INTERNATIONAL COOPERATION
IN BANKRUPTCY AND INSOLVENCY MATTERS

On the Origins, Development and Future of
Communication and Cooperation In Cross-Border Insolvency Cases

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B. The European Union

1. Judicial Cooperation in Civil Matters

Since May 2002 in the larger part of Europe the Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, usually referred to as EU Insolvency Regulation, has come into effect.1 Article 1(1) defines a framework for the applicability of the Regulation to “collective insolvency proceedings”, requiring four cumulative conditions, which all have to be fulfilled: (i) insolvency proceedings must be “collective” and therefore all creditors concerned may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded, (ii) the proceedings must be based on “the debtor’s insolvency” and not on other grounds. The test of “insolvency” is based on the law applicable in the Member State within which a court opens such proceedings, (iii) the proceedings must entail the total or partial divestment of the debtor, and (iv) the proceedings should entail the appointment of a “liquidator”.2 In all, in 2008, the EU Insolvency Regulation applies to over 90 types of national insolvency proceedings and over 90 types of persons/bodies (acting as “liquidators”) in 26 Member States. The enlargement since May 2004 with twelve new Member States has led to some minor changes in the text of the Insolvency Regulation.3 A “regulation” is a European Community law measure, which is binding and directly applicable in Member States.4

It should be noted that the Insolvency Regulation itself aims to fill a gap that deliberately was left, nearly forty years ago, in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Article 1(1) of this Convention excluded from its scope insolvency proceedings relating to “…bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial

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1 O.J. L 160 of 30 June 2000, p. 1. The Regulation has been amended several times. A consolidated version of the current text of the Insolvency Regulation (InsReg) has not been published. A private example can be found online at http://bobwessels.nl/wordpress/wp-content/uploads/2007/01/insreg-consolidated-as-per-jan-2007.pdf. The Annexes to the Insolvency Regulation also have been amended several times, the latest version being of June 2007, see OJ L 159 of 20 June 2007, 1., online at http://bobwessels.nl/wordpress/wp-content/uploads/2007/06/lists-a-c-june-2007.pdf. It should be noted that Denmark is not bound by the Insolvency Regulation.

2 For the Insolvency Regulation to be applied, it is however not sufficient that the proceedings in question meet the four conditions mentioned. A fifth condition should be met. The specific “proceeding” and its “liquidator” should be mentioned in one of the applicable Lists in the Annexes: A. Insolvency proceedings referred to in Article 2(a); B. Winding up proceedings, referred to in Article 2(b), and C. “Liquidator”, as referred to in Article 2(c).

3 See the consolidated text, supra n. 49.

arrangements, compositions and analogous proceedings.” The Brussels Convention has been transformed into a Regulation as of 1 March 2002, but article 1(2) Brussels Regulation 2002 contains the same exclusion, for which the EU Insolvency Regulation now should contain the necessary rules. Proceedings arising within pending insolvency proceedings will only also be excluded from the scope of the EC Regulation on Civil Jurisdiction and Judgments 2002 by art. 1(2)(b) if they derive directly from the bankruptcy or winding-up and are closely connected with the insolvency proceedings, like an action of a liquidator to recover debts due to the insolvent debtor. Article 25 InsReg contains provisions which determine international jurisdiction and enforcement of judgments relating to such actions, as will be discussed later.

The Insolvency Regulation applies to a “debtor,” being a natural person or a company (or legal person). Article 1(2) EU Insolvency Regulation excludes from its scope “insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.” For these financial institutions, falling outside the Regulation’s scope, 2001 produced Directive 2001/17 and Directive 2001/24 on the reorganization and winding-up of insurance undertakings and of credit institutions. The Directives for these two groups of financial institutions (insurance undertakings and credit institutions) are generally seen as to fill the gap left by the Insolvency Regulation. Where a Regulation is a European Community law measure binding fully the EU Member States, both Directives have to go through a legislative implementation process in each individual EEA (European Economic Area) Member State. The implementation date for Directive 2001/24 was 20 April 2003 and for Directive 2001/24 it was 5 May 2004. As far as can be assessed, all EU countries have implemented these directives.

Systematically judgments, which are not covered by the Winding-Up Directives, fall within the scope of the Brussels Regulation 2002. The Spanish professors Virgós and Garcimartín refer to the EC Insolvency Regulation as constituting the general rule, where the Directives with regard to reorganization and winding-up of financial institutions form special rules, but “…. they all form the “hermeneutic circle” within which interpretations should be made. The idea that all these rules must be seen as parts of a consistent (although unfinished) statutory scheme is important.” The validity of this submission will be tested in this chapter, but the opinion makes clear that the Insolvency Regulation should not be viewed in isolation, but in its relation to general procedural rules on jurisdiction and enforcement of judgments within Europe. From the onset it should be borne in mind that both Directives mentioned find

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9 There is still a gap with regard to insolvency proceedings concerning investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings, see E. Braun / G. Heinrich, Finanzdienstleister in der ‘grenzüberschreitenden’ Insolvenz – Lücken im System?, NZI 2005, 578ff.
their base in Title III EC Treaty (“Free movement of persons, services and capital”) and therefore do relate to EC policies, such as the freedom of establishment of branches and subsidiaries and the free movement of providing services, capital and payments. Conversely, the basis of the Insolvency Regulation is Title IV EC Treaty (“Visas, Asylum, Immigration and other policies related to free movement of persons”), according to which measures have been or will be adopted “[i]n order to establish progressively an area of freedom, security and justice” (Article 61 EC Treaty). Title IV also announces “[m]easures in the field of judicial cooperation in civil matters having cross-border implications taken ….. in so far as necessary for the proper functioning of the internal market.11

2. Coordinated Universality as Basic Model

“The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor’s assets”, see Recital 3 of the Insolvency Regulation. Insolvency cases having cross-border effect include instances where the insolvent debtor has assets in more than one Member State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. These instances cause a great number of sometimes rather complex legal questions, such as the international jurisdiction of the court which is authorized to open insolvency proceedings, the law applicable to the insolvency proceedings and on the substantial and procedural effects of these proceedings, e.g., on the legal position of creditors from abroad and their rights to set-off or the termination of employment contracts, the issue of recognition of proceedings which have been opened abroad, the powers of a liquidator or administrator who has been appointed abroad, etcetera. As explained in Chapter 3, the model which has found its way into the Insolvency Regulation is a modified or mixed model, mostly referred to as “modified”, “limited” or “mitigated” universalism, as a central element in the Regulation is the applicability of the law of the Member State, the court of which has opened insolvency proceedings, in all other Member States. The EU Insolvency Regulation is also based on the principle of communication and cooperation between the insolvency office holders, which have been appointed in insolvency proceedings, opened in different members states, although relating to one insolvent debtor. Therefore, the model is referred to by Wessels as “coordinated” universality.12

11 See Article 65 EC Treaty, according to which these measures shall include: (a) improving and simplifying the system for cross-border service of judicial and extrajudicial documents, cooperation in the taking of evidence, the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction; and (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States. See the alignment with these purposes in the EU Insolvency Regulation in Recital 1 (“The European Union has set out the aim of establishing an Area of freedom, security and justice”) and 2 (“The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty”).

12 Coordination is to be found especially in the mutual duties for liquidators in insolvency proceedings, pending in different EU Member States, to communicate information and to cooperate, see Article 31 InsReg. See Bob Wessels, It’s Time to Cooperate, in: 2 International Corporate Rescue 2005, 291ff.
The Regulation acknowledges the fact that as a result of widely differing substantive laws in the Member States “it is not practical to introduce insolvency proceedings with universal scope in the entire Community” (Recital 11). The differences mainly lie in the widely differing laws on security interests to be found in the Community and the very different preferential rights enjoyed by some creditors in the insolvency proceedings. The goals of the Regulation, with 47 Articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor’s assets and to avoid forum shopping. The Regulation, therefore, provides rules for the international jurisdiction of courts in a Member State for the opening of insolvency proceedings, the recognition of these proceedings in other Member States and the powers of the “liquidator” in the other Member States. The Regulation also deals with important provisions for choice of law (or: private international law). These contain special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in another Member State than the State of opening are allowed to be opened alongside main insolvency proceedings, which have in principle a universal scope. Below a short explanation follows. For more detail readers are referred to other sources.13

3. International Jurisdiction

a. Judgment Opening Main Insolvency Proceedings: Centre of Main Interests

In the practice of applying the Insolvency Regulation until today, the most important part has proven to be the rules relating to international jurisdiction of the court of the Member States. Article 3 InsReg designates the Member State of which the courts may open insolvency proceedings. Territorial jurisdiction within that Member State itself must be established by the national law of the Member State concerned (Recital 15). The essential model of the Regulation is to establish a hierarchical scheme of main (primary) and secondary (subsidiary) jurisdictional competence in relation to a debtor. The court where the “centre of the debtor’s main interests” (COMI) is situated, so within the territory of a Member State, will have the primacy to open the proceedings. It is important to keep in mind that the principle of subordination between main and secondary/territorial proceedings is set forth by Articles 3(2) – (4): where the centre of the debtor’s main interests is situated within the territory of a Member State, the courts of another State have a jurisdiction to open insolvency proceedings only if the debtor possesses an “establishment” in the territory of that other State (Article 3(2) and Article 2(h) InsReg). Consequently, several proceedings in relation to the same debtor, which run under the insolvency laws of two or more different Member States, are due to be opened. However, only one main proceeding (opened in the State where the centre of the

debtor’s main interest is situated) is allowed, whilst there could be as many secondary proceedings in other States as the debtor possesses establishments in these territories.

