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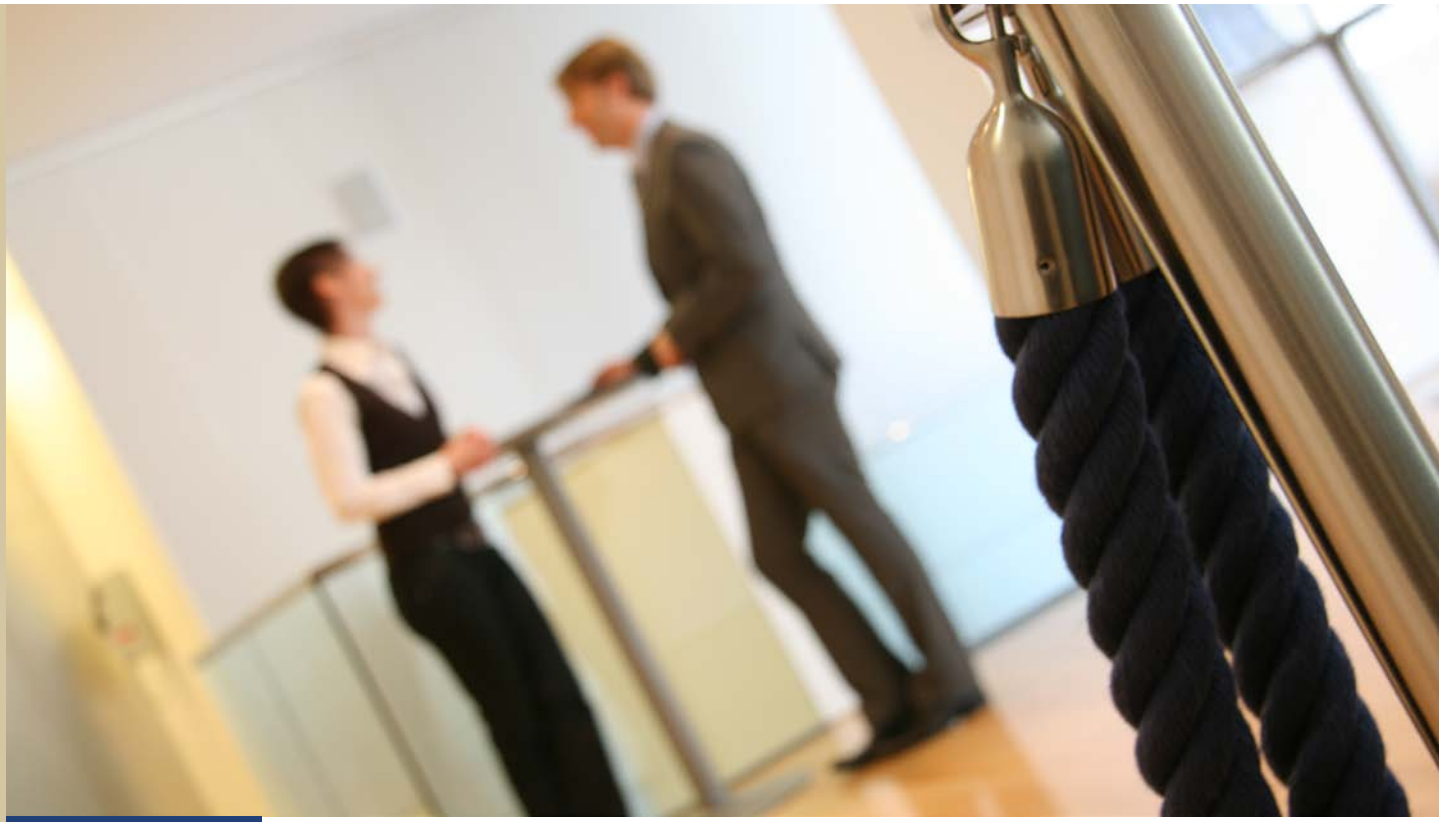
SPEAKERS' CONTRIBUTIONS
CROSS-BORDER INSOLVENCY PROCEEDINGS
THE EU INSOLVENCY REGULATION: LATEST CASE LAW AND REVISION



113R16 **Trier, 18-19 March 2013**

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Katja Lenzing
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Justice

The "Insolvency package" adopted on 12 December 2012

- Proposal amending Regulation 1346/2000
- Report on the application of Regulation 1346/2000
- Impact Assessment Report
- Communication "Towards a new approach to business failure and insolvency"

Justice

Why revise Regulation 1346/2000 on insolvency proceedings?

- Article 46 – review due ten years after entry into force
- Political aim to facilitate the survival of businesses and present a second chance for entrepreneurs ("Justice for Growth")
- Overall approach: Renovation not rebuilding of current Regulation

Justice

Main elements of the proposal

- Scope
- Jurisdiction
- Secondary insolvency proceedings
- Groups of companies
- Publicity of proceedings
- Lodging of claims

Justice

Scope

- Extension of scope to
  - pre-insolvency proceedings
  - debtor-in-possession proceedings
  - a broader range of personal insolvency proceedings
- Clarification that list of national proceedings in annex A is exhaustive and definitive
- New system of amending annexes:
  - Notification of procedure by Member State
  - Commission examines compliance with definition
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Justice

Jurisdiction

- Clarification of COMI concept
  - Moving definition from recital to Art 3 (1)
  - Adding new Recital 13a on companies' COMI
  - Adding new definition of COMI for individuals
- Improvement of procedural framework for determining jurisdiction
  - ex officio examination by opening court or body
  - right of foreign creditors to challenge opening decision
- Clarification of jurisdiction for related actions
  - Codification of case-law on *vis attractiva concursus* principle
  - Possibility to cumulate insolvency-related action with related action based on civil law

Justice

Secondary insolvency proceedings

- Secondary proceedings no longer have to be winding-up proceedings
- Court can refuse opening of secondary proceedings
  - if not necessary to protect interests of local creditors
  - liquidator in main proceedings has to be heard
- Possibility of "synthetic secondary proceedings"
- Improved coordination with main proceedings
  - Duty of courts involved to coordinate proceedings
  - Duty of liquidators involved to coordinate with courts

Justice

Group insolvency

Creation of specific legal framework for insolvency of several members of a group

- Cooperation and communication
  - Between liquidators involved, e.g. through protocols
  - Between courts involved
  - Between courts and liquidators
- Mutual standing of liquidators in proceedings for other group members
  - right to be heard in other proceedings,
  - right to attend meetings of creditors in other proceedings
  - right to propose reorganisation plan for other members

Justice

Publicity of proceedings

- Certain information on insolvency proceedings has to be available to the public free of charge via the internet
  - Obligation of MS to create or update electronic insolvency registers
  - Information required includes date and court opening, type of proceedings, contact details liquidator, deadline lodging claims
  - Carve-out for consumer insolvency
- Interconnection of insolvency registers via the e-justice portal

Justice

Lodging of claims

Facilitating lodging of claims for foreign creditors

- Creating standard forms for
  - notice of opening of insolvency proceedings
  - lodging claims
- Improving procedural framework

  minimum period to lodge claims

  right to be informed about contestation
- Reducing need for translation
  - Possibility to lodge claim in any EU language
  - Obligation for MS to indicate additional language for lodging claims

Justice

Next steps

- Examination by the European legislator
- Ordinary legislative procedure (ex co-decision)
- Council and EP have to agree on a text
- Ideally before 2014 EP elections.....

Justice

CROSS-BORDER INSOLVENCY PROCEEDINGS

THE EU INSOLVENCY REGULATION: LATEST CASE LAW AND REVISION, ERA Conference, Trier, 18 March 2013

Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 of 29 May, 2000 on insolvency proceedings

Intervention by Mr. Brendan Mac Namara, on behalf of Irish Presidency of the European Union, 2013

Good Morning.

I wish to commend the European Law Academy and its Director Dr. Fuchs and the INSOL Europe Academic Forum for their organisation of this very timely Conference to address the latest case law in regard to European cross-border insolvency and the proposed revision of the Insolvency Regulation. From my perspective – as the Chairperson of the Council Working Group which has just commenced its examination of the revised Regulation proposal – the Conference will, no doubt offer very valuable insights, information and perspective on the Commission proposal. I very much intend to listen and learn from the distinguished experts present over the next two days.

The Regulation of 2000 on insolvency proceedings (in operation since 31 May 2002) established a European framework for cross-border insolvency proceedings. It applies whenever the debtor has assets or creditors in more than one Member State, irrespective of whether they are a natural or legal person. The Regulation determines which Court has jurisdiction for opening insolvency proceedings. Main proceedings have to be opened in the Member State where the debtor has its centre of main interests and the effects of these proceedings are recognised EU-wide. Secondary proceedings can be

opened where the debtor has an establishment in a State, but the effects of these proceedings are limited to the assets located in that State.

As the Conference brochure states and my colleague from the Commission has explained in her presentation, the European Commission is proposing to move forward from the 2000 Regulation. It is seeking to modernise the current rules on cross-border insolvency so that they can better support a second chance and restructuring for viable businesses or honest entrepreneurs in difficulties and create an environment of rescue rather than liquidation. In that regard, the Commission proposal asks us to consider significant new policy and legal issues in regard to the scope of the Regulation, the insolvency of groups of related companies and clarifying the criteria applying to the determination of the Centre of Main Interest or COMI. Technical cooperation would be enhanced by increasing transparency by means of publicly accessible insolvency registers and closer cooperation between courts and liquidators.

The Commission proposal is part of a welcome response to the economic downturn being experienced across Europe. Modernised cross-border insolvency law, to make proceedings more efficient, can benefit both debtors and creditors throughout the European Union. The debt crisis of the past number of years has a direct effect on our people, their jobs and their business activities.

Member States have only had a short period since its publication in December to consider the proposed Regulation. We will all require time to conduct detailed internal evaluation and consultation. The development of the proposed new cross-border insolvency approaches will, I believe, require an open approach by all Member States during the negotiation process. I know that many States, like Ireland, have recently, or are in the process of, modernising their national insolvency laws and practice. This will be of some assistance in the debates to come.

I can speak with some degree of knowledge of the recent Irish experience having been directly involved in regard to the reform of our personal insolvency law. Ireland is endeavouring to cope with, and respond to, a very significant crisis in regard to over-indebtedness. This affects both corporate entities and natural persons and consumers. While our corporate insolvency law is well developed – we have processes for receivership, examinership (which is broadly similar to US Chapter 11) or liquidation - such was not the case for natural persons who have consumer debt, mortgage debt, trade and investment debt difficulties or, indeed, a combination of all of these debts.

The debt crisis for many Irish persons has effectively manifested itself since 2008 and can be directly related to the negative economic situation and a significant rise in unemployment to nearly 15%. There have been, as is well documented, significant impacts on the solvency of many of our financial institutions, some of which have had to be recapitalised.

Insolvency reform was thus critical. Until October 2011, Ireland's personal insolvency law had consisted of judicial bankruptcy only, with no real prospect of discharge from that state. The Irish participation in a Programme of Financial Support with the EU/ECB/IMF Troika included a commitment to reform personal insolvency. The Personal Insolvency Act 2012 fulfils that commitment and offers new and essentially "non-judicial" debt resolution processes. These processes are designed to return the debtor to a productive engagement with the economy and society over a period of years. There is provision for full debt write-off of debt up to €20,000 in some cases. For amounts beyond that, there are negotiated processes for the resolution of secured and unsecured debt over a period of 5 or 6 years.

Our new Personal Insolvency Arrangement has, we understand, introduced a unique process. It provides for the agreed settlement of secured debt up to €3 million, (although this cap may be increased with the consent of all secured

creditors), and unsecured debt without limit, normally over six years. In potentially accommodating highly indebted individuals, the Arrangement might be described as functioning as a type of personal examinership. It is designed to avoid the prospect of bankruptcy and liquidation with an agreed repayment perspective to offer a better return to creditors. Thus, our second chance approach predates the Commission proposal.

The new debt resolution processes require the engagement of a personal insolvency practioner who negotiates on behalf of the debtor with their creditors, during a court approved “protective certificate” or standstill period of 70 days. During this period, creditors are prevented from taking action against the debtor. If a successful Arrangement is concluded, the debtor will make repayments over a 5 or 6 year period and the debts concerned will be written off as agreed.

A significant number of Irish people own property in other Member States. The provisions of the new Insolvency Regulation and the likely listing of our new debt resolution processes in the next revision of Annex A of the current Regulation may well have an impact on creditors in those States. The Regulation can thus facilitate a more informed and coherent EU approach to personal insolvency and a mechanism for the mutual recognition of non-judicial debt settlement arrangements, such as those contained in the Irish Personal Insolvency Act 2012.

Ireland has been pleased, as the current President of the European Union, to facilitate the “political” launch of the proposed Regulation. The initial discussion took place at the informal Justice and Home Affairs Council meeting of EU Justice Ministers held in Dublin on 18 January last. The Ministers engaged in a lengthy and constructive discussion on the proposals. There was certainly a focus on the importance of a more uniform approach in regard to the establishment of the centre of main interest so as to combat potential abuses which have given rise to allegations of "bankruptcy tourism". The Ministers were also concerned in regard to the modalities of a rescue

approach in regard to dealing with possible fraudulent behaviour by directors and the consequences for creditors where one business obtained debt write-down.

