIES

*Bibliography: see literature on comparative law in the general bibliography.

I. IMPORTANCE, SCOPE AND SUBJECT MATTER

1. *Counterpart to the First Directive (Disclosure Directive)*

1. Already in the White Paper of 1985, a counterpart to the First Directive was planned.¹ In 1987, a **draft Proposal** was presented,² which appeared (only) until 1989 in the reports on work in progress and in the action plans.³ The main focus in the following, besides a short description, is on comparative law surveys.

2. The basic idea of the draft Proposal is simple: the **First Directive** (above §8) had considerably restricted the grounds for nullity and had prescribed stringent disclosure and formalisation conditions for those grounds for nullity still remaining. The object was to guarantee to any partner in a transaction European-wide that ‘its’ debtor would not all of a sudden ‘vanish’ because of the niceties of national laws (above §8 para. 7–17). A parallel risk was seen as possible if grounds for winding up were accepted too extensively (on this, see below II.). In any case, there was a need to protect obligations already incurred, a problem already extensively regulated, for instance, in the **Merger and Division Directives** (above §28) for one set of situations (see below III. and IV.).⁴ The draft Proposal is also similar to these harmonisation measures in its regulatory approach – and less so to the Insolvency Proceedings Regulation, which deals with a substantively much more closely related matter (above §35): in the draft Proposal again, mainly substantive law solutions are proposed, for which, models similar to those in the

¹ Completing the Internal Market: White Paper from the Commission to the European Council, COM(85) 310 final, Annex p. 36.

² (Amended) Draft Proposal for a Directive on the basis of Article 54 (3) (g) of the Treaty on winding up and liquidation of public limited companies, partnerships limited by shares and private limited companies, DOC XV/43/87; reported in German in: Lutter, *Europäisches Unternehmensrecht*, 299.

³ COM(87) 203 final, Annex 2, p. 11; COM(88) 134 final, Annex 3, p. 12; COM(89) 311 final, Annex 2, p. 11 (Second, Third and Fourth Reports from the Commission to the Council and the European Parliament on the Implementation of the Commission’s White Paper on Completing the Internal Market); but then abandoned: see, for instance, Pfister, *Europäisches Gesellschaftsrecht*, 36 et seq.

⁴ Related to the question of dissolution and liquidation is, of course, the case that a legal entity, once dissolved, is continued again. See on this question in a European perspective: Schouten, ‘Continuation of the Legal Entity that has been Dissolved in a European Perspective’, *ECL*