The judgment opening main insolvency proceedings, based on the existence of COMI, is a very specific one. It has the following characteristics: (i) such main insolvency proceedings “and their effects,” are to be determined by the law of the Member State within the territory of which the proceedings are opened. The applicable law is therefore the “lex concursus”, see Article 4(1) InsReg; (ii) such “opening of insolvency proceedings” (and their effects ex Article 4(1) InsReg), “shall not affect”, for example, the rights laid down in Articles 5-7 InsReg (rights in rem; set-off; reservation of title); (iii) the judgment opening main insolvency proceedings shall be recognised automatically (Article 16(1) InsReg) and (iv) such a judgment shall, unless the Regulation provides otherwise (Article 17(1) InsReg), with no further formalities have the same effects in other Member States as they have in the Member State in which the proceedings were opened; (v) main proceedings include the appointment of a liquidator who, in principle, can exercise in other Member States all the powers conferred to him by the law of the opening State (Article 18(1) InsReg);14 (vi) it may be registered in certain public registers in another Member State (Article 22 InsReg) or (vii) it may be published in another Member State (Article 21 InsReg); (viii) the judgment opening main proceedings is decisive with regard to whether a debtor of the insolvent debtor will be discharged following the honouring of an obligation which should have been honoured for the benefit of the liquidator (Article 24 InsReg).

The Regulation does not provide any express rule to resolve cases where the courts of two States concurrently claim jurisdiction in accordance with Article 3(1). Such conflicts of jurisdiction are seen as an exception, given the necessarily uniform nature of the criteria of jurisdiction. The principle of mutual trust (Recital 22) forms the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision.15

The Regulation does not define the concept of “centre of main interests” as meant in Article 3(1). Article 3(1) second sentence assumes that the registered office is the centre of main interests, in the absence of proof to the contrary. The assumption serves as a rebuttable presumption. To determine the COMI of a natural person, the Regulation does not contain such a presumption. The concept of COMI “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,” see Recital 13.16

14 If the proceedings are secondary proceedings, the judgment opening the secondary proceedings prohibits the main proceedings from having legal effect in the territory of the Member State in which the secondary proceedings are opened (Article 17(1) InsReg) and which limits the powers of the main liquidator (Article 18(1) InsReg).
16 Netherlands Supreme Court 9 January 2004, JOR 2004/87, comments by Wessels; NIPR 2004, 41 (Fortis v. Vennink). The court correctly decided that it does not automatically follow from the text or the recitals that, in relation to a natural person, his place of residence must be regarded as his centre of main interest pursuant to Article 3(1) Insolvency Regulation: “The explanatory report of Virgós and Schmit accompanying the Bankruptcy Convention of 1995, which was not enacted but served as a model for the rules of the EU Insolvency Regulation provides insufficient support for the above argument. The passage cited by the Attorney-General
On 2 May 2006 the European Court of Justice issued its well reported decision with regard to Eurofood IFSC Ltd, which had its registered seat in Ireland and is a wholly owned subsidiary of Parmalat SpA, a company incorporated in Italy. On the topic of COMI the ECJ decided:

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) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, whereby the centre of main interests of that subsidiary is situated in the Member State 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 Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by that Regulation.

The court of the Member State within the territory of which the debtor’s COMI is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to

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[Citing the English version of Report Virgós/Schmit, nr. 75: “In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence”?Wess.] does not imply that with regard to natural persons the common place of residence has to apply as centre of main interests or that this is a rebuttable presumption.”

17 European Court of Justice 2 May 2006 (Case C-341/04) (Eurofood).

18 It is clear that the presumption that the debtor’s COMI is the place of its registered office (Article 3(1) last line) is to be taken serious. It only can be rebutted “if factors which are both objective and ascertainable by third parties” enable it to be established that reality differs from legal form (the formal location at that registered office). The ECJ provides two examples: (i) when the company is not carrying out any business in the territory of the Member State in which its registered office is situated, and (ii) where a company carries on its business in the territory of the Member State where its registered office is situated. In the first example (POboxes; sham companies) the presumption may easily be rebutted. In the second example, the COMI of the debtor could be in the other Member State, but “the mere fact that its economic choices are or can be controlled by a parent company in another Member State” is not enough to rebut the presumption. Internal “invisible” (potential) control by the parent company will be not or hardly ascertainable. Rebutting the presumption based on these facts does not have effect. That is only possible if factors which are both objective and ascertainable by third parties would lead to that consequence. For comments see, among many others, Bob Wessels, The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation, in: 3 European Company Law, August 2006, 183ff; Samuel L. Bufford, International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies, in: 12 Columbia Journal of European Law Spring 2006, 429ff; Samuel L. Bufford, Center of Main Interest, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice, in: 27 Northwestern Journal of International Law & Business, Winter 2007, 351ff. According to Paul Torremans, Coming to Terms with the COMI Concept in the European Insolvency Regulation, in: Paul Omar (ed.), International Insolvency Law. Themes and Perspectives. Aldershot: Ashgate Publishing Limited, 2008, 173, courts should be “extremely reluctant” to overturn the presumption.
the territory of another Member State after lodging the request but before the proceedings are opened.\textsuperscript{19}


In addition to a judgment opening main insolvency proceedings, Article 3(2) InsReg gives the courts of another Member State, in which the debtor does not have his centre of main interests but possesses an “establishment”, jurisdiction to open insolvency proceedings in relation to that debtor. A secondary proceeding, opened pursuant to Article 3(2), does not have universal effect, as the effects are restricted to the assets of the debtor situated in the territory of that particular Member State. The proceeding itself can only be a liquidation proceeding (Article 27 InsReg). In principle there may only be one main insolvency proceeding. If a debtor has a number of establishments in various Member States, a corresponding number of secondary insolvency proceedings may be opened in each of those States.

According to the definition in Article 2(h) an “establishment” is “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”. “Place of operations” has been defined as “a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an ‘establishment’”,\textsuperscript{20} for which reason the availability of only a bank account in a Member State or the possession of merely a holiday home does not lead to the determination of an establishment.\textsuperscript{21}

c. Other Judgments

Article 3 InsReg relates to the international jurisdiction to open insolvency proceedings, either main insolvency proceedings (based on COMI) or secondary proceedings (based on establishment). Many judgments of a nature other than “opening” insolvency proceedings can be detected within the system of the Insolvency Regulation; e.g., Article 25 InsReg creates a system of recognition and enforcement of judgments which concern (i) the course and closure of insolvency proceedings, (ii) compositions approved by the foreign court, (iii) judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court, (iv) judgments relating to preservation measures taken after the request for the opening of insolvency proceedings, and (v) other judgments. Recently several question have been referred to the European Court of Justice (ECJ), posed by the Supreme Courts of member states, related to these categories of judgments. See further below.

\textsuperscript{19} European Court of Justice 17 January 2006 (Case C-01/04) (Suzanne Staubitz-Schreiber). It is interesting to note that in the ECJ’s approach to the aims and objectives of the Insolvency Regulation the recitals are pivotal. Furthermore, emphasis is laid on the interests and the protection of creditors, which seems to function as a forerunner of the ECJ decision in the Eurofood case.

\textsuperscript{20} Virgós / Schmit Report (1996), nr. 71.

\textsuperscript{21} On the concept of establishment, see Virgós / Garcimartín (2004), supra, nr. 300; Bob Wessels 2006, 10532 (analysing jurisprudence) and Suzanne Riedemann, in: Pannen 2007, 64.
Article 3(1) InsReg provides a rule to determine the courts of which Member State are to have jurisdiction to open insolvency proceedings in relation to a debtor. The extent of that jurisdiction itself is not determined. The central question therefore is: does the concept of insolvency proceedings extend to all ancillary or related actions commenced within the context of an insolvency or is it confined to the core proceedings itself? This question determines which regime is to provide the jurisdictional rules governing the action: the Insolvency Regulation or the Brussels Regulation 2002 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The point of view of a majority in literature is that the Insolvency Regulation and the Regulation on Civil Jurisdiction and Judgments are complementary. They do not contain overlap, nor do they leave a gap in their application. In that sense the scope of the Insolvency Regulation can be identified by reference to the exceptions to the application of the Brussels Regulation 2002, specifically Article 1(2)(b) of the latter Regulation, which indicates that it does not apply to: “bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”

The system for the recognition and enforcement of judgments as laid down in Articles 3, 16 and 25 of the Insolvency Regulation, consisting of five different regimes concerning the recognition and enforcement of certain judgments has, not without reason, been referred to as complicated. However, its structure, including the used wording, can be regarded as a codification of the decisions of the European Court of Justice regarding the Brussels Regulation 2002.