The broad thrust of the Commission's proposals received a very positive political welcome from our Ministers. The Irish Minister for Justice & Equality, as President of the Council, has made it clear that he wishes to see a comprehensive and intensive examination of the Regulation during the Irish Presidency. This priority is reflected in the scheduling of seven meeting days of the Council Working Group. I had the honour to Chair the first meeting of the Working Group in February and we resume again later this week.

The legal basis for the Insolvency Regulation is found in Article 81(2) of the Treaty on the Functioning of the European Union. Title V of Part Three of the Treaty is not applicable to Ireland and the United Kingdom and Ireland, unless they choose to exercise the right to "opt-in" to the negotiation of the proposed measure within the allowed time period. The Irish Government has approved a Motion to the Irish Parliament to exercise our opt-in and that Motion will be debated by the Parliament on 27 March next. We would expect that it will be approved, so that Ireland will be in a position to formally notify the fact before the deadline.

Ireland has commenced its own internal examination of the detail of the proposals contained in the Regulation. However, it is not yet possible to offer definitive national comments beyond our broad initial welcome of the stated objectives of bringing greater clarity to cross-border insolvencies and expanding the scope of the existing Regulation. Also, it would be inappropriate for Ireland, as current holder of the Presidency of the European Union to seek to express, on behalf of the Council and the Member States, a firm opinion on the detail of the Commission proposals at this early point of our examination.

This Conference will be discussing all of the major themes contained in the Commission proposal. I would not wish to repeat the detailed presentation of those themes given already by my Commission colleague. However, perhaps I might be allowed some brief thoughts on certain of those themes.

The Commission's proposal extends the Regulation's scope by revising the definition of "insolvency proceedings" to include the restructuring of a company at a pre-insolvency stage and hybrid proceedings which may leave the existing management in place as well as debt discharge and other insolvency proceedings for natural persons where these processes exist in a Member State. This is a critical extension of the scope of the Regulation. It is a desirable objective and is in tune with our approach to seek where possible, to provide a mechanism to restructure potentially economically viable debtors.

We are conscious that it may take some time to arrive at a common understanding and recognition of the type, efficiency and effect of such pre-insolvency proceedings or procedures. We will need to understand the criteria Member States would require if there is to be recognition of other Member State's procedures as there will, no doubt, be some differences of approach in regard to the evolution of definitions in this regard. There will be some compromise required.

This leads me to one of the key features of the revised Regulation that is the move away, where possible, from the traditional liquidation approach to insolvency to one that facilitates the continuation in business of viable companies or relief for indebted individuals in financial difficulty. There will be a requirement obviously to have behaved in an honest fashion. This is a potentially very significant new tool to protect and nurture business activity and to preserve employment across the EU.

However, in pursuing a second chance approach, we must be conscious of balancing the legitimate rights and expectations of creditors as much as we

want to assist debtors. Other concerned actors, such as our respective Revenue and tax authorities may have their own perspectives on this approach. Member States will have to critically examine and perhaps change long established insolvency processes. Issues will arise in the development and understanding of the restructuring approach to apply to cross-border insolvency proceedings.

Ireland supports the second chance approach. However, let me utter a word of caution. Our Company Law Review Group, in its 2012 Report on Proposals to Reduce the Cost of Reduce of Rescuing Viable Small Private Companies, was concerned that the more effective a rescue system is in writing down debts owed by an ailing business, the more likely it is that other businesses (perhaps better managed and more deserving of survival) will receive less than they are owed such that their own solvency may be endangered.

It is thus essential, that in pursuing a second chance approach, that we must avoid giving an unfair competitive advantage to certain companies through an insolvency process. Winding up insolvent and economically unviable companies should remain the default position. We do not wish to increase the risk of a “chain” event, whereby the rescue of one company leads to the potential consequential financial demise of other companies or individuals - who have supplied goods or services in good faith – further down the chain.

The Commission’s most newsworthy proposal is in regard to the retention of the now established concept of Centre of Main Interest or COMI and seeks to ensure that it is consistent with the body of case law that has developed. The COMI test is extended to private individuals or natural persons. There will be a duty on the court that opens the insolvency proceedings to examine the COMI of the debtor and specify the ground on which their jurisdiction is decided. Creditors from other Member States will have a right to challenge the Court’s decision. It is a matter for the court concerned to satisfy itself that the provisions in its national law in this regard have been observed.

We must be conscious of the need to avoid abuses in this regard, often described as forum shopping or bankruptcy tourism. As I already mentioned, Ministers discussed this point at the Informal JHA Council. However, on the other hand, we have to bear in mind that a company or natural person is entitled to change a COMI and could do so for a number of purposes. This entitlement arises under the broad rubric of freedom of movement in the Internal Market and such freedom has been enforced by decisions of the European Court of Justice.

The COMI test Ireland will apply for our new personal debt resolution processes or reformed judicial bankruptcy is that the debtor be normally resident for one year in Ireland. We are not, however, anticipating a rush of debtors from outside the State. It is worth noting that we will now have automatic discharge from bankruptcy after 3 years. This period is in line with the broad European norm.

Despite this reform, we are likely to continue to see a number of Irish people establishing a COMI in the UK to seek to take advantage of the 1 year discharge period for bankruptcy there. However, we have also noted in regard to Irish applicants, that the UK Courts can and have refused to accept or revoked jurisdiction in insolvency proceedings where an abuse has been detected.

In regard to secondary proceedings, the new requirement for cooperation between the liquidators involved is desirable. However, again I would sound a note of caution here. In practice, such cooperation might be somewhat difficult to achieve. There may well be language difficulties and differences in insolvency cultures and approach. We should be careful in expecting too much.

The Commission proposal will require Member States to publish relevant decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. There is no mandatory publication or registration of the decisions in the Member State where a proceeding is opened, nor in Member States where there is an establishment. Again, I believe that this is a very worthy initiative in regard to publicity requirements. However, there are practical considerations involved. Not all Member States have developed such Registers or have them to the extent that the Regulation would appear to require. Extra costs may well arise.

The Council Working Group has not yet had the opportunity to discuss the issues involved in regard to the treatment of insolvency where a group of companies is concerned. It is a sensitive issue which will likely give rise to a variation of views. The Commission proposes to retain the company by company approach to the insolvencies of group companies, but seeks to improve coordination of efforts. The courts and liquidators involved in different proceedings on group companies will be obliged to communicate and cooperate. New procedural tools would enable the liquidator with the biggest interest in the successful restructuring of all companies concerned to officially submit a reorganisation plan in the proceedings concerning a group member, even if the liquidator in these proceedings may be unwilling to cooperate.

In conclusion, the review last year of the EU Insolvency Regulation was timely. The Commission has identified a need for further improvement and clarification in certain critical aspects. It has brought forward proposals that can assist us in putting economic growth at the heart of our civil justice agenda and in strengthening the Internal Market. We in the Council are at the beginning of the process of our consideration of the various elements of the proposed Regulation, and that much further work remains to be done. It is incumbent on us to respond to the very significant indebtedness problems that our businesses and citizens are suffering.

In preparing for the Informal JHA Council last January, Ireland put forward the following questions for discussions by the Ministers. I repeat them here and would suggest that they can also provide a useful aid to our discussions. The questions were as follows:

- are the measures contained in the proposed Regulation broadly sufficient to achieve a second chance culture for viable businesses encountering temporary financial difficulty and for individuals?

- are the proposed measures adequate to counteract the difficulties resulting from bankruptcy tourism?

- are there other areas of insolvency law which might also be addressed during the discussions on the Insolvency Regulation?

- are the proposed measures an appropriate basis on which to further develop the EU's insolvency law and procedures along the lines suggested in the Commission Communication?

I wish to again, thank the European Law Academy for organising this important and timely Conference. I believe that our discussions over the next two days can inform the debate. I look forward to the interaction with the many experts gathered here and to enhancing my understanding of the issues and thus, would be better equipped to contribute to the ongoing Council discussions.

Thank you.

Europäische Rechtsakademie

18 March 2013
Scope of the EU Regulation 1346/2000 and definition of insolvency

Jean-Luc Vallens,
Judge, associate professor, Strasbourg

The regulation 1346/2000 EC on insolvency proceedings covers insolvency proceedings without providing any definition of what insolvency is.

The fact is that the Regulation concerns insolvency proceedings opened by domestic courts whatever insolvency actually means. However, such a lack does not create any difficulty for other courts: why?
The reason is that the purpose of the Regulation was not to create an insolvency regime applicable to all European distressed companies.
Its main goal was only to facilitate recognition and enforcement of orders issued by courts, based on local conditions (1).
Mechanisms provided for by the Regulation did not really need any definition and, moreover, did not need a common definition of insolvency.
Every Member State therefore had kept the possibility to define insolvency in line with its own legal traditions.

Such a choice has however entailed some shortcomings, for differences between domestic legislations created some degree of uncertainty with respect to the scope of the text and to the consequences of foreign proceedings. A recent example of such negative aspects can be observed with the Bank Handlowy case : if a main proceeding opened in France is not based on insolvency, do Polish courts have to recognize it, when an application is filed for a secondary proceeding ?
The question could seem serious, for the opening of the main proceeding normally implies that the debtor is deemed insolvent (2).
As a reply to this challenge the CJEU rejected any control of the opening conditions by the second court (3).

But in most countries, the Regulation has been applied without any real difficulty, thanks to specific rules provided for in the Regulation :

A list of proceedings covered by the text, mentioned in two annexes (4).
An application of the legislation of the opening State for defining the legal conditions for opening the proceedings (5).
An automatic mutual recognition of foreign proceedings, without reviewing its substance (6).
A principle of mutual trust (7).
Finally, no examination of the insolvency, when a secondary proceeding is requested (8).

I will now address 3 points:

Today: no definition, and a rather clear scope
Tomorrow: a flexible approach
Later: a possible harmonization of the concept of insolvency

1. Today: no definition, and a rather clear scope

Member States have avoided difficulties with respect to the scope of the Regulation, by giving force to foreign proceedings based on the definition of proceedings covered by the text (9) and the list of proceedings contained in the annexes (10);

As regarding to possible issues raised by the virtual differences between the definition of insolvency proceedings and the proceedings listed in the annexes, that can be more flexible, the CJEU clarified this question by stating that any proceeding mentioned in the lists is an insolvency proceeding subject to recognition. That is exactly what the proposed future Regulation provides for in its Art 2: “insolvency proceedings means the proceedings listed in Annex A”.

That is why the scope is clear enough: as soon as a proceeding is mentioned in the list, it should be viewed as an insolvency proceeding and recognized in other Member States. Such an approach however is not always so clear: in the Eurofood case, the ECJ decided that the interim proceeding should be recognized in other Member States, for it entails similar effects, despite the fact that it was not mentioned in the list (11).

It was probably the best choice that could be made: the Regulation is mainly a set of international private law rules. One can see that 26 Member States may have 26 definitions of insolvency… According to B. Wessels, about 100 different kinds of proceedings are available among Europe, meaning that maybe 100 legal conditions exist for opening proceedings…

Moreover, differences do not only relate to substantial conditions but also to procedural requirements: who may file for bankruptcy ?; must the debtor file an application ?; is it easy to get a judgment ?; may the applicant choose among different proceedings? are there specific conditions for creditors when presenting a demand ? …

The regulation leaves it to Member States and domestic courts to decide themselves the conditions to be met. That is the main meaning of Art 4; “the law of the State of the opening of proceedings shall determine the conditions for opening of those proceedings”.

One should here mention that, in spite of those differences, most lawmakers adopted 2 (or maybe 3) conditions for opening proceedings :

- a financial test (“a cash-flow test”) : a debtor cannot pay its outstanding debts any more;
- a balance sheet test (assets are not sufficient any more for the debtor to meet with its liabilities);
- more recently (in the last 20 years), a more debtor-friendly condition based on imminent insolvency : if the debtor is likely to become unable to pay its debts in the short term.

That leads me to the second point.

2. Tomorrow: a flexible approach

The revised regulation is based on observations made by the European Commission: most domestic laws support the purpose of rescuing troubled companies which are not yet insolvent.

That is why it has been decided to propose a more flexible approach, by giving debtors the possibility to file for bankruptcy before being insolvent.

Such a trend goes back to Chapter Eleven of the US Bankrupty code. Rescuing companies can be made easier if the managers may get the protection of a legal general stay as early as the mere threat of insolvency occurs. Various names have been used to describe this condition for opening proceedings: financial difficulties, likelihood of suspension of payments, crisis…
This means that rescuing the troubled company will be possible if it still has some cash but is already facing a serious risk of insolvency. Such proceedings have been successful for some major airways companies.

Another idea, close to the former one, has been noticed by the Commission: rescue can be facilitated by leaving the debtor in possession. If it keeps its management powers over its business, it may have the confidence of its creditors for presenting a workable rescue plan.

These points have been viewed as relevant aspects and significant trends of domestic laws. Nevertheless, the Commission acknowledged that insolvency laws remain different in spite of such a convergence.

For these reasons, the revised regulation amends the provisions related to its scope: it will apply to collective proceedings:

- based on a law relating to insolvency (as opposed to a proceeding based on insolvency as such),
- which may have the purpose of rescuing companies,
- which entails either a divestment of the debtor or a control or a supervision by a court.

This more flexible approach is supposed to give the debtors better chances for rescuing their business. It would probably be helpful for meeting the goals of the Small Business Act for Europe and the wishes of the European Commission regarding the needs of small and medium-sized enterprises.