Should a Danish judgment in the context of insolvency proceedings be recognised on the basis of Article 25 or on any other basis? As has been mentioned “Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.” (Recital 33). The decision of the District Court of Frankfurt 24 January

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2005\textsuperscript{27} is therefore not surprising. The Court decided that the Insolvency Regulation does not apply to Denmark and that an order of a Danish insolvency court can not be enforced by applying Article 25 InsReg. With regard to this question on 9 April 2008 the Spanish Supreme Court has referred a question to the ECJ: “Does the fact that Regulation No 1346/2000 is not binding on and is not applicable in Denmark mean that other Member States are not to apply that Regulation in respect of the recognition and enforcement of judicial declarations of insolvency handed down in that country, or, on the other hand, that other Member States are obliged, unless they have made derogations, to apply the Regulation when the judicial declaration of insolvency is handed down in Denmark and is presented for recognition and enforcement in other Member States, in particular, in Spain?”\textsuperscript{28} Any forecast of the direction the ECJ will take is dangerous, but it may be expected that the Frankfurt decision will set the tone.

\textbf{(1) Judgments Deriving Directly from the Insolvency Proceedings and Which Are Closely Linked With Them}

Judgments “handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16” and which judgments “concern the course and closure of insolvency proceedings” … “shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.” The conditions for the opening, conduct and closure of proceedings shall be determined by the lex concursus (Article 4(2) InsReg) and shall, without further formalities, produce the same effects in all other Member States; however, they will be enforced in the manner as described. For judgments “deriving directly from the insolvency proceedings and which are closely linked with them” the method of enforcement as detailed in Article 25(1), first subparagraph, second sentence, also applies to such judgments. Although Article 25(1) InsReg deals with the recognition and enforcement of (certain types of) judgments, the Regulation does however not provide a clear rule with regard to the international jurisdiction with regard to actions which may result in insolvency-related judgments, where Article 3 InsReg just provides for international jurisdiction in relation to the decision of “opening” of insolvency proceedings. In June 2007 a question related to this issue has been referred to the ECJ by the German Supreme Court.\textsuperscript{29}

A German company had transferred € 50 000 a few days prior to its insolvency to an account of a third party (a Belgium company), which it held with a German bank, for delivery of goods. The liquidator in the main insolvency proceedings opened in Germany filed its action (based on the existence of a detrimental act or “avoidance action”) at the court that in general has jurisdiction in Germany, but in appeal the District Court (\textit{Oberlandesgericht}) in Frankfurt decided on 26 January 2006 that the court in the first instance lacked international jurisdiction. In summary, the District Court decided that the Brussels Regulation 2002 does not provide jurisdiction for a German court, that the exclusion of Article 1(2) related to insolvency proceedings does not relate to an avoidance action, that Article 3(1) InsReg does

\textsuperscript{27} District Court of Frankfurt 24 January 2005, ZinsO 2005, 715.
\textsuperscript{28} See Case C-148/08 (Finn Mejnertsen v. Betina Mandal Barsoe).
\textsuperscript{29} Case-339/07 (Seagon, acting as liquidator of Frick Teppichboden Süpermarkte GmbH v. Deko Marty België NV).
not cover the international jurisdiction for a judgment deriving directly from the insolvency proceedings and which is closely linked with them and that an analogous interpretation of Article 3 must be disregarded. The two questions referred to the ECJ are: (i) will the courts of a Member State, in the territory of which main insolvency proceedings against a debtor have been opened, have international jurisdiction concerning an avoidance action (Insolvenzanfechtungsklage) against a third party, a Belgian company, who has its statutory seat in Belgium, and (ii) in case the answer is negative, will the action fall within the scope of the exclusion of Article 1 II b Brussels Regulation 2000 or is the latter Regulation applicable?30

Already a year earlier, in the Netherlands, District Court Utrecht 26 July 2006 decided in the line of the Frankfurt Court in a case in which a German liquidator (Conrads re the insolvency of Gold-Zack AG) initiated an avoidance action (Actio Pauliana) against a Dutch party (the Dutch company Groet Houdstermaatschappij B.V.). The Utrecht court decided that Dutch national procedural law is decisive for answering the question because (amongst others) the German Bankruptcy Act (Insolvenzordnung) is not mentioned in either Annex A or C.31 Although the decision falls within the discretion of the ECJ, it should be noticed that a majority of the authors support the view that Article 3 InsReg must be interpreted by way of analogy, determining jurisdiction for insolvency-related judgments, in Germany regarded as the so-called “vis attractiva concursus under European law”, which rejects the application of the Brussels Regulation 2002 or the application of national procedural rules.32 It should be noted though that the vis attractiva concursus principle (in short: the principle that the court which opened the insolvency proceedings has sole jurisdiction to deal with both the insolvency proceedings and any disputes arising from the insolvency) explicitly has not been included in the Insolvency Regulation, see Virgós / Schmit Report (1996), nr. 77.33 Lorenz34 has submitted the better view that Article 25 must be interpreted in the light of Article 3 and the aim to establish not only an economic internal market, but also an internal procedural area, for which reason Article 25, relating to recognition and enforcement, implicitly attributes jurisdiction.35

It is submitted that the application by analogy of Article 3 to determine the international jurisdiction of the courts concerning insolvency-related judgments may well follow the approach the ECJ took in the Susanne Staubitz-Schreiber case,36 in which a strong emphasis is laid on the recitals of the Insolvency Regulation and (in that case) “the transfer of jurisdiction” (in that case: from the court originally seized to the court of another Member

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31 District Court Utrecht 26 July 2006, LJN: AY5201; JOR 2006/278. It is respectfully submitted that the court is clearly wrong here.
32 See Suzanne Riedemann, o.c., Art. 25, nr. 23ff (referring to some ten German and Austrian authors). L. Klöhn and O. Berner, ZIP 2007, 1418ff, though favour the application of the Brussels Regulation 2002.
33 See also Miguel Virgós / Francisco Garcimartín, supra, nr. 82; Jasmina Garasić, Anerkennung ausländischer Insolvenzverfahren, Diss. Hamburg 2004, Frankfurt am Main: Peter Lang, 2005, 2 Volumes, Part II, at 132; Israël, supra, at 269.
35 In this way too: Charlotte Willemer, supra, at 101. For a similar view in the Netherlands, see T.M. Bos, Grensoverschrijdende insolventieprocedures en (de aansprakelijkheid van) pseudo-buitenlandse vennootschappen, in: Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 6638 (2005), 780.
36 ECJ 17 January 2006, Case C-1/04 (Susanne Staubitz-Schreiber).
State, which should decide about opening of insolvency proceedings) “would be contrary to the objectives pursued by the Regulation”, including “contrary to the objective stated in the second and eight recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings...”. According to the Virgós / Schmit Report (1996), nr. 196, other “insolvency-related” judgments include judgments related to (i) an action relating to the admission or the ranking of a claim, (ii) a dispute between the liquidator and the debtor on the question of whether an asset belongs to the insolvent debtor’s estate, and (iii) an action related to the personal liability of directors based upon insolvency law.37

(2) Recognition and Enforcements of Judgments Beyond the Scope of Article 25(1) Insolvency Regulation

Certain actions derive from law other than that relating to insolvency and should therefore not be included within the scope of Article 25(1), even though such actions may be affected by the opening of proceedings (actively or passively). These actions include an action with regard to the existence or the validity under general law of a claim (e.g. a contract) or relating to its amount or an action to recover another’s property the holder of which is the debtor.38 The recognition and enforcement of judgments other than those detailed in Article 25(1) InsReg shall be governed by the Brussels Convention 1968, “provided that that Convention is applicable”, see Article 25(2) InsReg. The purpose of Article 25(2) is “to avoid gaps” between the (now) Brussels Regulation 2002 and the Insolvency Regulation.39 Literature struggles with the interpretation of Article 25(2), especially the words at the end: provided that the (now) Brussels Regulation is applicable, because what would happen if it isn’t applicable, because a certain judgment falls within the exclusion of Article 1(2) concerning “bankruptcy….. and analogous proceedings”? Also to this rule it may be expected that in the near future will provide guidance here. The Netherlands Supreme Court with its judgment of 20 June 2008 has referred three questions to the ECJ.40

The case relates to a German request to enforce in the Netherlands a German order (Beschluss of Court of first instance (Landesgericht) Braunschweig of 5 December 2006) towards the Dutch liquidator to surrender several machines, purchased by the insolvent Dutch company, under reservation of title of the German seller, German Graphics. The Supreme Court is clear in its interpretation: “The German order is not a judgment in the meaning of Article 16(1) InsReg. It has not been given by a court which has opened insolvency proceedings and would therefore be recognised ex Article 16 and, moreover, the German order does not relate to “the conduct and closure of insolvency proceedings”. The order furthermore has not been given by the insolvency judge (insolventierechter) or another judge in the Member State within the territory of which insolvency proceedings have been opened. Finally, the order does not concern a judgment of the insolvency judge, so the German order is fully beyond the reach of Article 25(1) InsReg.” The Supreme Court goes on to consider that therefore the question arises whether the recognition and enforcement of the order, based on Article 25(2) InsReg, is to be determined by the Brussels Regulation: “It is unclear whether this should be accepted without any doubt or whether it should be assessed first that

37 For these and other examples, see Bob Wessels, supra, para. 10800ff, and Suzanne Riedemann, o.c., Art. 25, nr. 18ff.
39 See the Virgós / Schmit Report (1996), nr. 197.
40 Netherlands Supreme Court 20 June 2008, LJN: BD0138 (German Graphics Graphische Machinen GmbH v Van der Stee, liquidator of Holland Binding B.V.).
the order in the light of Article 1(2)(b) Brussels Regulation indeed falls outside the substantial scope of this Regulation. Therefore, according to the Supreme Court, the answer of said question depends on the interpretation of Article 25(2) InsReg and, if assessment as meant is necessary, the interpretation of Article 1(2)(b) Brussels Regulation. It’s the ECJ’s move now.

In a recent comprehensive study, the ongoing discussion both in case law as well as in the legal literature on the problems and uncertainties regarding the delimitation between the Brussels Regulation and the Insolvency Regulation has been mentioned by national reporters as a major problem. Accordingly, the reporters conclude that a comprehensive delimitation between the European instruments should address several issues, one of which is that the delimitation between the two instruments should be clarified to the effect that even collective proceedings and proceedings related to insolvency proceedings which are not explicitly listed in Annex A of the Insolvency Regulation are either dealt with by the Insolvency Regulation or the Judgment Regulation. As demonstrated, presently, under the system of the Insolvency Regulation, each legal or judicial act must be assessed within the context of its own individual circumstances to arrive at its legal qualifications regarding international jurisdiction and enforcement. This could be considered to be a weakness of the Regulation, as it affects the way in which such acts will be followed up or recognized and enforced respectively, which is to the detriment of the certainty that particular creditors may expect and to the objective (of the creation of an internal system) of efficient and effective cross-border proceedings.

**d. Treatment of Multinational Groups of Companies: The Problem**

The Insolvency Regulation does not contain specific rules concerning multinational groups of companies. If insolvency proceedings are opened against a company that is in some way related to another company the former company is considered to be a separate debtor in accordance with the rule that every legal person is a single debtor under the application of the Regulation. Therefore, the system requires that any legal person in any Member State must be considered separately – even if sole-shareholder or majority shareholder relationships exist between some of them – with regard to the question of where the centre of main interests is located. COMI “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” (Recital 13), but in the absence of proof to the contrary Article 3(1) InsReg assumes that the registered office is the centre of main interests. The Regulation “presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This

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44 See Gabriel Moss and Tom Smith, supra, at 208; Bob Wessels, supra, par. 10590. We agree with those authors that submit that the system of recognition of judgments re insololvency is too complicated, see e.g. Horst Eidenmüller, Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht, IPRax 2001, 9, and Jens Haubold, Europäisches Zivilverfahrensrecht und Anspruch im Zusammenhang mit Insolvenzverfahren, IPRax 2002, p. 159.
place normally corresponds to the debtor’s head office.” The Regulation’s approach to companies is founded on strictly legal notions.

Within the broader framework of EU measures it has been correctly noted that this approach is ambivalent to Community rules regarding reclamation of unlawful State aid (Article 87 EC Treaty) which are applied by looking through the legal structure of the entity.

In addition, an exception to the rule of considering the debtor only in terms of a single and separate legal entity may be at hand “where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located,” see Recital 19. The recital continues that, in this situation, the liquidator in the main proceedings may request the opening of secondary proceedings “when the efficient administration of the estate so requires,” which seems to suggest that, under certain circumstances, the opening of secondary proceedings may be requested in relation to e.g. a wholly owned subsidiary in another Member State, when the financial and commercial administration, the IT-platform, etc. are inseparably shared with the debtor.

In Eurofood, in determining the COMI of a debtor company, the ECJ held that it followed that the presumption in favour of the registered office of that company could be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation existed which was different from that which locating it at that registered office was deemed to reflect. Moss and Smith interpret the quoted words in the Virgós/Schmit Report, nr. 75 (“that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”) to mean that any evidence designed to show that the COMI is in a member state other than that in which the registered office is located, must demonstrate that the head office functions were carried out in that other State. They submit that it is more appropriate to focus on where the head office functions are carried out rather than on the location of the head office, suggesting that the place in which “head office functions” are carried out will be the place where activities such as strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branding etc., are performed. In several European court cases the ‘head office functions’ approach to determine COMI has been followed. See the following examples from Germany, France and England.

Hettlage AG & Co KG, the debtor, was a company registered in Austria and was a 100% subsidiary of Hettlage KgaA, registered in Germany. The District Court Munich held: (i) that the German court of the registered office of the parent company had international jurisdiction to open main insolvency proceedings against subsidiaries abroad, if the actual location of economic interests (“tatsächliche Verwaltungsort der Wirtschaftlichen Interessen”) and therefore the centre of the debtor’s main interests in the meaning of Article 3(1) was at the registered office of the parent company, (ii) the centre of main interests of a subsidiary abroad would be presumed to be the place of the domestic company if the latter

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45 Virgós / Schmit Report (1996), nr. 75.
46 C. Paulus (2002a), 730.
47 Gabriel Moss and Tom Smith, supra, 8.39.
48 On these cases Wessels, supra, par. 10595; Christoph Paulus, Group Insolvencies – Some Thoughts about New Approaches, in: 42 Texas International Law Journal 2007, 819ff.
delivered services such as purchasing, sales, marketing, personnel and accounting as part of
the operational business, (iii) by concentrating these tasks at the place of the registered office
of the parent company ("Konzernsitz", in Munich, Germany) the presumption of Article 3(1),
second sentence, that the registered office of a company shall be presumed to be the centre of
main interests in the absence of proof to the contrary (Innsbruck, Austria) was rebutted.49

The Collins & Aikman Corporation Group consists of one company incorporated in
Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden,
three in Italy, one in Belgium, four in The Netherlands and one in the Czech Republic. The
Collins & Aikman Group had its headquarters in Michigan, USA, and was a leading global
supplier of automotive component systems and modules to the world’s largest vehicle
manufacturers, a combined workforce of approximately 23,000 employees and a network of
more than 100 technical centres, sales offices and manufacturing sites in 17 countries
throughout the world. In Europe it operated 24 facilities in the countries mentioned with
around 4,500 staff. The US operations of the Group went into Chapter 11 proceedings in the
United States in May 2005. The High Court in London considered recital 13 and several
English court decisions regarding the issue of the centre of main interests and stated that in
order to rebut the presumption that the relevant place is the place of incorporation, “it will be
necessary to show that “the head office functions” are carried out in a member state other than
the state in which the registered office is situated.” The evidence from the companies
(probably no other evidence was taken into account) was that the main administrative
functions relating to the European operations had since 17 May 2005 been carried out from
England including cash-coordination, pooling bank accounts from London, HR, IT,
engineering and design and sales. The submission and evidence was that the registered office
of each of the companies was in England and there was no material which would rebut the
presumption that England and Wales was the centre of main interests of each of the
companies. The court was satisfied on the evidence that the centre of main interests for each
of the companies, apart from the English companies, were not related to the location of their
respective registered offices.50

In February 2005 the Commercial Court of Nanterre, in France, noted that the courts
of member states had applied the concept of “headquarters functions” in determining COMI.
It considered that, in the context of a group of companies, the concept of “head-office
functions” should be used to determine the location of the company’s COMI.51 A fine
example also is to be found in the case of Eurotunnel, where the Paris Commercial Court
adopted a similar approach. Eurotunnel PLC is a holding company under English law, with
registered office in England. Together with Eurotunnel SA, a French company, it is one of
holding companies of the Eurotunnel Group, with subsidiaries in Spain, Germany, Belgium
and the Netherlands. Because of ongoing financial difficulties representatives of seventeen
companies, including Eurotunnel PLC filed a request on 11 July 2006 for the opening of

49 Court Munich 4 May 2004, ZIP 2004, 962 (Hettlage); ZIP 2004, 1064; NZI 2004, 450 (Mankowski); EWiR
2004, 495 (Paulus).
50 High Court of Justice (Chancery Division Companies Court) 15 July 2005, [2005] EWHC 1754 (Ch) (Collins
& Aikman Europe SA). See also e.g. Re BRAC Rent-A-Car International Inc [2003] 2 All ER 201, [2003] 1
WLR 1421; Re Daisytek-ISA Limited [2004] BPIR 30; Re Ci4net.com Inc [2005] BCC 277; Re TXU German
793, note Jean-Luc Vallens; Sandy Shandro, Insolvency of Corporate Groups, in: American Bankruptcy Law
“Sauvegarde”-proceedings. The court referred to the Eurofood judgment and applied an autonomous – unrelated to national laws – interpretation. The court considered that several facts and circumstances proved that the COMI of the various companies was in France, including (i) strategic and operative management of the group of companies is discharged by a joint council, based in Paris, comprising only French citizens, (ii) managing finances and accounting takes place in France, (iii) the majority of the activities, employees and assets are located in France, and (iv) all negotiation on debt restructuring took place in Paris.52

In June 2008, the High Court of Justice considered regarding Lennex Holdings PLC and two Spanish subsidiaries and within the context of the Eurofood decision: “What I should concentrate on is the head office functions of the two Spanish companies. It is, I should say, clear that the two Spanish companies do carry on business in the member state where their registered offices is situated and consequently the ‘mere fact,’ that its economic choices are or can be controlled by a parent company is not enough to rebut the presumption. That is not what is relied on in the present case. It is not control by a parent company that is relied on in the present case. It is control of the companies themselves by their boards of directors.” The relevent facts of the case at hand related to strategic, operational and management being conducted from England, with the court concluding: [t]hus the financing of the company, its major decisions and the administration of the company itself is conducted in this country and through English suppliers, English directors and with English funding.”