Besides, in parallel, it must be underlined that the Commission proposes to check the new proceedings submitted by Member States, to be listed in the annex against the above criteria: such a control should be necessary to enforce the more specific scope of the final text….

At this point, is it possible to go further? Is harmonization of laws a realistic way for the European legislator?

That will be my third point.

3. Later: a possible harmonization of the concept of insolvency

2 questions may be raised in that respect: do we need harmonization? Is harmonization possible? I would say yes on these 2 aspects.

- Harmonization is necessary.

The current text aimed at avoiding and preventing forum shopping (12). One must admit that the regulation was not successful in that respect.

It failed namely because of differences between domestic laws.

The absence of a common criterion for opening insolvency proceedings is actually one of the issues.

As long as it will be easier to file for bankruptcy in a court than in another one, such a forum shopping will go on.
This does not give any legal certainty to creditors and investors, who face the risk of a misconduct by the debtor filing an application with a foreign court…

Harmonization therefore would create a fairer and clearer legal framework linked to this risk.

- Harmonization is feasible.

It seems permitted by the TFEU itself, the articles 65, 81 and 114 of which allow for some degree of harmonization or approximation of laws.

Several harmonized rules are already provided for by the current Regulation, in particular with regard to information of creditors and lodging of claims. It also includes a common set of international private law rules…

The revised regulation proposed by the European Commission adds some more harmonized rules relating to the lodging of claims.

The observed convergence between national laws, already mentioned above, make harmonization possible.

Let me conclude with a mention of the Legislative guide on insolvency law, adopted by UNCITRAL, several recommendations (13) of which suggest criteria for opening insolvency proceedings. It would be a useful tool for the European legislator.

Footnotes

(1) EIR, Rec nr 6
(2) EIR, art 27
(3) CJEU 22 Nov 2012, C 116/11, Bank Handlowy
(4) EIR, art 2 a
(5) EIR, art 4
(6) EIR, art 16 and 17
(7) EIR, Recital nr 22
(8) EIR, art 27
(9) EIR, art 1
(10) EIR, art 2
(11) ECJ 2 may 2006, C 341/04, Eurofood
(12) EIR, Recital nr 4
(13) UNCITRAL, Legislative Guide on insolvency law, 2004, Recomm. n° 15, 16 and 17

Concept of COMI: case-law and revision

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Jurisdiction

- Main Proceedings (MP)
  - COMI – **C**entre **O**f **M**ain **I**nterests
    - operates like domicile in Brussels I
    - Recital 14: *This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the EU*

Jurisdiction – MP – COMI

Article 3(1): *In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*

Recital 13: *The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.*

Jurisdiction – MP – COMI

- Under the Regulation any company that has its centre of main interests in a MS may be made subject to corporate IP in that MS, regardless of where it is registered.
- *Enron Directo SA* (company registered under Spanish law, principle headquarters' functions in London)
- *BRAC Budget Rent a Car* (company incorporated in Delaware, centre of main interests in the UK)

Jurisdiction – MP – COMI

- ECJ, *Eurofood* (C-341/04)
  - *Concept peculiar to the Regulation, having an autonomous meaning, to be interpreted in a uniform way, independently of national legislation*
  - *The definition of Recital 13 shows that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of 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 Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply.*

cont'd

Jurisdiction – MP – COMI

- *It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.*
- *That could be so in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated.*

Jurisdiction – MP - COMI

ECJ, *Interedil* (C-396/09)

- *A debtor's COMI must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties.*
- *Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions are taken, in a manner that is ascertainable by third parties, in that place, the presumption that the COMI is located in that place cannot be rebutted.*

cont'd

Jurisdiction – MP – COMI

ECJ, *Interedil* (C-396/09)

- *Where the company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a MS other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision ando the management of its interests is located in that other MS.*

Jurisdiction – MP – COMI

Commission's proposal

- The ECJ rulings are incorporated / codified in the text
- Recital 13a => Interedil
- Article 3(1) => ex Recital 13
- Ascertainability by third parties is in the very text

Jurisdiction – Transfer of COMI

Recital 4:

It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one MS to another, seeking to obtain a more favourable legal position (forum shopping)

- Transfer of assets?
- Transfer of judicial proceedings?
- Transfer of COMI !

Jurisdiction – Transfer of COMI

ECJ, *Staubitz-Schreiber* (C-1/04)

- *The court of the MS within the territory of which the debtor's COMI is situated at the time when the debtor lodges the request to open IP retains jurisdiction to open those proceedings if the debtor moves the COMI to the territory of another MS after lodging the request but before the proceedings are opened.*

ECJ, *Interedil* (C-396/09)

- *Where a debtor company's registered office is transferred before a request to open IP is lodged, the company's centre of main activities is presumed to be the place of its new registered office.*

Jurisdiction – Transfer of COMI

- Transfer of COMI has been used in several cases in order to change the law applicable to the IP
- "bad" forum shopping where the change is made in order to cheat creditors (Rec. 4)

vs

- "good" forum shopping where the change leads to the application of a law which allows better solutions for creditors and is made with the agreement of creditors.
- Stress between free movement and abusive relocation of COMI

Jurisdiction – Transfer of COMI

INSOL Europe draft

If a company has moved its COMI less than one year prior to the request for opening of IP, the jurisdiction rests with the MS of the previous COMI if the debtor has left unpaid liabilities caused at the time when its COMI was located in that country, unless all creditors of the said liabilities have agreed in writing to the transfer of the COMI in the other MS.

Jurisdiction – Transfer of COMI

Commission's proposal

Amendment to Recital 4

It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).

Jurisdiction – Groups

- The EIR does not dictate specific rules for the opening of IP of groups of companies.
- COMI of subsidiaries was held to be located at the holding/parent company of the group
- SP were opened at the seat of the subsidiary. This solution was conceived in order to resolve the gap in the EIR and allow IP do be coordinated by one liquidator for the whole group
- However, this approach changes the law applicable to the insolvency of the subsidiary

Jurisdiction – Groups

ECJ, *Eurofood* (C-341/04)

- *Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1), whereby the COMI of that subsidiary is situated in the MS where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the MS in which its registered office is situated.*
- *By contrast, where a company carries on its business in the territory of the MS where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another MS is not enough to rebut the presumption laid down by that Regulation.*

Jurisdiction – Groups

Commission's proposal

New Chapter IVa, Articles 42a-42d

Rules on cooperation and coordination of MPs of the companies of the group

Jurisdiction – MP – Individuals

- if the debtor is engaged in trade, profession or self employment this will be the country in which he/she mainly carries out the trade, profession or self employment
- where the debtor does not trade or carry on a profession, the state in which he/she habitually resides is considered to be the COMI
- where the debtor resides in one country but trades in another, it is the country in which the trade is carried out that is considered to be the COMI
- where a person's only connection with a country is that they work there on a non self-employed basis, then the COMI will generally be in the country in which they live and consequently pay bills, operate a bank account and buy items, etc.
- regardless of nationality

Jurisdiction – MP – Individuals

Commission's proposal

New Article 3(1)(3)

In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be that individual's principal place of business; in the case of any other individual, the centre of main interests shall be the place of the individual's habitual residence.

Recital 12a: thorough analysis of the state of facts

Procedural issues and solutions

Commission's proposal

Recital 12a: investigation ex officio + right to challenge the decision opening IP

- *Before opening insolvency proceedings, the competent court should examine ex officio whether the debtor's centre of main interests or establishment is actually located within its jurisdiction. Where the circumstances of the case give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support his assertions and, where appropriate, give the debtor's creditors the opportunity to present their views on the question of jurisdiction. In addition, creditors should have an effective remedy against the decision opening insolvency proceedings.*

Procedural issues and solutions

Article 3b

1. The court seized of a request to open insolvency proceedings shall ex officio examine whether it has jurisdiction pursuant to Article 3. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based, and, in particular, whether jurisdiction is based on Article 3(1) or (2).

3. Any creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, shall have the right to challenge the decision opening main proceedings. The court opening main proceedings or the liquidator shall inform such creditors insofar as they are known of the decision in due time in order to enable them to challenge it.

The EU Insolvency Regulation
Latest Case Law and Revision

Best practices for cross-border court-to-court communication

Trier 18-19 March 2013

Prof. Dr. Bob Wessels
Leiden Law School, The Netherlands

Main topics:

- Present status
- Proposal
- JudgeCo project
- Round Table questions

Chapter 3 “Judicial Cooperation in Civil Matters”

Art. 81 TFEU (ex Art. 65 TEC):

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States

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Model of coordination of proceedings

Recital (12) …..**To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. ….Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.**

Recital (20) ….**Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.**

Model: COORDINATION RE PROCEEDINGS
The liquidator in the main proceedings may:

- Exercise right ex art. 20 (creditor in other MS shall return what he has obtained)
- Request publication of opening judgment or registration of judgment in public registers kept in another MS (Art. 21, 22)
- Request opening of secondary proceedings in other MSs (art. 29)
- Participate in secondary proceedings (Art. 32(3))
- Request stay of the process of liquidation of sec. proc. (Art. 33(1)) and may request measures ex Art. 34.1 (see Art. 34(3))
- Request termination of this stay (Art. 33(2))
- Propose a rescue plan, when allowed (Art. 34(1))
- Dis-content with finalizing liquidation in sec. proc. (Art. 34(1))
- Claim the remaining assets (art. 35)

COORDINATION RE PROCEEDINGS (Cont'd)

Key duties of liquidator in main and secondary proceedings:

- 1. To communicate information (Art. 31(1))
- 2. To cooperate (Art. 31(2))
- 3. To lodge all claims lodged in the main proceedings (Art. 32(2))
- 4. To immediately inform all known creditors (Art. 40(1)) by individual notice (Art. 40(2))

Article 31

Duty to cooperate and communicate information:

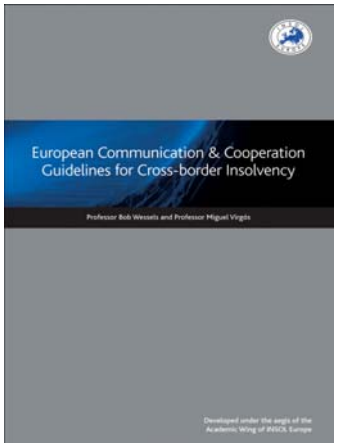
- Text does not provide clear guidance
- Applies only to liquidators

Art. 31 InsReg - Key to success?

Several parallel proceedings:

- Communication
- Cooperation
- Coordination

www.insol-europe.org



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European Communication and Cooperation Guidelines For Cross-border Insolvency (2007)

CoCo Guidelines - www.insol-europe.org

My weblog

2007-09-doc1 - text CoCo Guidelines (18 in number)

2007-10-doc2 - endorsement by INSOL Europe

Status – "Soft law" / best practices

Promotes coordination, using 'Protocols' (includes "Checklist Protocol")

- Examples:

  - Requirements for practitioners
  - Language
  - Fees and costs

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CoCo Guidelines - Guideline 4

4.2. A liquidator is required to act with the appropriate knowledge of the EC Insolvency Regulation and its application in practice.

4.3. A liquidator is required to act honestly, objectively, fairly and expeditiously in dealing with all parties concerned, including the courts.

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CoCo Guidelines - Guideline 10

10.1. Liquidators shall determine the language in which Communications take place on the basis of convenience and the avoidance of costs. The court is advised to allow use of other languages in all or part of the proceedings if no prejudice to a party will result.
10.2. Courts are encouraged, to the maximum extent Permissible under national law, to accept any documents related to those communications in language decided upon under Guideline 10.1, without the need for a translation into the language of proceedings before them.

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CoCo Guidelines - Guideline 11 Fees and costs

11.2. Obligations and fees incurred by the liquidator in the main proceedings prior to the opening of any secondary proceedings but concerning assets to be included in the estate of these latter proceedings in principle will be funded by the estate corresponding to the secondary proceedings.

CoCo – A Useful Medicine?

CoCo Guidelines in Literature?

- 1. Literature: how to “include” in InsReg?
  - Annex to InsReg?
  - In a national “Kodex”?
  - Standard / yardstick to measure “national” duties?
  - A “European” standard for liquidators?
    (An non-binding “Opinion” ex Art. 288 TFEU?)

CoCo Guidelines in Practice?