The “head office” approach will have several benefits, including fewer procedural costs and a transparent method of tracing assets, due to the availability of all the group’s documents, and improving the possibility of selling parts of the business which economically form one business, but are legally broken down into several legal entities.53 It has however been submitted that the head office functions theory follows from the (interpretation of) the text, the history and the system of the Regulation.54 The theory (“head office functions”, “parental control doctrine”, “mind of management approach”), with emphasis on typical issues of group structure and organisation, departs from the rationale laid down in Virgós/Schmit Report (1996), nr. 75, that third parties must always be able, in every system of insolvency, to calculate their risks. The COMI can hardly be ascertained by third parties without investigating the group structure. By emphasizing the importance of the “interior” of the ties based on corporate and contract law and the managerial and operational structure of a group (to which the debtor belongs), third parties will not be able to do this calculation. The question should be considered too as to what happens when the group’s management simply decides to change its place of control. The head office functions approach then serves as an

53 See e.g. Taylor, Practical Difficulties in Handling Group Insolvencies, in: 1 International Corporate Rescue, Issue 4, 2004, 236.
54 The validity of this interpretation has been questioned, whilst the quoted words from the Virgós / Schmit Report only explain the logic of the choice for the presumption and do not present an independent criterion for determining COMI, while the suggested meaning of the place “where the head functions are carried out” go beyond the context of the COMI, being Recital 13: COMI as connecting factor is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. See Bob Wessels, The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation, in: 3 European Company Law, August 2006, 183ff.
invitation for what the Regulation aims to avoid, i.e. forum shopping. From the Virgós / Schmit Report and Recital 13 flows the decisiveness of the “contact with creditors approach” is decisive. This would form only a starting point as it remains to be seen whether all creditors are equal or a division should be made between “large” and “small” creditors, “trade” creditors of “insider”, i.e. creditors with knowledge of certain (“internal”) facts.

e. Treatment of Multinational Groups of Companies: A Solution?

The treatment of multinational groups of companies is a hotly debated topic. Firstly, it is in agreement that there is a widely spread lack of solutions of an integrated concept of group insolvency. Secondly, it is in agreement too that “One subsidiary in not the other”. Within (multinational) groups of companies there is an enormous variety of possibilities in the way they are organised, managed, financed and operated. These differences should play a role when considering new principles or rules to apply in the cross border insolvency context. Within Europe, related to the Insolvency Regulation, several suggestions have been made, which all have their pros and cons.

The first suggestion is to leave matters as they are. The ECJ in Eurofood did not condemn the interpretation as followed by “a vast majority” of European courts in particular in the context of groups of companies and the ECJ leaves it to the national courts to further develop criteria meeting the COMI-test of “objective and ascertainable by third parties. The treatment of multinational groups of companies is preferably left to “national case law (under the control of the ECJ, to avoid excesses) to continue to keep the Regulation up to date.” From this suggestion the method to be followed is that each individual (subsidiary) should be looked at separately and any appreciation of a company’s autonomy must be weighed against creditors’ expectations, although it is fully admitted that the Regulation was not meant to create the possibility to guarantee “one stop European filing.”

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55 In this way also e.g. Duursma-Kepplinger, supra, Art. 3, nr. 15; Bruno Kübler, Der Mittelpunkt der hauptsächlichen Interessen nach Art. 3 Abs. 1 EulnsVO, Festschrift für Walter Gerhardt, RWS Verlag Kommunikationsforum 2004, 527; Dietmar Adam, Zuständigkeitsfragen bei der Insolvenz internationaler Unternehmensverbindungen, Baden-Baden: Nomos, 2006, at 92.
59 For an overall view, also describing UNCITRAL’s present work regarding “enterprise groups”, see Janis Sarra, Maidum’s Challenge, Legal and Governance Issues in Dealing With Cross-Border Business Enterprise Group Insolvencies, 17 International Insolvency Review 2008, 73.
61 Michel Menjucq and Reinhard Dammann, supra.
62 Patrick Wautelet, supra, at 104.
Another opinion was published in connection with the radical different approaches the courts in Ireland and Italy took when interpreting and applying COMI in the Eurofood case. An amendment to the Regulation should, according to this opinion, provide a proper definition, which is necessary as a matter of priority, because no question is likely to create more international conflict between member states than the COMI question. How sensitive the answer to the question is indeed is demonstrated by two well-known commentators, who fully agree on nine points for improvement of the Regulation, but do not succeed in offering a joint proposal for a uniform text for the definition of COMI. The suggested definition for companies and other legal persons from Gabriel Moss is the following: “The centre of a debtor’s main interests for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, except that, where the head office functions of the debtor are carried out in another Member State and that other Member State is ascertainable to prospective creditors as the place where such head office functions are carried out, it shall mean the Member State where such head office functions are carried out.”

The proposal of Christoph Paulus is: “The centre of a debtor’s main interests’ for the purposes of Article 3(1) shall mean, in the case of companies and legal persons, the place of the registered office, or, if shown to be in a different Member State, the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties, except for cases where the debtor is part of a group of companies or legal persons which operate as an economic unit (‘an economic unit case’). In an economic unit case, the centre of a debtor’s main interests for the purposes of Article 3(1) shall mean the place where the head office functions of the debtor are carried out, provided that place is ascertainable by prospective creditors as the place where such head office functions are carried out.”

A third proposal originates from Horst Eidenmüller. It is based on an economic analysis of applicable legislation and takes into account Articles 43 and 48 EC Treaty, allowing firms “to choose a corporate form of their liking, regardless of the location of the actual head office (real seat) of the company.” Based on his theoretical point of view Eidenmüller adopts a model of “constrained forum choice”, i.e. a free choice of bankruptcy forum in combination with the company law applicable to the company. This approach is not only aimed at overcoming the problem of treatment of insolvency of corporate groups, but reflects a general attempt to prevent forum shopping and to improve the certainty for creditors with regard to applicable law. With regard to companies and legal persons Eidenmüller suggests the following text for Article 3(1): “The courts of the Member State within the territory of which the registered office of a company or legal person is situated shall have jurisdiction to open insolvency proceedings. If a company or legal person does not have a registered office, the courts of the Member State according to which laws the company or legal person is organized shall have such jurisdiction.” The proposal has the benefit of clarity for creditors and will probably have the effect that the holding company in a pyramidically structured group of companies will make clear choices of applicable law. On the other hand, it

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65 Id, at 446.
does not solve the issue of treatment of group insolvencies if choices are made for different laws, as this will create again different fora.\textsuperscript{66}

Is it possible to regard a subsidiary company as an “establishment” (in the member state in which the subsidiary has its registered office), in the meaning of Article 2(h) InsReg of the parent company? This question has led to a fourth proposal. The history of the Regulation reveals that the majority of member states did not agree with the use, in the Regulation, of the interpretation of the term “establishment” as provided by the European Court of Justice with reference to Article 5(5) of the 1968 Brussels Convention. Article 5 provides that the courts of a member state have jurisdiction to determine disputes arising out of the operations of a branch, agency or other establishment situated within that state. Article 5(5) Brussels Regulation on Civil Judgments and Jurisdiction 2002 contains the same provision. In 1978 the ECJ held that the concept of “establishment” implies a place of business which has the appearance of permanency so that third parties do not have to deal directly with the parent body.\textsuperscript{67} Consequently subsidiary companies of a parent company have been held to be establishments of such a parent company.\textsuperscript{68} However, the majority of member states preferred an independent concept to be developed for insolvency matters which would take into account the fact that the definition of “establishment” for the Insolvency Regulation would be similar to that developed for said Article 5(5) but, under such definition, separate subsidiary companies would not be considered to be establishments of the parent, as such a broad definition would interfere with general jurisdictional rules under which all companies are considered to be separate entities.\textsuperscript{69} Dutch authors have submitted that, in certain exceptional circumstances, i.e “in the case the subsidiary is fully controlled by the parent,” it may be possible, when applying the presumption of Article 3(1) InsReg, to replace the registered office of the subsidiary (being the centre of main interests) with the registered office of the parent company. The same authors suggest that, in more exceptional circumstances, the subsidiary in the state of the registered office could be classified as an establishment (ex Article 2(h) InsReg) of the parent.\textsuperscript{70}

A recent study\textsuperscript{71} demonstrates however that the question in legal literature generally is responded to negatively. Mainly two reasons have been mentioned – apart from the fact that the history of the term establishment does not seem to support the interpretation given – namely the mere own legal personality of the subsidiary and the fact that the Insolvency Regulation deliberately does not contain rules for group of companies. Although it is recognized that the idea of the subsidiary to be regarded as establishment allows for cooperation for a joint reorganisation from the holding and one or more subsidiaries, history, text and system of the Insolvency Regulation (an establishment only allows for liquidation proceedings) the proposal does not find much support.\textsuperscript{72} In an English case the court refused

\textsuperscript{69} Virgós / Schmit Report (1996), nr. 70; Gabriel Moss and Tom Smith, supra, 8.31.
\textsuperscript{71} Timo Torz, Gerichtsstände im Internationalen Insolvenzrecht zur Eröffnung von Particularinsolvenzverfahren. Studien zum vergleichenden und internationalen Recht – Comparative and International Law Studies, Band 113, Peter Lang, Frankfurt am Main, 2005.
\textsuperscript{72} Torz, supra, at 110. With similar arguments: Dietmar Adam, supra, at 40; Thomas M. Nitsche, Konzernfolgeverantwortung nach lex fori concursus, Baden-Baden: Nomos, 2007, at 266.
to give credence to a creditor’s submission that business premises of a Swedish company’s UK subsidiary company could qualify as an ‘establishment’ for the purposes of Article 3(2) InsReg, where the Swedish parent company itself has no “establishment” in England.73

A fifth view in literature relates to Article 4 InsReg. In an insolvency of a group of companies it is unclear, according to Hirte,74 whether the opening of main proceedings over more than one debtor is covered by Article 4(2)(a) (the lex concursus determines “against which debtors insolvency proceedings may be brought on account of their capacity”).75 Article 4 should be amended to state that a recognition also takes place if a court opens an insolvency proceeding over different members of a group. Hirte is of the opinion that the interests of the subsidiary’s creditors are better served within the framework of one single insolvency, admitting that creditors are helped by Articles 32, 39 and 40 InsReg. A last element in this proposal is the mandatory appointment of a “national law expert” and the possibility to use the creditors’ language.76

A sixth proposal has been made by Van Galen.77 The proposal does not amend the text of Article 3(1) InsReg, but creates a system which has its starting point within the model of the Regulation and from there extends itself with substantial topics. It is based on the principle that if a subsidiary and its ultimate parent company both enter into insolvency proceedings “the liquidator of the parent company be given powers similar to those that the liquidator in main proceedings has vis-à-vis secondary proceedings.” This leads Van Galen to suggest that the parent company’s liquidator should have powers of coordination with respect to the subsidiary’s proceedings as well as the power to effect the coordinated sale of the assets of the companies in question, including the power to bring forward a group reorganisation plan. The result would lead, as Van Galen submits, to amend for instance Article 29 (right of the liquidator in the main proceedings to request opening of main proceedings regarding subsidiaries), Article 31 (mutual rights regarding communication and cooperation should be centered by the liquidator in the main proceedings), Article 33 (stronger position of the main liquidator regarding staying of the liquidation process in proceedings concerning the subsidiaries) and Article 34 (the right to propose a company reorganisation plan).78

73 See High Court of Justice 16 October 2002, [2002] EWHC 2377, [2003] B.C.C. 856 (Telia v. Hillcourt). It is noted, however, that the French Circulaire of 2006, see supra, at 1.2.2, seems to allow the view that a company, with registered seat in France, but with COMI in one of the other member states, can be regarded as “establishment”, see François Mélin, Le règlement communautaire du 29 mai 2000 relatif aux procédures d’insolvabilité, Bruylant, Bruxelles, 2008, at 167.
75 Article 621-2(2) French Commercial Code allows the court to extend the procedure once it is opened to one or more persons when their assets were intermingled with those of the debtor or the existence of the company is a mere sham.
76 It seems that the suggested amendment would fit better in Article 16, whilst Article 4 deals with applicable law. The reference to Article 32 is confusing as that provision presumes the existence of secondary proceedings, which Hirte aims to avoid.
78 “The creditors of the group companies involved in the plan should be divided into separate classes for the purpose of voting on the plan. The court supervising the parent company's main proceedings should have the power to apply “cram-down” provisions, provided (i) the creditors concerned receive more than they would have received if the company in question had been wound up, and (ii) those creditors are not treated unfairly vis-à-vis the other creditors, taking into account the relative strength of their respective positions,” see Van Galen,
Deyda has criticized this proposal. Apart from questions related to political feasibility and the reluctance of some member states against the idea of "group" insolvency, the substance of the proposal is rejected. The group-definition (based on majority of shareholder participation) results in applying the proposed system also in cases in which there will be no organisational and economical unity. Were such an economic oneness exists, Deyda believes the continuation of the business of a group can be to the detriment to the interests of the creditors. He does not favour amending the Regulation, on the contrary, he submits that non-binding agreements between the various liquidators should guarantee the necessary flexibility, that every individual case deserves.79

Finally, one other notable alternative has been developed and applied by courts in Europe. As the model of the Insolvency Regulation is based on the possibility of having secondary proceedings running parallel to main proceedings, whilst these secondary proceedings ultimately act as supportive proceedings for the main insolvency proceedings, in legal practice a seventh solution has been developed. To overcome problems of differences in ranking of claims under various jurisdictions (e.g. under German, Austrian and Italian law a loan of a parent company to a subsidiary in subordinated to all other creditors, in contrast with French, Dutch and UK law; the existence of superprivileges for certain creditors, as in France for employees, unlike the position in other countries, e.g. limited privilege (UK) or no privileges at all (Germany)) some court have treated creditors in Europe “as if” in their respective jurisdiction indeed secondary insolvency proceeding had been opened. Such “virtual contractual secondary proceedings”80 therefore result in the treatment of such creditors as they could expect under their national law. In the MG Rover case,81 the court opened main proceedings against the Rover Group and its subsidiaries in Germany, France, the Netherlands, Belgium, Luxembourg, Spain, Ireland, Italy and Portugal. The court accepted the promise made by the main liquidator of Rover SAS (the French company) which ensured that the French employees would enjoy the same privileges in the main proceedings as they would have received as secondary liquidation proceedings in France would have been opened. An explicit clarification of the powers of the liquidator by way of a supplemental Order sought to address the practical difficulties occasioned by the international jurisdiction provision: “I hope that by this means courts in other Member States may come to appreciate that the principal objective of the administration is to rescue the relevant national sales companies as a going concern.” Eight supplemental Orders were issued describing the objective of the English main insolvency proceedings and the responsibilities and powers of the administrators, including their power to make payments to the employees of eight EU registered subsidiaries to enable the employees to receive the same monies as they would have received if secondary proceedings were commenced, provided that the administrator thought that such payments were likely to assist the purpose of the administration. Subsequently the pressure on the employees of national sales companies to commence secondary proceedings or to ignore the primary proceedings was, to a great extent,

80 Menjucq and Dammann, supra, at 154.
The foregoing demonstrates the variety of possibilities for a preferred treatment of groups of companies under the Insolvency Regulation. The lack of provisions concerning multinational groups of companies has been classified as an omission. However, not all critics take into account the fact that cross-border insolvency within Europe was discussed for over forty years before the Regulation was devised. The discussions concerned complex problems. At the time, the decision to postpone “group insolvencies” to a later date may have been considered both politically and practically prudent. Furthermore, the Regulation reflects thinking of the 1980s and 1990s, when the phenomenon of groups of companies was not as current as in the first decade of the 21st century and, moreover, in domestic insolvency laws reorganisation or rescue of companies was not the prevailing option. In addition, little thought has been given to the position of ‘corporate insolvency law’ and its relation to corporate law, e.g. the ‘punishing’ effect of insolvency law and the function of corporate governance or subjects such as (cross-border) director’s liability. Presently, the EU Insolvency Regulation has its roots in judicial cooperation in civil matters in order to progressively establish an area of freedom, security and justice (Article 61(c) EC Treaty). “Groupings of corporations” is not, in itself, a particularly relevant subject-matter for the EU’s ideal of judicial cooperation and cross-border recognition of legal proceedings. For this reason the aforementioned criticism lacks appropriate context. Finally, it remains for further debate whether in Europe certain rules relating the treatment of insolvency of multinational groups of companies should be developed independently from the present debate on a global level, as presently takes place within UNCITRAL. In the meanwhile courts and practitioners may take advantage of a proposal to develop Principles for Rescue of Multi-National Enterprise Groups.

4. Applicable Law

a. Conflict of Law Rules

Recital 23 states the following without further explanation and using imperative wording: the Insolvency Regulation “….. should set out, for the matters covered by it,
uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law.” The choice seems so obvious that no further explanation seemed necessary. Article 4 of the Insolvency Regulation introduces one of the most important provisions of the Insolvency Regulation. The provision determines which law is applicable to the insolvency proceedings. The guiding principle is that, aside from as otherwise provided in the Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, therefore the “lex (fori) concursus”. The law of the State of the opening of proceedings shall, in particular, determine the conditions for the opening, conduct and closure of those proceedings. Article 4(2) contains an enunciative list of thirteen subjects which are determined by the lex concursus. This rule on conflict of laws is valid both for the main proceedings and secondary proceedings (Article 28 InsReg).