- 1. Literature: how to “include” in InsReg?
- 2. Practice:
  - BenQ Holding 2007?
  - Automold (German court – UK liquidator re scheduling creditors meeting in Germamy)
  - Restructuring Committee Landsbanki – ICESAVE?
  - Kauptingh – Norway?
  - Lehman Brothers Holdings Inc. (LBHI)
  - PIN AG (German & Lux court re “main proceedings”)

Nortel Networks

Workforce of 30,000 worldwide
- 12,000 R&D employees
- 3,200 Global sales force
- 9,700 Service organisation

Global scale of operations : 150 countries

More than half of Fortune 500 companies

Over 5,000 patents worldwide

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[2009] EWHC 206 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
THE HON MR JUSTICE PATTEN

Royal Courts of Justice
Strand, London, WC2A 2LI
11th February 2009

Before:
THE HON MR JUSTICE PATTEN
IN THE MATTERS OF:
NORTEL NETWORK SA
NORTEL GMBH
NORTEL NETWORKS NV
NORTEL NETWORKS S.P.A.
NORTEL NETWORKS BV
NORTEL NETWORKS POLSKA SP. Z.O.O.
NORTEL NETWORKS HISPANIA SA
NORTEL NETWORKS INTERNATIONAL FINANCE&HOLDINGS BV
NORTEL NETWORKS (AUSTRIA) GMBH
NORTEL NETWORKS SRO
NORTEL NETWORKS ENGENEERING SERVICE KFT
NORTEL NETWORKS PORTUGAL SA
NORTEL NETWORKS SLOVENSKO
NORTEL NETWORKS FRANCE SAS
NORTEL NETWORKS OY
NORTEL NETWORKS ROMANIA SRL
NORTEL NETWORKS AB
NORTEL NETWORKS (IRELAND) LIMITED
(INDIVIDUALLY THE "COMPANY" AND TOGETHER THE "COMPANIES")
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

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Nortel Group (14 Jan. 2009)

- Administration orders based on COMI of 18 Nortel Companies
- Blackburne J (by way of Day One Order) authorised the Joint Administrators in their discretion to make payments out of their assets to employees and preferential creditors of the relevant Companies corresponding to the amounts they would receive in the event that secondary insolvency proceedings were to be commenced in other Member States
- The court also authorised the Joint Administrators to apply to the relevant judicial authorities in any other country for such assistance as they consider they may require in connection with the performance of their functions as administrators

Nortel Group (11 Febr. 2009)

Decision re an application by the Joint Administrators of the Nortel group of companies for the court:

1. to send a letter of request to the courts of a number of Member States in the EC asking those courts to put in place arrangements under which the Joint Administrators will be given notice of any request or application for the opening of secondary insolvency proceedings in respect of any of the companies in administration,
2. this letter will also request the courts to which it is sent to permit the Joint Administrators to make submissions on any such applications in respect of the potential damage which secondary proceedings might have on the interests of the estate and the creditors of the relevant Companies.

Nortel Group (cont'd)

The High Court has an inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances:

- the request for assistance stems from Art. 31(2)
- this duty reflects "a wider obligation which extends to the courts which exercise control of insolvency procdures in their respective jurisdictions" (see Re Stojevic, Vienna Higher Regional Court 9 November 2004)
- it is desirable that a court which is dealing with an application to open insolvency proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings (see Rover France SAS, Court of Appeal Versailles 15 December 2005)
- Art. 33(1) allows the stay of the process of liquidation, but it does not prevent the continuation of winding-up prodeedings (Re Collins & Aikman, Higher Regional Court Graz 20 October 2005)

Nortel Group (final)

Hon mr Justice Patten:

In these circumstances, it seems to me highly desirable that the assistance of the foreign courts specified in the Schedule to the draft order should be sought with a view to enabling the Joint Administrators to be heard prior to the opening of any secondary insolvency proceedings in these jurisdictions and I will therefore authorise the sending of appropriate letters of request to the judicial authorities in those States

Reaction?

- Domestic and x-border calling / confusion

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New [CoCo] Guideline?

Guideline xx

In the appropriate circumstances, via a letter of request of a court the assistance of a foreign court may be sought with a view to enabling the liquidators in the main proceedings to be heard prior to the opening of any secondary insolvency proceedings in the jurisdiction of this court

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Application Report COM(2012) 743 final (p. 14:)

"….The duties to cooperate and communicate information under **Article 31** of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings."

Cross-border Cooperation

- Renewed recital 20
- Two new recitals (20a & 20b)
- Renewed Art. 31
  CoCo between liquidators
- New Art. 31a
  CoCo between courts
- New Art. 31b
  CoCo between liquidators and courts

Pr(13) Recital 20 is replaced by the following:

- "(20) Main insolvency proceedings and secondary proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators and the courts involved must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the liquidator should be able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings. In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law."

Pr(35) Article 31 is replaced by the following:

Cooperation and communication between liquidators

1. The liquidator in the main proceedings and the liquidators in the secondary proceedings shall cooperate with each other to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. Such cooperation may take the form of agreements or protocols.

2. In particular, the liquidators shall:

(a) immediately communicate to each other any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information;

- (b) explore the possibility of restructuring the debtor and, where such possibility exists, coordinate the elaboration and implementation of a restructuring plan;
- (c) coordinate the administration of the realisation or use of the debtor's assets and affairs; the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary proceedings.

Pr(36) Article 31a to be inserted:

Cooperation and communication between courts

- 1. In order to facilitate the coordination of main and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint a person or body acting on its instructions.
- 2. The courts referred to in paragraph 1 may communicate directly with, or to request information or assistance directly from each other provided that such communication is free of charge and respects the procedural rights of the parties to the proceedings and the confidentiality of information.
- 3. Cooperation may be implemented by any appropriate means, including
- (a) communication of information by any means considered appropriate by the court;
- (b) coordination of the administration and supervision of the debtor's assets and affairs;
- (c) coordination of the conduct of hearings,
- (d) coordination in the approval of protocols.

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Pr(36) Article 31b to be inserted:

Cooperation and communication between liquidators and courts

1. In order to facilitate the coordination of main and secondary insolvency proceedings opened with respect to the same debtor,

(a) a liquidator in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings and

(b) a liquidator in secondary or territorial insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings is pending or which has opened such proceedings,

2. The cooperation referred to in paragraph 1 shall be implemented by any appropriate means including the means set out in Article 31a (3) to the extent these are not incompatible with the rules applicable to each of the proceedings.

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Pr(14) recital 20a to be inserted

- (20a) This Regulation should ensure the efficient administration of insolvency proceedings relating to different companies forming part of a group of companies. Where insolvency proceedings have been opened for several companies of the same group, these proceedings should be properly coordinated. The various liquidators and the courts involved should therefore be under the same obligation to cooperate and communicate with each other as those involved in main and secondary proceedings relating to the same debtor. In addition, a liquidator appointed in proceedings relating to a member of a group of companies should have standing to propose a rescue plan in the proceedings concerning another member of the same group to the extent such a tool is available under national insolvency law.

Shaping and Modeling “Cooperation”?

Recital 20, new last line:
“In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and international associations active in the area of insolvency law.”

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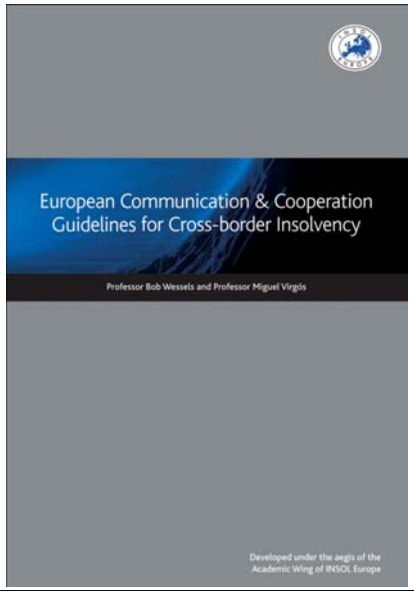

Protocol

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	Chapter 11
Nortel Networks Inc., *et al.*,[1]	Case No. 09-10138 (KG)
Debtors.	Joint Administration Pending
	RE: D.I. 18

ORDER PURSUANT TO 11 U.S.C. §§ 105(a)
APPROVING CROSS-BORDER COURT-TO-COURT PROTOCOL

Upon the motion, dated January 14, 2009 (the "Motion"),[2] of Nortel Networks Inc. and its affiliated debtors, as debtors and debtors in possession in the above-captioned cases (the "Debtors"), for entry of an order, as more fully described in the Motion, pursuant to section 105(a) of title 11 of the United State Code (the "Bankruptcy Code"), approving that certain cross-border court-to-court protocol attached thereto as Exhibit B (the "Protocol"); and upon consideration of the Declaration of John Doolittle in Support of First Day Motions and Applications, filed concurrently with the Motion; and adequate notice of the Motion having been given as set forth in the Motion; and it appearing that no other or further notice is necessary; and the Court having jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having determined that

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, are: Nortel Networks Inc. (6332), Nortel Networks Capital Corporation (9620), Alteon WebSystems, Inc. (9769), Alteon WebSystems International, Inc. (5596), Xros, Inc. (4181), Sonoma Systems (2073), Qtera Corporation (0251), CoreTek, Inc. (5722), Nortel Networks Applications Management Solutions Inc. (2846), Nortel Networks Optical Components Inc. (3545), Nortel Networks HPOCS Inc. (3546), Architel Systems (U.S.) Corporation (3826), Nortel Networks International Inc. (0358), Northern Telecom International Inc. (6286) and Nortel Networks Cable Solutions Inc. (0567).

[2] Capitalized terms used but not defined herein shall have the meaning ascribed to them in the Motion.

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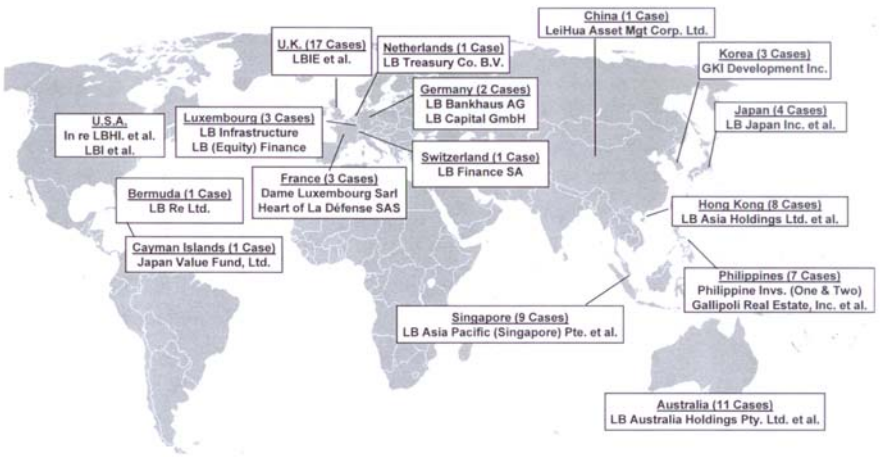
I. International Overview



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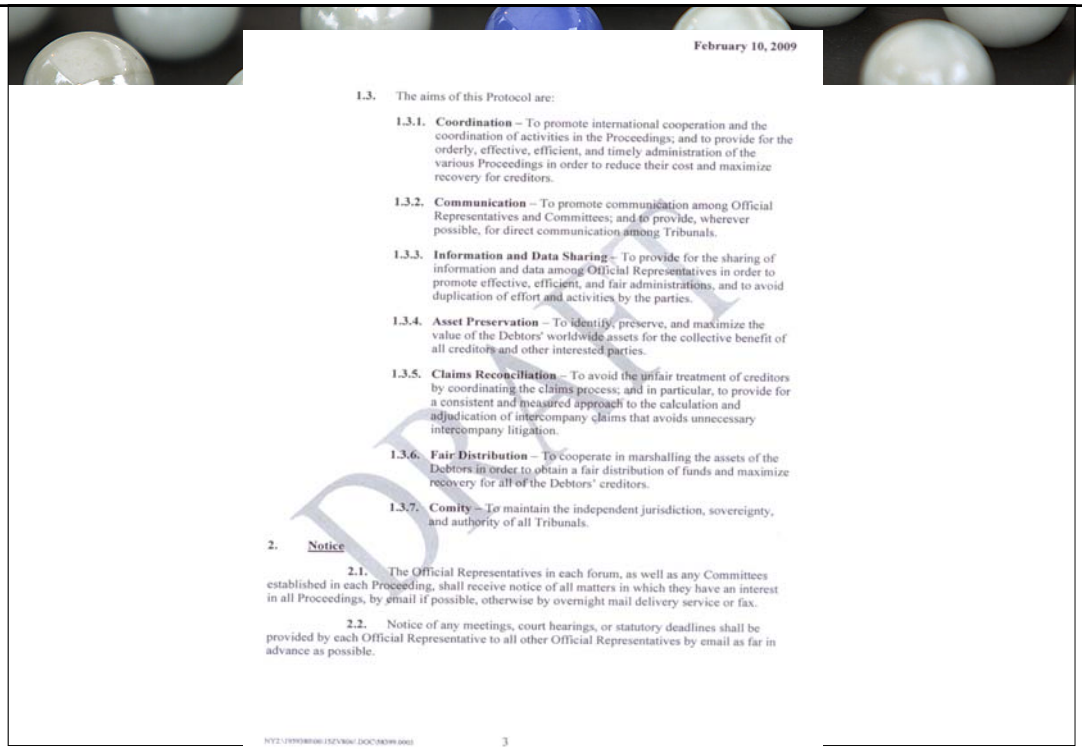

February 10, 2009

1.3. The aims of this Protocol are:

1.3.1. **Coordination** – To promote international cooperation and the coordination of activities in the Proceedings; and to provide for the orderly, effective, efficient, and timely administration of the various Proceedings in order to reduce their cost and maximize recovery for creditors.

1.3.2. **Communication** – To promote communication among Official Representatives and Committees; and to provide, wherever possible, for direct communication among Tribunals.

1.3.3. **Information and Data Sharing** – To provide for the sharing of information and data among Official Representatives in order to promote effective, efficient, and fair administrations, and to avoid duplication of effort and activities by the parties.

1.3.4. **Asset Preservation** – To identify, preserve, and maximize the value of the Debtors' worldwide assets for the collective benefit of all creditors and other interested parties.