Application of the general principle of the lex concursus results in the enforcement of the internal law of the opening Member State in other Member States and the automatic extension of this law (and therefore the legal consequences of the proceedings) to other Member States (Article 16 and Article 25(1) InsReg). The effect of this principle is therefore hindering or thwarting the legal rules which would otherwise apply to legal acts. The Regulation however aims to provide a counter-balance, see Recital 24: “To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.” The Insolvency Regulation therefore provides a number of these exceptions. Protecting legitimate expectations is an alternative method of stating that certain creditors will be protected from a surprise attack by the lex concursus. In addition to “protecting legitimate expectations” and “protecting certainty of transactions” a third reason should also be mentioned: the exclusions respond to the need to reduce the overall complexity of the insolvency proceedings, see the book of 2004 of the Spanish professors Virgós and Garcimartín, referring to recital 11, which opens with the acknowledgment that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community, as “[t]he application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties.”

Exclusions to the applicability of the lex concursus have been laid down in Articles 5-15. There are two main groups of exceptions to the principle rule regarding applicability of the lex concursus: (i) certain legal consequences of the main proceedings result in exceptions to the lex concursus with regard to certain rights over certain goods situated in a Member State other than the State of the opening of proceedings; the opening of main insolvency proceedings ‘shall not affect’ these rights, see Articles 5, 6 and 7, and (ii) in a group of cases the applicable law in certain legal relationships is determined not by the lex concursus, but by another choice of law (Articles 8, 9, 10, 11 and 15). Following group (i): three subjects are excluded from the legal consequences normally attached to the opening of insolvency proceedings: third parties’ rights in rem (Article 5), set-off (Article 6), and reservation of title (Article 7). Flowing from group (ii): for six subjects the Regulation refers to another applicable law than the lex concursus. This is the case for: contracts relating to immovable property (Article 8), rights and obligations of parties to a payment or settlement systems or to a financial market (Article 9), contracts of employment (Article 10), the debtor’s rights in

86 Miguel Virgós and Francisco Garcimartín, supra, nr. 135.
immoveable property, a ship or an aircraft subject to registration (Article 11), the validity of some acts of a debtor concluded after the opening of insolvency proceedings, in order to protect third-party purchasers (Article 14), and the effects of insolvency proceedings on lawsuits pending (Article 15).\textsuperscript{87}

Both categories of exclusions (group (i) and group (ii)) differ in nature. The first category does not contain a specific conflict of law rule as such, but provides a limitation of, and exclusion to, the universal effect of the lex concursus of the main proceedings which have been opened. It contains its own substantive norms. The second category on the other hand contains pure conflict of law rules. The system of the Regulation therefore has one proceeding (main proceedings in Member State 1, assets in the other Member States) or has two or more proceedings (main proceedings in Member State 1 and one or more secondary proceedings in Member States where the debtor possesses an establishment in the meaning of Article 2(h)), within which different substantive rules apply. In this way the Regulation will require a degree of co-ordination and co-operation between the liquidators appointed in these proceedings, and through them, by the respective courts. The model of the Insolvency Regulation is founded on the principle that coordination and communication takes place between liquidators, see Article 31.

b. Meaning of Lex Concursus

The general rule of the applicability of the lex concursus to the main insolvency proceedings opened is not without problems. In respect of the insolvency proceedings and their effects, Article 4(1) of the English, French and Dutch texts use the wording “the law applicable” (“la loi applicable”, “het recht van de lidstaat”), whereas the German and the Austrian text refer to the applicability for the insolvency proceedings and their effects of “das Insolvenzrecht des Mitgliedstaats,” meaning: the applicability of (only) the insolvency laws of the Member State (of the opening of proceedings). Consequently Paulus questions whether certain topics belong to the domain of (German internal) insolvency law, e.g. the issue of whether director’s liability is an “insolvency” question.\textsuperscript{88} If so, these rules are exported to the other 25 Member States when main proceedings are opened in Germany. Recently it has been submitted that for an English Limited, with its COMI in Germany, both the managing directors’ duty to file for opening of insolvency proceedings in case of their company’s inability to pay (zahlungsunfähigkeit) and its sanction of personal liability towards the debtor-company, in the meaning of Article 64 German Private Limited Companies Act, are “insolvency” questions and therefore based on Article 4 InsReg applicable to a director of a company, incorporated in a foreign state, when the company has its COMI in Germany.\textsuperscript{89} The wording in the German and Austrian texts certainly indicates a narrower meaning of the lex concursus than the wording in other texts as certain legal rules of “the law applicable to

\textsuperscript{87} Article 12 (Community patents and trade marks) provides that certain rights may be included only in the main proceedings. Article 13 (Detrimental acts) creates a defence against the applicability of the lex concursus.


insolvency proceedings” may fall outside a Member States’ domain of “insolvency law,” falling instead under general civil law or general company law, but nevertheless applicable to insolvency proceedings.  

A second remark relates to the nature of the rule of the applicability of the lex concursus to the main insolvency proceedings. Given the nature of a Regulation as an EU measure, the uniform conflict of law rules substitute, by operation of law, national rules of Member States dealing with private international law (of conflict of law rules). A reference to the “applicable law” of a Member State should be taken to mean a reference to that State’s internal law, designated by the respective conflict of law rules and without reference to the latter State’s private international law. Article 4(1) contains a reference to a “Sachnorm”, and is not a “Gesamtnorm.” These German words refer to Article 4(1) containing a substantial norm and not a combined norm (private international law rules included). The InsReg therefore does not use the somewhat complicated method of ‘renvoi’.  

c. Exclusions From the Lex Concursus

The exclusions from the general rules of applicability of the lex concursus create their own difficulties. They are structured similarly and use similar wording. In group (i), Articles 5 – 7, the opening words provide that the judgment concerning the “opening of insolvency proceedings” shall not affect certain rights. This raises the questions of whether such rights will be affected by other decisions during the conduct of the proceedings and what the precise meaning is of the words “shall not affect.” In several Articles of the second group – but also in Article 6 – the exceptions refer to the “law” of a State or of a Member State. Does this include references to a parties’ choice of law? Is a reference in the provisions in the regulation to a “State” limited to “EU Member States”? Articles 5 – 15 may, in the words of Fletcher provide a miniature code of uniform conflict rules, however, abundant legal commentary demonstrates the vagueness of certain central terms and the uncertainties which result from the unclear formulations.

(1) Opening of Insolvency Proceedings

The provisions laid down in Articles 5 – 7 are linked to the “opening of insolvency proceedings.” The “opening” of main insolvency proceedings and the consequential effects of automatic recognition (universal effect of the lex concursus) “shall not affect” certain rights. The obvious question is: will such rights be affected by other decisions or judgments made during the course of the main insolvency proceedings? Or should “[t]he opening of insolvency proceedings,” be read to mean: shall not be affected by “[t]he Insolvency Regulation.” It has

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90 The width of the rule of the lex concursus is not only a European question, as in the UNCITRAL Legislative Guide, the recommendation with regard to “Law applicable in insolvency proceedings” reads: “(31) The insolvency law of the State in which insolvency proceedings are commenced (lex fori concursus) should apply to all aspects of the commencement, conduct, administration and conclusion of those insolvency proceedings and their effects.”
92 See Fletcher, supra, 7.79.
93 Fletcher, supra, 7.78.
been suggested that the text (“opening”) is clear and therefore it is a “pure and simple rule,”\(^94\) that only the effects of the opening are halted, not any later effects of other decisions or orders during the proceedings. Berends argues (op. cit., 399) that Article 5 can be interpreted in terms of the ‘pure and simple rule’. This interpretation\(^95\) has followers in e.g. the Netherlands,\(^96\) Germany and Austria.\(^97\) The beginning words of the text of Article 5 – 7 is certainly confusing, however, it is submitted that the pure and simple rule does not contribute to the achievement of the purpose of the Regulation. Its application would lead to interference with legitimate expectations (first reason for the exclusions) and can hardly be seen as simplifying the administration of the proceedings (third reason for the exclusions). The genesis and the teleology of the Regulation point to the interpretation that the rights mentioned in Articles 5-7 are immune for the lex concursus from the main insolvency proceedings. In this way too Virgós and Garcimartín\(^98\) and Philip Smart.\(^99\)

\[2\text{ Shall Not Affect}\]

The exception to the main principle of applicability of the lex concursus in Articles 5 – 7 is worded as follows: the “opening” of insolvency proceedings “shall not affect” (“oververlet laat”; “nicht berührt”, “n’affecte pas”) the rights which fall under the scope of these Articles. With regard to Article 5, “shall not affect” means that the lex concursus of the main proceedings shall not affect the rights in rem of creditors or third parties in respect of certain assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. In literature several propositions have been submitted for the interpretation of “shall not affect”

The first proposition (“secured creditor limited by lex rei sitae”) is that the holder of a right in rem will not be affected by foreign law (i.e. the universal reach of the lex concursus of the main proceedings), but will be bound by any limitation of the lex rei sitae, i.e. the limitations which are contained in the law of the Member State in which the asset is situated. Thus: a creditor who has taken security over real estate located in Italy will not be affected by the consequences of the opening of main insolvency proceedings in France, but he will be subject to any limitations imposed by Italian law for this type of creditor. The rationale for this approach is that it is unfair to place this creditor in a better position than he would have been if the property had been located in the Member State in which the proceedings were opened.\(^100\)

\(^{94}\) André J. Berends, Insolventie in het internationaal privaatrecht, Doct. Thesis Vrije University, Amsterdam, 2005, at 388.