1.3.5. **Claims Reconciliation** – To avoid the unfair treatment of creditors by coordinating the claims process; and in particular, to provide for a consistent and measured approach to the calculation and adjudication of intercompany claims that avoids unnecessary intercompany litigation.

1.3.6. **Fair Distribution** – To cooperate in marshalling the assets of the Debtors in order to obtain a fair distribution of funds and maximize recovery for all of the Debtors' creditors.

1.3.7. **Comity** – To maintain the independent jurisdiction, sovereignty, and authority of all Tribunals.

2. **Notice**

2.1. The Official Representatives in each forum, as well as any Committees established in each Proceeding, shall receive notice of all matters in which they have an interest in all Proceedings, by email if possible, otherwise by overnight mail delivery service or fax.

2.2. Notice of any meetings, court hearings, or statutory deadlines shall be provided by each Official Representative to all other Official Representatives by email as far in advance as possible.

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Lehman BHInc (Draft protocol of Febr. 09 – Final version appr. June 09) (Bankr. SDNY – Judge Peck)

- **2. Notice**
- **3. Rights of Official Representatives and Creditors to Appear**
- **4. Communication and Access to Data and Information Among Official Representatives**
- **5. Communication Among Tribunals**
- **5.1.** The Guidelines Applicable to Court-to-Court Communication in Cross-
- Border Cases (the "Guidelines") attached as Schedule "A" hereto, shall be incorporated by
- reference and form part of this protocol in whatever form they are formally adopted by each
- Tribunal, in whole or in part and with or without modifications (if any). Where there is any
- discrepancy between the Protocol and the Guidelines, this Protocol shall prevail.
- **6. Communication Among Committees**
- **7. Asset Preservation**
- **8. Claims**
- **9. Special Procedures for Intercompany Claims**
- **10. Submission of Winding-Up Plan, Plan of Reorganization or Liquidation, or Deed of Company Arrangement**
- **11. Comity**
- **12. Amendment**

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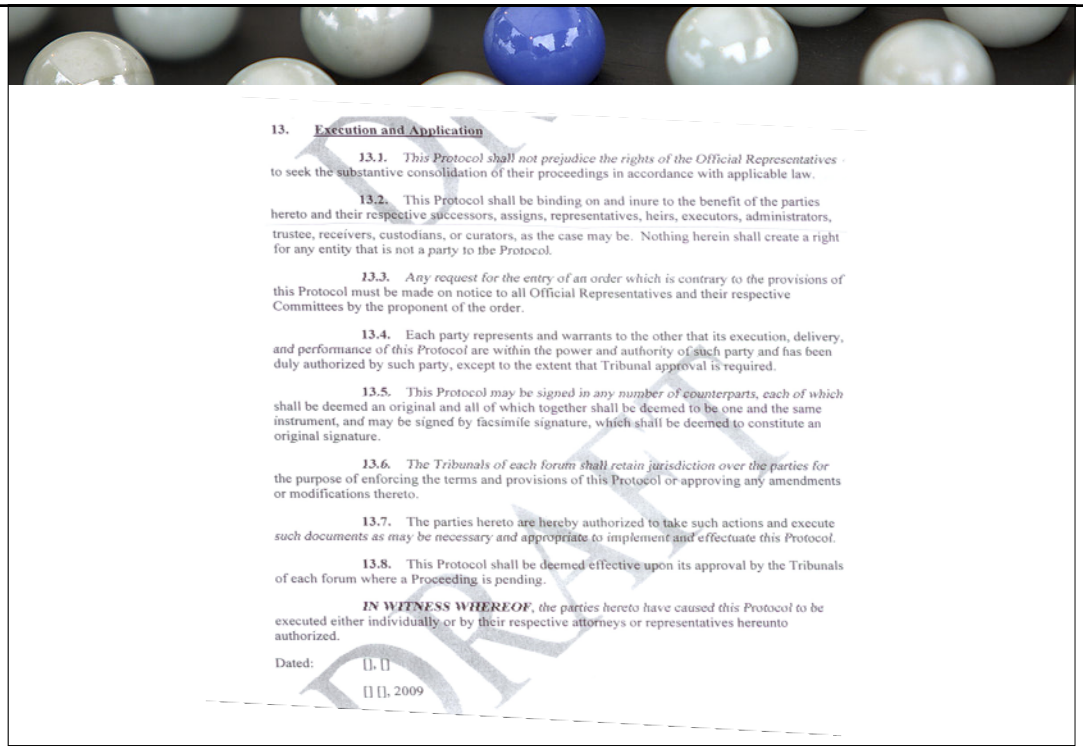

13. **Execution and Application**

13.1. *This Protocol shall not prejudice the rights of the Official Representatives* to seek the substantive consolidation of their proceedings in accordance with applicable law.

13.2. This Protocol shall be binding on and inure to the benefit of the parties hereto and their respective successors, assigns, representatives, heirs, executors, administrators, trustee, receivers, custodians, or curators, as the case may be. Nothing herein shall create a right for any entity that is not a party to the Protocol.

13.3. *Any request for the entry of an order which is contrary to the provisions of* this Protocol must be made on notice to all Official Representatives and their respective Committees by the proponent of the order.

13.4. Each party represents and warrants to the other that its execution, delivery, and performance of this Protocol are within the power and authority of such party and has been duly authorized by such party, except to the extent that Tribunal approval is required.

13.5. This Protocol *may be signed in any number of counterparts, each of which* shall be deemed an original and all of which together shall be deemed to be one and the same instrument, and may be signed by facsimile signature, which shall be deemed to constitute an original signature.

13.6. *The Tribunals of each forum shall retain jurisdiction over the parties for* the purpose of enforcing the terms and provisions of this Protocol or approving any amendments or modifications thereto.

13.7. The parties hereto are hereby authorized to take such actions and execute *such documents as may be necessary and appropriate to implement and effectuate this Protocol.*

13.8. This Protocol shall be deemed effective upon its approval by the Tribunals of each forum where a Proceeding is pending.

IN WITNESS WHEREOF*, the parties hereto have caused this Protocol to be* executed either individually or by their respective attorneys or representatives hereunto authorized.

Dated: [], []

[] [], 2009

DRAFT

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Global Principles (2012)

- ALI-III project *"Global Principles for Cooperation in International Insolvency Cases"*
- Contents:
  - Worldwide acceptance of ALI NAFTA Principles
  - Refine ALI Guidelines Applicable to Court-to-Court Communication in Cross-Border cases
  - "Glossary"
  - Recommendations re "Applicable law"

ALI
THE AMERICAN LAW INSTITUTE

http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=85
For free:
http://www.iiiglobal.org/component/jdownloads/finish/557/5932.htm
or
Weblog 2012-06-doc1 Final report

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Future

- *Re "protocols" - European Models?* *http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_Ebook_eng.pdf* (includes sample clauses)

European Cross-border Insolvency: Promoting Judicial Cooperation

Universiteit Leiden

NOTTINGHAM LAW SCHOOL
Nottingham Trent University

Profs Bob Wessels and Jan Adriaanse Prof. Paul Omar

European Cross-border Insolvency: Promoting Judicial Cooperation

Objective: to develop 'guidelines', 'best practices' and 'standards' for communication and cooperation in insolvency cases between courts in the European Union. The result should lead to a set of "*EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines*":

(i) ensuring as far as possible that the EU Insolvency Regulation works in practice, to efficiently and effectively deal with a debtor's estate;

(ii) fitting the current environment where solutions have been developed based on models reflecting cooperation and communication;

(iii) guaranteeing the organisation and conduct of a fair legal process and ensuring the fair representation of stakeholders concerned in insolvency processes.

Three Phases

- Workstream 1 (January 2013-September 2013)
  - Two surveys will be developed and sent out to a representative group of around 30 experts – insolvency judges, senior insolvency court representatives, insolvency lawyers/trustees/ practitioners, academics – chaired by prof. Fletcher UCL
  - Study of 5 Int'l and EU Codes on Independency / Integrity of Judges
  - Redrafting Global Principles and CoCo Guidelines in discussion with Review & Advisory Group
- Workstream 2 (September 2013-July 2014)
  - focuses on capacity building by inviting individual EU Insolvency Judges to participate in sidetracks of (already) planned conferences by the projects' participating or invited partners
- Workstream 3 (July 2014-December 2014)
  - focuses on bringing together 60 EU Insolvency Judges for 'Cooperation Trainings' of 10-12 hours at three European universities (Leiden, Nottingham, Trier, a city in the Eastern-European region?).

Where do we stand in 2014?

Future of Cross-border Cooperation

- Present status: model of coordination
- CoCo Guidelines (2007)
- Global Principles (2012)
- *EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines (JudgeCo project; 2014?)*
- *Prof & Ethical rules re IOH's (Best Practices project INSOL Europe; 2014?)*
- *Protocol??*

Thank you for your attention!

Bob Wessels
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The information within these slides does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.

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To: participants ERA Trier conference 18-19 March

From: Professor Bob Wessels, University of Leiden, Leiden Law School

Date: 7 March 2013

Re: Promoting Judicial Cooperation in Cross-Border Insolvency Cases in the EU (JudgeCo-project)

During my presentation in Trier I will refer to the development of a set of Guidelines, tentatively called "*EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines*". These would be the outcome of a programme of study, research, discussion and pilot-training of judges for which the Leiden Law School, in cooperation with Nottingham Law School, has been awarded a EU Action Grant 'Civil Justice'. The grant is part of a larger EU project called *European Cross-border Insolvency: Promoting Judicial Cooperation.*

The (non-binding) EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines will be developed for application in cross-border communication and cooperation in insolvency cases between courts in the European Union. The result should (i) ensure as far as possible that the EU Insolvency Regulation works in practice, to efficiently and effectively deal with a debtor's estate, (ii) fit the current environment where solutions have been developed based on models reflecting cooperation and communication, and (iii) ensure to the best possible extent the organisation and conduct of a fair legal process, with a fair representation of stakeholders concerned in insolvency processes.

The project is funded by a grant from the European Committee, with third-party funding by the International Insolvency Institute. It runs to the end of 2014.

The project (we call it "the JudgeCo-project") will further develop earlier initiatives, to which some of the invitees have already contributed. In 2007, under the aegis of INSOL Europe (generally representing the European insolvency community) the European Communication and Cooperation Guidelines for Cross-Border Insolvency were published. This initiative was jointly chaired by Professors Bob Wessels (University of Leiden, The Netherlands) and Miguel Virgós (University Autonomá,

Madrid, Spain). These Guidelines (also known as "CoCo Guidelines") have received attention both in legal literature as well as from judges and practitioners and were for instance taken into account in the June 2009 Global Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies. Direct and indirect court-to-court communication may enhance international collegiality that has emerged amongst judges in cross-border insolvency cases, a form of judicial globalisation that will lead to the development of more of such cross-border methodologies such as protocols and guidelines. This is of considerable interest to EU Member States that already have adopted (e.g. Poland, Romania, UK, Slovenia and Greece) or are considering adopting the UNCITRAL Model Law on Cross-Border Insolvency 1997, whose Article 27 provides a non-exhaustive list of how cooperation may be implemented including through communication between courts and office-holders as well as cooperation through co-ordinating concurrent proceedings. Finally, in June 2012, the American Law Institute (ALI) and International Insolvency Institute (III) Global Principles for Cooperation in International Cases ('Global Principles') were published. These Global Principles include Global Guidelines for Court-to-Court Communications in International Insolvency Cases. These Global Principles and Global Guidelines were drafted by professor Ian Fletcher (University College London) and myself.

This project has three phases.

Workstream 1 (January 2013-September 2013) focuses on developing a draft text of EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines. Two surveys will be developed and sent out to a representative group of experts – insolvency judges, senior insolvency court representatives, insolvency lawyers/trustees/ practitioners, academics – based in the majority of EU Member States and some five non-EU jurisdictions. Based on further analysis and discussion (of the Global Principles, and the CoCo Guidelines) the draft-Guidelines will be reviewed by a Review & Advisory Group after which the Guidelines are to be presented to the general public. Workstream 2 (September 2013-July 2014) focuses on capacity building by inviting individual insolvency judges to participate in sidetracks of (already) planned conferences by the JudgeCo project's participating or invited partners. Workstream 3 (July 2014-November 2014) focuses on bringing together 60 EU insolvency judges for a day and a half 'Cooperation Training' at three European

universities (Leiden, Nottingham and a city in the Eastern-European region). The grant also covers costs of travel and overnight stay for these judges.

In the meanwhile the Review & Advisory group for the project is established and will include some thirty judges, practitioners and academics to allow open-minded debate with the project team and to ensure that aspects of the project which may provide difficulties of transposition into the legal culture of a Member State can be addressed. The Review & Advisory Group acts as the projectmanagement's sounding bourd and will be chaired by professor Ian Fletcher, University College London.
has the following goals:

Please let me know (B.Wessels@Law.LeidenUniv.nl) whether you are interested in following the project. A website is under construction which will contain links to the sources mentioned and we will periodically report about the progress of the project.

Kind regards,

Bob Wessels

Data protection in the future regulation on insolvency proceedings

Elise Latify

ERA Conference
on Insolvency Proceedings

Trier, 18 March 2013

Data protection in the future regulation on insolvency proceedings

1. Introduction
2. When should data protection principles apply?
3. The Golden Rules of data protection
4. Personal data in the insolvency regulation
5. Data protections safeguards in the insolvency regulation?
6. Examples: registers, cooperation

1- Introduction – The EDPS

- **Independent authority:** 3 missions
- **Supervision** of EU institutions
- **Cooperation** with national data protection authorities
- **Consultation**: COM, EP and Council

3

2- When should data protection apply? -

- Whenever personal data is processed whether or not by automatic means (article 3 Directive 95/46/EC)
- What is personal data ? data allowing to identify someone directly or indirectly
- Examples: name, last name, identification number…but also finger prints, IP address, picture.

4

5. The golden rules of data protection

- **Purpose limitation principle** : what is the purpose?
- **Data minimization principle**: what are the data processed?
- **Prohibition of sensitive data processing**: are there some sensitive data?
- **Necessity, proportionality, adequacy** : is it necessary? Proportionate to the purpose ?
- **Accuracy:** are the data accurate and, where necessary, kept up to date ?
- **Retention period definition:** for how long are the data processed?
- **Access limitation**(confidentiality/security)**: w**ho can access the data?
- **Data subjects rights (info, access, rectification):** are data subjects informed of the processing of their data? How can they get the information?

5

Data processing in the future insolvency regulation: where?

- Processing of personal data: **3** occurrences
- **In general**: transparency and communication =) exchange of data between stakeholders
- **More specifically**:
  - Insolvency **registers**: publication of decisions opening and closing insolvency proceedings (A 20A)
  - **Interconnection** of electronic registers (A 20B)
  - **Cross-border cooperation and communication** between stakeholders: liquidators (A31), courts (A31a), liquidators and courts (31b) and idem for group of companies.

6

Data protections safeguards in the future insolvency regulation?

- References are made to data protection framework (46A, recitals, explanatory memorandum and IA) but…
- …data protection requirements are not implemented in the corpus of the regulation.

7

DP AND INSOLVENCY REGISTERS: application of the golden rules

- **Purpose**? information and transparency.
- **Data collected**? enumerated in A 20A. Proportionate to the purpose.
- **Necessity?** Yes
- **Proportionality and adequacy?**
  - **Publication :** yes
  - **Publication on the Internet, accessible to the public, free of charge :** questionable. Why? Very intrusive + alternative options not addressed + risks linked to the Internet
- **Accuracy? Retention period?** Nothing. Who will update the data? How much time is it necessary to keep it?
- **Access limitation?** Reference to confidentiality in A46A but who will access ? What measures to prevent data breaches ?
- **Data subjects rights?** Nothing. What? How?

8

Cooperation and communication between stakeholders

- Involves processing of personal data
- ex: exchange of emails/mail with names of natural persons (debtors/creditors/judges).
- Data protection principles not implemented
  - purpose? transparency/ cooperation/ communication
  - Data collected? not specified
  - Necessity? Proportionality? Adequacy? ok
  - Accuracy? retention period? not specified
  - Access limitation? security? not specified
  - Data subjects rights? not specified

9

So?

- Data protection principles are not preventing insolvency proceedings from being efficient
- Idea: strike a balance between interests that are not opposite.
- Both interests are legitimate.
- **Let's find a compromise!**

10

Thank you for your attention!

For more information:

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Recognition of foreign judgments and pre-insolvency proceedings

Reinhard Dammann

19 March 2013

CLIFFORD
CHANCE

The EU Insolvency Regulation: Latest Case Law and Revision

Outline

1. Recognition of foreign judgments
    1. Principle of automatic recognition
        1. Insolvency proceedings
        2. Proceedings which derive directly from the insolvency proceedings
    2. The Limits to automatic recognition
        1. The misinterpretation of Art.3?
            a. Case law
            b. The proposal of revision: the reinforcement of article 3
        2. The exception of public order
2. Recognition of pre-insolvency proceedings

1. Recognition of foreign judgments

1.1.1. Automatic recognition of the judgments opening insolvency proceedings

- Article 16: automatic recognition as from the day the judgment becomes effective in the State of opening
- Article 17: same effects in all Member states without further formalities

- Proposal of revision of the Regulation: No modification of articles 16 and 17

1. Recognition of foreign judgments

1.1.2. Automatic recognition of the proceedings which derive directly from the insolvency proceedings

- Art. 25 and the *Deko Marty case (recognition of the principle « vis attractiva concursus »)*

- Actions falling within the scope of Art. 25:
  - Actions to set aside (art. 18(2))
  - Personal liability of directors for shortage of assets (ECJ 22 feb 1979, C-133/78, Gourdain/Nadler)
  - Personal bankruptcy of the director (French case: «Com. 22 janv. 2013» n° 11-17968)
  - Liability for abusive support to the debtor

- Actions falling outside the scope of Art.25:
  - Actions to recover another's property that is held by the debtor

- Proposal of revision of the Regulation:
  - New article 3a: Confirmation of the principle «*vis attractiva concursus* » and articulation avec the (EC) Regulation n°44/2001

1. Recognition of foreign judgments

1.2 Limits to the automatic recognition

1.2.1 Can a court refuse recognition on the grounds of a misinterpretation of art. 3?

1.2.2 Art. 26: To what extent may public order be invoked to prevent automatic recognition?

1. Recognition of foreign judgments

1.2.1. The misinterpretation of article 3

- Can a court refuse recognition of a judgment on the ground that a court of another Member state has misinterpreted art. 3?

1. Recognition of foreign judgments

1.2.1.a Case law

- *Eurofood* case: "*the main insolvency proceedings opened by a court of a Member State must be recognized by the courts of the other Member States, without the latter being able to review the jurisdiction of the court of the opening State*".

1. Recognition of foreign judgments

1.2.1.a Case law

- Recent confirmation by French Court of appeals, «CA Paris, 26 feb. 2013»:
  - Debtors were denied the opening of *redressement judiciaire* in France because they did not prove the COMI was in France (registered office in Amsterdam)
  - The Tribunal of Amsterdam then opened a *faillissement* proceeding finding the COMI was located in the Netherlands. The Court of appeals of Amsterdam later confirmed.
  - The director of the debtors argued before the Court of appeals of Paris that COMI was wrongfully found in the Netherlands, that the COMI was in France and that therefore the French court should refuse to recognise the Dutch decisions and open a main French insolvency proceeding.
  - The Court ruled that: «*the Dutch decisions are binding and bar the opening of a second insolvency proceeding*" and that "*for this reason, the judgments denying the companies the opening of redressement judiciaire should confirmed*".

1. Recognition of foreign judgments

1.2.1.b The Proposal of revision of the Regulation: the new article 3

- Confirmation of the *Eurotunnel* and *Interedil* case law: integration of previous recital 13 in the new article 3
- New article 3*b*: Obligation for courts to examine *ex officio* their juridiction under article 3
- New article 3*b*: Right to appeal for creditors (confirmation of the *Eurotunnel* case-law)

1. Recognition of foreign judgments

1.2.2. The exception of public order

- To what extent may public order be invoked to prevent automatic recognition?
- Article 26 provides for a public order exception comparable to that of article 34 of Regulation n°44/2001 («Brussels I Regulation»).

1. Recognition of foreign judgments

1.2.2. The exception of public order

- *Eurofood* case:
  - Irish courts refused to recognize the Italian proceedings based on public order because the Italian administrator denied access to essential documents.
  - The ECJ ruled that: it can only be invoked in cases of "*flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys*"
  - It cannot be used to criticize the material law or legal objectives of other Member states.
- Confirmation in recent case-law: ECJ, 22. jan 2010, C-444/07, M.G. Probud; ECJ, 22 nov. 2012, C-116/11, Christianapol.

1. Recognition of foreign judgments

1.2.2. The exception of public order

- Daisytek case (French case):
  - The French prosecutor invoked the public order exception because British law does not provide for the consultation of workers prior to the opening of an insolvency proceeding.
  - The French *Cour de cassation* refused to deny recognition even though the non-consultation of workers is a criminal offense under French law.

1. Recognition of foreign judgments

1.2.2. The exception of public order

- The Proposal of revision of the Regulation:
  - No modification of article 26

2. Recognition of pre-insolvency proceedings

- Art. 1(1): Present definition of the scope of the Regulation
- Art. 2(a): Insolvency proceedings within the scope of the Regulation are listed in Annex A.

2. Recognition of pre-insolvency proceedings

- Can one challenge a judgment opening a pre-insolvency proceeding on the ground that such pre-insolvency proceeding does not meet the conditions set in article 1(1)?

- *Quid* debtor-in-possession proceedings, which do not meet the criterion of divestment.

2. Recognition of pre-insolvency proceedings

2.1.1 The *Eurofood* case

- The ECJ had extended the scope of the Regulation to pre-proceedings that met three conditions:
  - The nomination of a liquidator;
  - The divestment of the debtor; and
  - The pre-proceeding would lead to the opening of an insolvency proceedind listed in Annex A

2. Recognition of pre-insolvency proceedings

2.1.2.The *Christianapol* case and the French «*procédure de sauvegarde*»

- Debtor is a Polish company with all its assets in Poland.
- A «*procédure de sauvegarde*» was opened in France: *a priori,* contradiction with the conditions set in article 1(1).
- Even though the question was not raised, the ECJ ruled that: "*It follows that, once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation*."
- *Quid* the French proceeding of "*sauvegarde financière accélérée"*?

2. Recognition of pre-insolvency proceedings

2.1.3 The *Alkor* case and the German «*Schwacher vorlaüfiger Insolvenzverwalter*»

- Debtor is a German company with its subsidiaries in the EU.
- The Tribunal of Munich opened an insolvency proceeding and nominated a «*Schwacher vorläufiger Insolvenzverwalter*» (weak interim liquidator).
- In this proceeding, the debtor is not divested.
- The liquidator opened several secondary proceedings in other Member states, which national courts recognized this main proceeding.

2. Recognition of pre-insolvency proceedings

2.1.4 The *Ben Q* case and the Dutch «surséance van betaling»

- Debtor is a Dutch holding company with its assets in Germany.
- It filed for *«surséance van betaling»,* a Dutch moratorium proceeding, which is listed in Annex A and does not divest the debtor.
- It filed for a secondary proceeding in Munich.
- The German tribunal recognized the «*surséance van betaling*» as the main proceeding.

2. Recognition of pre-insolvency proceedings

2.2. The Proposal of revision of the Regulation

- New article 1(1):
  - Enlargment of the scope
  - Exclusion of confidential proceedings (such as «*mandat ad hoc*» and «*conciliation*»)
- New Recital 9: Confirmation of the *Christianapol* case: *"When a national procedure figures in Annex A, this Regulation should apply without any further examination by the courts of another Member State regarding whether the conditions set out in this Regulation are fulfilled."*
- New article 45(2) and recital 31: new obligation for the Commission to control that the insolvency proceedings respect the conditions of article 1 before including them in Annex A.

Recognition of foreign judgments and pre-insolvency proceedings

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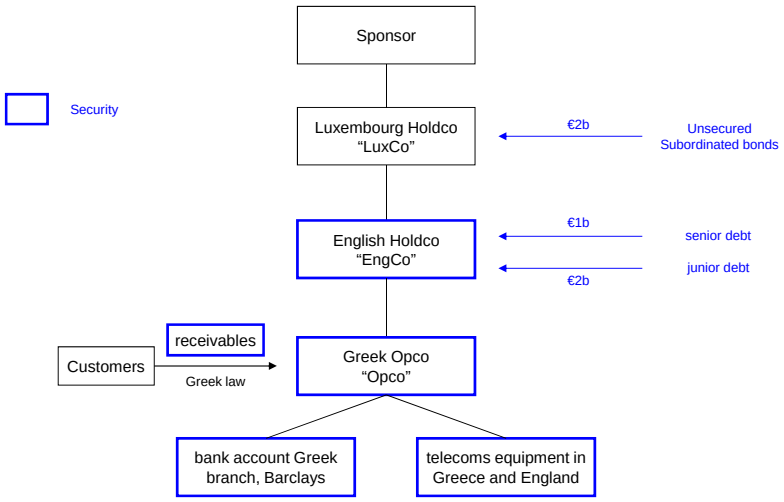
ALLEN & OVERY

Applicable law and the impact on rights *in rem*

Jennifer Marshall, partner, Allen & Overy LLP

Simplified structure diagram



ALLEN & OVERY

Proposed changes to choice of law rules

– Expansion of *lex situs* definition - art 2(f)
– New article for netting agreements – art 6a
– New article to "clarify" articles 8 and 10 – art 10a
– Article 15 expanded to expressly cover arbitration

BUT:
– No proposed changes to article 5
– No proposed changes to article 6
– No proposed changes to article 13

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Lex situs rules – art 2(g), now art 2(f)

– Why are these rules important?
  – secondary proceedings only apply to assets in the relevant Member State
  – article 5 only protects assets outside the Member State where insolvency proceedings commenced
– Problems with existing rules:
  – is art 2(g) a definitive list?
  – what if fall into more than one category?
  – what if an asset is outside the EU?
  – what about shares and bank accounts?

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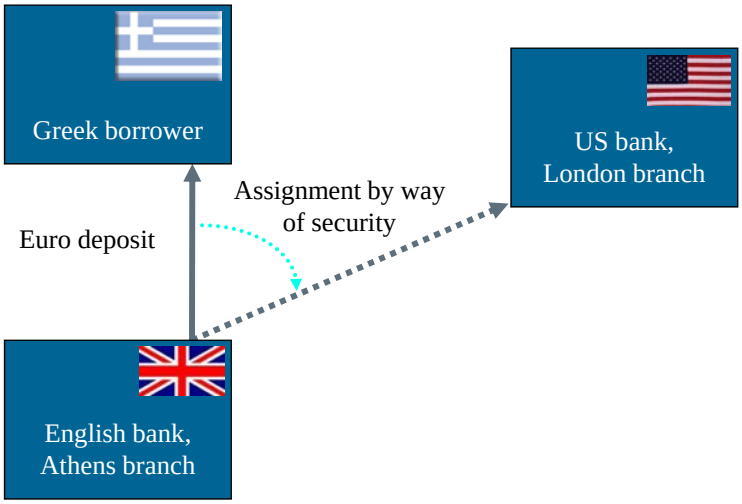
The location rule under article 2(g): example 1



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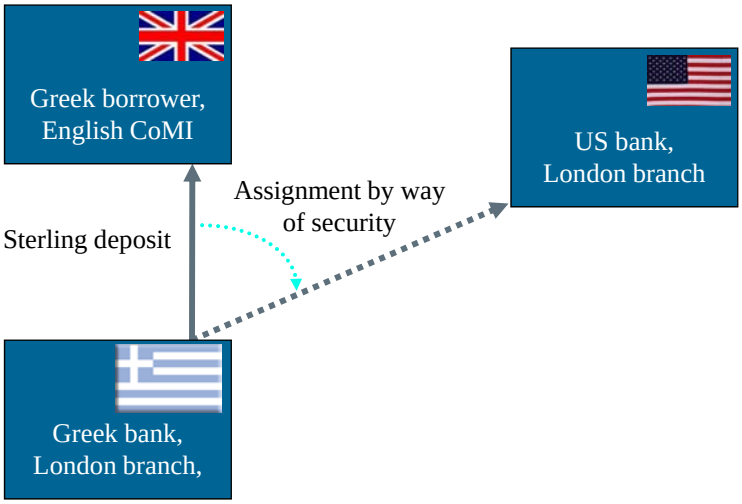
The location rule under article 2(g): example 2



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Proposed *lex situs* rule – article 2(f)

"the Member State in which assets are situated" means, in the case of:

(i) **tangible property**, the Member State within the territory of which the property is situated,

(ii) property and rights ownership of or entitlement to which must be entered in a **public register**, the Member State under the authority of which the register is kept,

(iii) **registered shares** in companies, the Member State within the territory of which the company having issued the shares has its registered office,

(iv) financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary ("**book entry securities**"), the Member State in which the register or account in which the entries are made is maintained,

(v) **cash** held in accounts with a credit institution, the Member State indicated in the account's IBAN,

(vi) **claims** against third parties other than those relating to assets referred to in subparagraph (v), the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1)

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New netting provision – article 6a

Netting agreements shall be governed solely by the law of the contract governing such agreements

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New extension of articles 8 and 10 – article 10a

Where the law of the Member State governing the effects of insolvency proceedings on the contracts referred to in Articles 8 and 10 provides that a contract can only be terminated or modified with the approval of the court opening insolvency proceedings but no insolvency proceedings have been opened in that Member State, the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts

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But no changes to article 5 (third parties' rights *in rem*)

"The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings."

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Article 5: ability to compromise secured debt?

GREECE

- CoMI of various group companies held to be in Greece
- Restructuring plans proposed in respect of all key companies in group
- Proposed plans to restructure financial indebtedness purports to compromise the secured facilities

ENGLAND

- Finance documents governed by English law
- Critical secured assets situated in England

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Article 5: turnover provisions

GREECE

- Plans purport to compromise the debts documented in the underlying facilities
- Under the plan both the “senior” and “junior” creditors to receive realisations in respect of their compromised debts
- Senior creditors receive greater dividend to reflect their priority

ENGLAND

- Intercreditor agreement governed by English law
- Contains standard turnover trust to ensure that all “realisations” are distributed in accordance with prescribed waterfall

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And no changes to article 13 (detrimental acts)

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings; and
- that law does not allow any means of challenging that act in the relevant case.

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Questions?

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LUXEMBOURG

Max Planck Institute Luxembourg
for International, European
and Regulatory Procedural Law

Prof. Dr. Burkhard Hess, MPI Luxembourg

Recent case-law of the ECJ on related actions and the interplay with the Brussels I Regulation

ERA Trier 3/19/2013

Outline

I. Introduction: The delineation between the Regulations (EC) 44/20001 et 1346/2000
II. The case-law of the ECJ
III. Case-law in the EU-Member States: Findings of the Heidelberg/Luxembourg/Vienna-Report
IV. The proposal of 12/12/2012: the proposed Article 3a EIR
V. Practical implications of the new head of jurisdiction
VI. Concluding remark

1. Introduction

The EU-Commission's „Insolvency-Package" of December 12th, 2012.

- **Report** of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM(2012)743final

- **Proposal** for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM(2012)744final

- **Communication** from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A new approach to business failure and insolvency, COM (2012)742final

Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

1. Introduction

Delineating the scope of the Regulations (EC) 44/2001 and (EC) 1346/2000

The starting point is Article 1 of the Brussels I Regulation :

"1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to: (…)
(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;"

I. Introduction

Nota bene: The delineation between the two instruments operates in a way that the definition of insolvency proceedings is found in Articles 1 and 2 of the EIR. Accordingly, all proceedings covered by the EIR are excluded from the Brussels I Regulation (as mirrored by Article 1 (2) lit b) JR).

On the other hand, proceedings which do not fall under the EIR may qualify as civil and commercial matters in the sense of Article 1 (1) of the Brussels I Regulation.

There is no regulatory loophole between the JR and the EIR.

II. Introduction

A current example: **Scheme of Arrangement** (Sections 896 – 901 UK-Companies Act 2006).

German Supreme Civil Court (BGH): These proceedings are not listed in the Annex A of the EIR and therefore do not qualify as insolvency proceedings. However, they are civil and commercial matters and the English decisions can be recognised under to Articles 32 et seq. JR.

BGH, 2/15/2012, NJW 2012, 2113; BGH,4/18/2012, NJW 2012, 2352 *(Equitable Life*).

Art. 1 EIR, Proposal of the EU-Commission

(1) This Regulation shall apply to collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation,

(a) the debtor is totally or partially divested of his assets and a liquidator is appointed, or

(b) the assets and affairs of the debtor are subject to control or supervision by a court.

The proceedings referred to in this paragraph shall be listed in Annex A.

The proposed Article 1 will change the delineation of the two EU-instruments

- More collective judicial or administrative proceedings, including interim proceedings will fall exclusively under the scope of the Insolvency Regulation.
- Consequently, the jurisdictional regime of Article 3 EIR will apply to these proceedings – consequently, any reorganisation of businesses under the Scheme of Arrangement presupposes that the COMI of the company is situated in England and Wales.
- The recognition of decisions related to the reorganisation is controlled by Articles 25 and 26 EIR.

II. Insolvency Related Proceedings – the Case-Law of the European Court of Justice

1. Gourdain ./. Nadler
2. Christopher Seagon ./. Deko Marty Belgium
3. SCT Indursti AB ./. Alpenblume
4. German Graphics
5. F-Tex SIA
6. Erste Bank Hungary
7. Rastelli ./. Hidoux

Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

II. Insolvency Related Proceedings – the Case-Law of the European Court of Justice

1. ECJ: Gourdain ./. Nadler

„Insolvency related proceedings are not insolvency proceedings in the proper sense of the term, but proceedings which derive directly from the insolvency proceedings and are closley linked with them, even if they were handed down by another court."

- The vis attractiva concursus confers ancillary jurisdiction upon the courts of a MS where the insolvency has been opened -

II. Insolvency Related Proceedings – the Case-Law of the European Court of Justice

1. ECJ, 2/22/1979, *Gourdain ./. Nadler*, ECR 1979, 733, 743

„The concepts used in Article 1 of the Judgments Convention must be regarded as independent concepts which must be interpreted by reference, first, to the objective and scheme of the Convention and, secondly, to the general principles which stem from the concepts of the national systems."

Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

II. Insolvency Related Proceedings – the Case-Law of the European Court of Justice

1. Gourdain ./. Nadler
2. Christopher Seagon ./. Deko Marty Belgium
3. SCT Indursti AB ./. Alpenblume
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5. F-Tex SIA
6. Erste Bank Hungary
7. Rastelli ./. Hidoux

II. Insolvency related proceedings in the case-law of the European Court of Justice

Christopher Seagon ./. Deko Marty Belgium

Actions for avoidance are closely related to the insolvency proceedings. The same applies to the invalidity of a transfer of shares based on insolvency law (*Alpenbume*). If the administrator assignes the claim of the actio Pauliana, Article 3 (1) EIR does not longer apply (*F-Tex*).

German Graphics

An action of a vendor based on the retention of the title does not qualify as an ancillary proceeding.

III. The main findings of the Heidelberg/Luxembourg/Vienna-Report

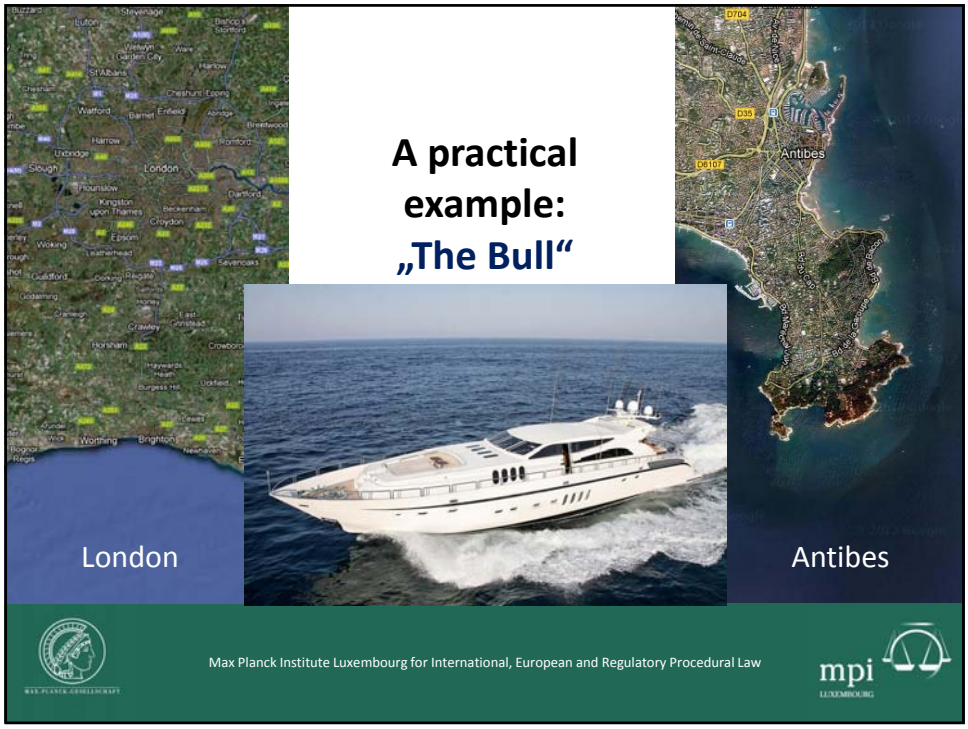
1. The operation of the Gourdain ./. Nadler formula has proved to be difficult. Case-law in the Member States shows inconsistencies in some areas.
2. Unproblematic constellations relate to
   - actions for avoidance
   - actions for determination of a claim
   - actions concerning the liability of the administrator

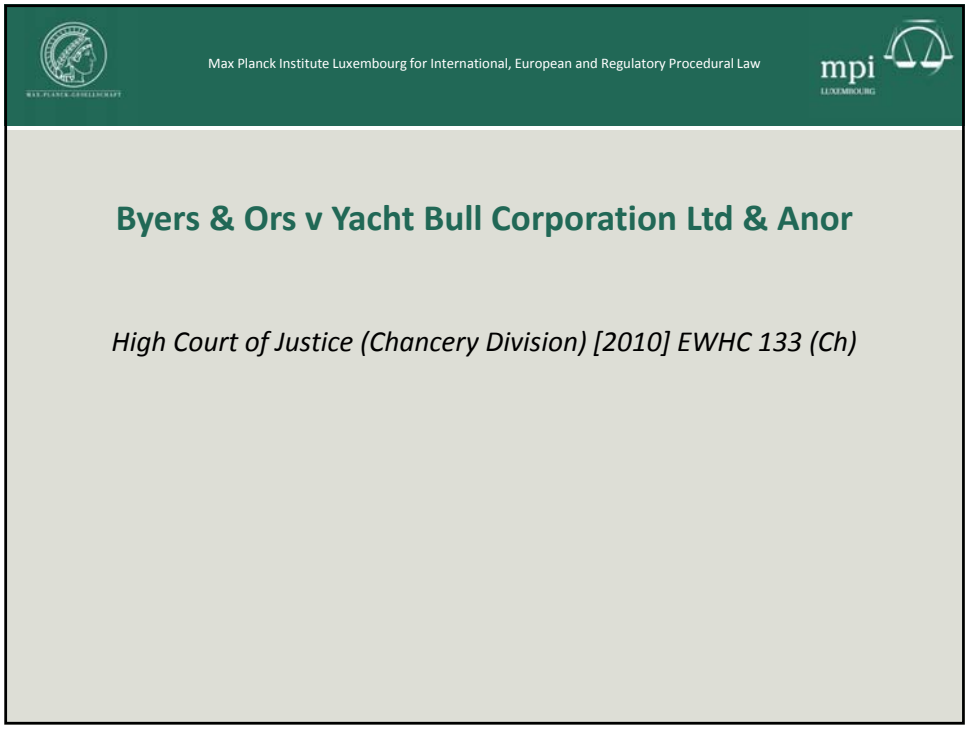
These actions are considered as annex-proceedings and are covered by Article 3 EIR

III. The Main findings of the Heidelberg/Luxembourg/Vienna-Report

3. The problematic constellations relate to
   - actions for the liability of directors
   - actions for the maintenance of capital requirements
   - actions for the recovery of the company‘s debts brought by the liquidator in fiduciary capacity
   - actions for the determination of assets forming part of the estate.

These actions are based on the civil and/or company laws of the Member States and are mostly not considered as annex-proceedings.


A practical example:
„The Bull“
London
Antibes
Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law
mpi
LUXEMBOURG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LUXEMBOURG
Byers & Ors v Yacht Bull Corporation Ltd & Anor
High Court of Justice (Chancery Division) [2010] EWHC 133 (Ch)

Bought by:

MSIL
(Madoff Securities Investment Ltd.)

Bernard Madoff
Ownership & Control

With funds from:

BMIS
(Bernard Madoff Investment Securities LLC)

Not Ruth

Gifted to:

YBC
(Yacht Bull Corporation)

Ruth Madoff
Ownership & Control

Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

Incorporated in England

MSIL
(Madoff Securities Investment Ltd.)

Controlled by

Joint Liquidators

The Bull

Moored in Antibes

France

Seeking compensation

BMIS
(Bernard Madoff Investment Securities LLC)

Invested in

Luxalpha Fonds

Subscribed in

Financière Meerschaert SA

IV. The proposal of the EU-Commission: The new Article 3a EIR

1. Endorses the case-law of the ECJ on the Gourdain-Nadler formula
2. Provides for an additional head of jurisdiction for several, but related causes of actions asserted by the administrator.
3. This head of jurisdiction is based on the domicile of the defendant (similarly to Art. 6 no 1 JR).
4. The administrator (or the estate) must be usually sued in the Member State where the insolvency proceedings are pending.

Art. 3a Jurisdiction for related actions:

(1) The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for **any action which derives directly from the insolvency proceedings and is closely linked with them**.

(2) Where an action referred to in paragraph 1 is related to an action in civil and commercial matters **against the same defendant**, the liquidator may bring both actions in the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought **against several defendants**, in the courts of the Member State within the territory of which any of them is domiciled, provided that that court has jurisdiction pursuant to the rules of Regulation (EC) No 44/2001.

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IV. The proposal of the EU-Commission: The new Article 3a EIR

1. Consequences:

The new head of jurisdiction equally applies to actions brought by the administrator and the creditor.

It enlarges the scope of the EIR and takes prevalence over the heads of jurisdiction of the Brussels I Regulation (including exclusive heads of jurisdiction).

It does not apply to incidental questions based on insolvency law.

2. **Open issues**

Does the provision also apply to actions regarding third state defendants?

Exclusive or elective jurisdiction?

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CROSS-BORDER INSOLVENCY PROCEEDINGS

RELATIONSHIP BETWEEN MAIN AND TERRITORIAL PROCEEDINGS IN THE LIGHT OF *BANK HANDLOWY* Case C-116/11

Introduction

1 It is well known that the system of the EC Regulation on Insolvency Proceedings involves the potential for both main and secondary proceedings relating to the same legal entity. At present, only main proceedings can be rescue or reconstruction proceedings and secondary proceedings have to be winding-up proceedings. The Commission's proposals suggest a change removing this restriction on secondary proceedings.

2 The current restriction is designed to reflect the supremacy of the main proceedings. The main proceedings apply throughout the EU (except Denmark) except and to the extent that a secondary proceeding has been started in another Member State. Such a proceeding can only be begun if there is an "establishment" in that Member State, as defined by Article 2(h) of the Regulation.

3 The Regulation contains express provisions for co-operation and communication of information between main and secondary liquidators (Article 31). It has been held in Austria and the UK that an obligation for courts to co-operate is implied: *Re Stojevic* (Higher Regional Court of Vienna, 9 Nov 2004) 28 R 225/04w, *Nortel* [2009] BCC 343 (HCJ, England).

4 The opening of a secondary proceeding whilst the main insolvency proceeding "liquidator" (as defined in Article 2(b)) is trying to rescue or reconstruct a company or to sell it as a going concern, can be very disruptive. For this reason, it is often preferable not to have the opening of a secondary proceeding: **Moss**

Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings 2nd ed, 2009 at 8.151-3.

5 In the UK, we have developed the ability for insolvency practitioners to persuade local creditors against requesting the opening of secondary proceedings in return for a promise that if no secondary proceedings are opened then local priorities will be respected in respect of the assets which would have been part of the secondary proceedings. The giving of such undertakings are accepted by the English courts as being valid and effective: *Collins & Aikman* [2006] BCC 861, *Nortel* [2009] BCC 343.

6 The giving of such undertakings is not possible in some EU Member States and therefore the European Commission has proposed that the ability to give such undertakings be provided expressly by a change to the Regulation.

The *Bank Handlowy* Case

7 The debtor, Christianapol, is a company registered in Poland whose ultimate parent is a French company. A French Tribunal de Commerce opened sauvegarde proceedings as main proceedings in respect of the company, on the basis that the debtor's centre of main interests was in France.

8 Whilst the main proceedings were continuing in France, Bank Handlowy, a Polish bank asked a Polish court to open secondary proceedings under Article 27 of the Regulation. It made an alternative claim that if the opening in France were to be held to be a breach of Polish public policy under Article 27 of the Regulation, the debtor should simply be wound up under Polish law.

9 The French court approved a rescue plan for Christianapol which involved the payment of its debts in instalments spread over 10 years. The French court appointed a person to oversee the implementation of the plan.

10 The debtor contended in the secondary proceedings that they should be discontinued, since the main proceedings had closed. It also contended that on the basis of the plan put in place by the French court, no claims were outstanding

against it under Polish law and therefore there were no grounds for supporting a declaration of insolvency.

11 The Polish court asked the French court whether the insolvency proceedings in France were still pending. "The answer given by the French court did not provide the necessary clarification."

12 The Polish court referred three questions to the European Court of Justice:

(i) Should the term "closure of insolvency proceedings" in Article 4, relating to choice of law, have an autonomous meaning or should it be understood in the sense of the national law of the State of the opening, in that case France?

(ii) Does Article 27 of the Regulation prevent the court asked to open secondary proceedings from ever examining the insolvency of a debtor in respect of whom main insolvency proceedings had been opened in another Member State, even though it has been established in the main proceedings that the debtor is *not insolvent*?

(iii) Can secondary proceedings be opened even though a plan is being implemented by the debtor? It seems that the assets of the debtor were in Poland and the opening of a secondary proceeding excludes the effects of the main proceeding within the relevant Member State, in this case Poland.

13 By way of background to the problem, Article 1(1) of the Regulation says that the Regulation shall apply to "collective insolvency proceedings". Article 2(a) defines "insolvency proceedings" as the collective proceedings referred to in Article 1(1) and states that those proceedings are listed in Annex A. Thus the Regulation has both a definition of insolvency proceedings and also a definitive list.

14 The French have persuaded the EU to add the sauvegarde procedure to Annex A by way of an amending Regulation, even though it is not strictly speaking an insolvency proceeding, but a *pre-insolvency* proceeding. The Commission has

proposed the expansion of the scope of proceedings within the Regulation to pre-insolvency proceedings, but they were not intended to be within the current text.

15 The Polish court did not raise any question for the ECJ as to whether the definition overrode the reference to Annex A or vice versa. The ECJ, on the basis that sauvegarde is included in Annex A, concluded at paragraph 35 that the debtor had to be regarded as being insolvent and in insolvency proceedings.

16 With regard to question (i), although provisions of EU law are usually given an autonomous and uniform interpretation, it was held that that principle only applies where the provisions make no express reference to the law of a particular Member State (paragraph 49). Since Article 4 was a choice of law clause, which provides that the closure of main proceedings is governed by the law of the main proceedings, then the question of closure cannot be given an autonomous interpretation but must be decided by the law governing the proceedings.

17 In other words in the *Bank Handlowy* case the question of whether the main French proceedings had closed had to be decided in accordance with French law (paragraph 50). The question of whether the sauvegarde proceedings have been closed under French law was however to be decided by the court requested to open the secondary proceedings (paragraph 54).

18 With regard to question (iii) the ECJ held that the authority to open secondary proceedings in Article 27 and Article 3(3) of the Regulation makes no distinction between cases where the main proceedings are "protective" i.e. pre-insolvency proceedings and therefore those provisions must be construed as authorising the opening of secondary proceedings where the main proceedings, such as French saufgarde proceedings, have a protective purpose.

19 The ability to open secondary proceedings even where the main proceedings are of a "protective" nature, creates a risk of undermining the main proceedings (paragraph 59). The ECJ however pointed out that the Regulation provides mandatory rules for co-ordination and for the dominant role of the main proceedings (paragraph 60). Under Article 33(1) of the Regulation, the liquidator in the main proceedings may request an order for stay of the process of liquidation

in the secondary proceedings subject to certain conditions. Under Article 34(1) the liquidator in the main proceedings may propose closing the secondary proceedings with a rescue plan, a composition, or a comparable measure. Article 34(3) provides that during the stay of the process of liquidation under Article 33(1) of the Regulation, only the liquidator in the main proceedings or the debtor, with the liquidator's consent, may propose such measures.

20 The answer to the potential disruption of the main, rescue, proceedings is the "principle of sincere co-operation", which requires the court having jurisdiction to open secondary proceedings to have regard to the objectives in the main proceedings and to take account of the scheme of the Regulation and the aim of ensuring efficient and effective cross-border insolvency proceedings through mandatory co-ordination between the main and secondary proceedings, guaranteeing the priority of the main proceedings (paragraph 62). In short, the Polish court is obliged to consider and to co-operate with the French main proceeding and its goals.

21 With regard to question (ii), Article 27 provides that the opening of main proceedings shall permit the opening in another Member State of secondary insolvency proceedings "without the debtor's insolvency being examined in that other State". The wording is not entirely clear as to whether, although the examination of the debtor's insolvency is not necessary, it nevertheless remains possible, or whether it is ruled out altogether.

22 The ECJ points out that the Regulation does not define insolvency or lay down criteria for determining whether a situation of insolvency exists, but instead refers to national law. It is therefore a prerequisite for the opening of main proceedings that a court having jurisdiction has established that the debtor is insolvent under national law. The ECJ considered that once a finding of insolvency had been made in the main proceedings then that is binding on the court considering the opening of secondary proceedings. That interpretation is the only one liable to avoid the difficulties which would arise of the application by different courts of diverging national definitions of the concept of insolvency. If it were possible to have different assessments in the different countries, that would be "incompatible with the objective of efficient and effective cross-border insolvency proceedings".

23 The ECJ therefore ruled that the words in Article 27 mean that the court considering a request to open secondary proceedings where a main proceeding has been opened cannot examine the insolvency of a debtor, even where the main proceedings had a "protective" purpose.

24 This does give rise to the odd result that, because pre-insolvency proceedings such as sauvegarde have been smuggled into Annex A, they have to be treated as insolvency proceedings and the court opening the main proceedings has to be regarded as having found insolvency. On this basis the court considering an application to open secondary proceedings must accept that finding of insolvency and must treat the debtor as if it were insolvent.

25 The European Commission has proposed the ending of this rather artificial approach by expanding the scope of insolvency proceedings, expressly to include pre-insolvency proceedings.

Discussion

26 The facts of a case like *Bank Handlowy* raise difficult questions about the inter-relationship between main and secondary proceedings where the centre of main interests is in one Member State but the assets are in another. Hopefully the ECJ rulings on the preliminary issues has assisted the Polish court in safeguarding the plan in the main proceeding.

27 It seems to me however that if a plan is adopted in the main proceedings before secondary proceedings are opened, then the assets and liabilities of the debtor become subject to that plan and this cannot be interfered with by the opening of secondary proceedings. Even if the main proceeding terminates by reason of a plan or some similar exit route, a further proceeding, whether main or secondary, should not be able to interfere with the disposition of the assets and liabilities dealt with by the plan in the prior main proceeding.

28 This still leaves a question mark. What if the Polish court had opened secondary proceedings before the plan in the main proceeding was adopted? In that case it seems that the assets in Poland could never have become subject to the plan in the main proceeding. However, the liquidator in the main proceeding could have requested a stay of the process of liquidation in the secondary proceeding, pursuant to Article 33 and proposed a plan parallel to the proposed plan in the main proceeding, using his special power under Article 34(3).

29 As the ECJ pointed out, no question was asked about a potential conflict between Annex A and the definition of insolvency proceedings as being collective insolvency proceedings in Article 1(1). For example, Annex A contains some proceedings which can be insolvency proceedings or may not be insolvency proceedings. A winding-up proceeding in the United Kingdom can be a solvent winding-up requested by a shareholder who has demonstrated to the court that the assets will be greater than the liabilities and that he will receive a distribution as a shareholder. It is not at all clear whether such a proceeding, based on solvency rather than insolvency, should be regarded as being within the Regulation.