\(^{95}\) Berends (representative of the Netherlands during the negotiations finally leading to the text of the Insolvency Regulation) is of the opinion that draftsmen are inclined to deliberately include terms of a vague nature in respect of certain topics in EU Regulations and Directives. The adoption of ambiguous text occurs, in Berends’ opinion, where issues are, on the one hand, of a sensitive nature, but on the other hand not sufficiently significant to warrant the inclusion of a separate EU measure (such as the Insolvency Regulation). In Berends’ opinion the chosen words in this instance could have been the result of such “intentional and creative ambiguity.”

\(^{96}\) Jona Israël, supra, at 280.


\(^{98}\) See Miguel Virgós and Francisco Garcimartín, supra, nr. 166.


\(^{100}\) For an overview of opinion, mainly from authors from Germany, see Alexander Plappert, supra, at 270.
The second approach ("secured creditor limited only to the extent that the limitations of the lex rei sitae match the limitations of the lex concursus") is that the holder of a right in rem shall not be affected by the opening of the foreign main proceedings, but will be bound by those limitations of the lex rei sitae to the extent that such limitations reflect the limitations of the lex concursus. Authors in favour of this opinion state that the protection which Article 5 aims to provide is not frustrated as rights in rem are not limited as severely as they would have been in a domestic proceeding. The desire to uphold legal certainty is central to this proposition as the creditors’ rights in rem will not be affected as they would have been following the opening of national insolvency proceedings. This approach has been called the "cumulative solution" (Kumulationslösung) and has found some approval in the Netherlands and in Germany.101

A third proposition ("secured creditor may exercise all his rights, undisturbed") is that the holder of the right in rem can exercise his rights without exception or limitation. The wording "shall not affect" is read to mean that said secured creditor does not encounter any limitation. It is clear from the Regulation’s preparatory working documents that this is the approach that should be followed. This view is referred to as the “hard and fast rule” or the “maximalist view.”102 In the final discussions regarding facilitation of estate administration the majority preferred the simplicity of the formula laid down in the current Article 5, for reasons of the “simplification of the administration of insolvency proceedings.”103 The reason given by Virgós for the choice of the “hard and fast rule” is that it is based on an idea of law and economics: “In evaluating the alternatives, not only policy considerations but also arguments based on the relative procedural costs were taken into account: both administration (= those necessary for the application of the rules) and error (= those derived from wrong applications of the law) were compared for this purpose…. (…) …the idea of facilitating the administration of the estate and the purpose of achieving a PIL text of simple application was decisive: better but more difficult to administer PIL solutions would require constant recourse to legal services, added costs and time-delays.”104

The hard and fast rule in general105 is understood to result in the non-application of those lex concursus provisions which relate to forms of postponement or dissolution of rights and of the provision that certain holders of rights in rem should contribute to the costs of the estate.106 Some authors describe the hard and fast rule in terms of the secured creditor gaining an unexpected advantage or “internationality bonus,”107 which allows a secured creditor to

103 See Miguel Virgós and Francisco Garcimartín, supra, at nr. 136 and nr. 164.
104 Virgós, supra nt __, at 20.
105 For further debate, see Wessels, supra note __, para. 10635.
execute the collateral pending an insolvency proceeding in a case where the national law would not allow such execution. Although Article 5 should indeed be interpreted as a hard and fast rule, it is the general opinion that the result of this interpretation is the over-protection of secured creditors and only can be understood by resorting to the main reason: the simplification of the administration of insolvency proceedings. The other aforementioned approaches are contrary to the ratio of the provision. Furthermore they do not seem logical as they introduce elements, derived from the lex concursus, whereas Article 5 InsReg intentionally serves as an exception to the lex concursus. Finally, reference should be made at this juncture to a German study of 2004, which provides a detailed analysis of Articles 5 and 7 in an aim to shed some light on what she calls the “interpretation chaos” in legal literature (not including English and Dutch literature). The study considers a textual interpretation in fourteen languages with regard to the wording “shall not affect,” with the outcome that in nearly all languages the term may be read to mean either “no affect whatsoever on the right in rem” or “not to be influenced to the detriment of the holder of the right in rem.”

(3) State

A third term common to several of the exclusions is the word “State.” In Articles 8, 10, 11, 13 and 14 the exception to the application of the lex concursus is made by referring to “the law of the Member State.” This gives rise to the question of what should happen if parties have inserted a choice of law provision referring to non-EU law, e.g. Turkish law, the Laws of Texas or Delaware or – for that matter – Danish law. In this instance the intention of the Regulation is clear. It does not seek to regulate the effects of the insolvency proceedings vis-à-vis non-Member States. “Where non-Member States are concerned, it is the responsibility of each Member State to define the appropriate conflict rules.” It is submitted, that this explains why all of the exceptions to the application of the basic conflict of law rule of the lex concursus are limited to situations governed by the law of a Member State. This opinion does not take into account the fact that Article 14 merely refers to “State” in the English, German, French and Dutch versions. With regard to the laws of non-Member States, the rationale behind the Regulation is therefore deference to the national private international law rules of the Member State in question. The “Community Connection” dictates that the Regulation only governs intra-Community conflicts, i.e. when the debtor’s centre of main interest is in the Community and either the asset in question is located in a Member State (according to the location rules of Article 2(g)) or the law governing the claim or the legal relationship is itself, according to the ordinary conflict of law rules of the forum, that of a Member State.

108 See e.g. Miguel Virgós / Francisco Garcimartín, supra, 105; Israël, supra, 280.
110 Naumann, supra, at 133.
111 Naumann, supra, at 214.
113 Miguel Virgós / Francisco Garcimartín, supra, at 24.
114 Miguel Virgós / Francisco Garcimartín, supra, at 11.
115 Miguel Virgós / Francisco Garcimartín, at 24.
An example could illustrate the uncertainty with regard to the meaning of the word “State.” Main insolvency proceedings have been opened in Germany and in an office (establishment) of the insolvent debtor in the Netherlands twenty people are employed on contracts to which German or Dutch law applies. In these cases either German law or Dutch law is decisive for “[t]he effects of insolvency proceedings” (Article 10 InsReg) to those contracts. The power to terminate these contracts will be in the hands of the German liquidator (lex consursus). Typical employment law effects can not be seen as “effects of insolvency proceedings” and these will therefore be determined by the law applicable to the employment contract (lex laboris). In general one may think of the period for termination to obey or the size of the monetary claim for instance for non taken holidays, although the distinction may not be so clear. Now, a non-EU element is introduced in this case. In the office in the Netherlands also a USA expert works, on an employment contract to which the law of Texas. In such a case four approaches present themselves as possible solutions:

(i) the intra-Community approach, as explained above and followed by most of the European authors. The result is that the regulation only deals within the EU. The choice for the laws of Texas brings the whole case outside the Community context, and general private international law rules of Texas state law will determine the outcome;

(ii) a textual interpretation of the exclusion: a reference to the laws of Texas does not trigger the exclusion of Article 10, as it is obvious that Texas is not an EU Member State. The exclusion of Article 10 not being applicable, the matter falls back to the applicability of the general rule: the lex concursus (German law);

(iii) a choice for non-EU law is decisive. Where the Regulation does not seem to interfere with the freedom to decide which rules third parties deem most appropriate, it is logical to presume that when non-EU law applies (e.g. as the lex causae), the latter law is decisive.

(iv) finally, the rationale of the exception. In some cases the exceptions to the general rule of applicability of the lex concursus reflect the desire to accommodate the fact that Member States wish to protect their social or economic policies in relation to certain matters, for instance concerning employment (Article 10) and real estate (Article 8). In other cases the purpose is to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, for instance in cases of set-off (Article 6). It could be submitted that there is no reason in the latter case (where a social policy does not seem to prevail) not to protect legitimate interests based on a choice of law provision in a contract which refers to non-EU law. If this is the case, the exception provided for in Articles 8 – 11 and 13 – 15 also applies beyond the Community context. It should be noted in this regard that Article 9 (with regard to payment systems and financial markets) explicitly allows the application of “the law of the Member State applicable to that system or market.” It cannot therefore be excluded that the Regulation must give way to non-EU law, if this law is applicable to the particular “system” or “market.”

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116 See Wessels, supra n. __, para. 10637.
117 Most authors opine that the Rome Convention should be applicable in this type of cases, see e.g. Berends, supra, at 370; Haubold, supra, at 131; Fletcher, supra, at 7.79.
118 The English language version of Article 14 refers to the law of the “State” within the territory of which the immovable asset is situated or under the authority of which the register is kept. Other text versions of the Insolvency Regulation refer to the “State” (“l’État”; “Staate”; “estato”; “stato”). The Dutch version of Article 14 however refers to “lidstaat”, meaning Member State. Here, the same question arises as in the case of the text in Article 6 of whether the scope of the Article is indeed limited in its application to a “Member State” or encompasses the law of all states, including non-EU States. On the basis of the purpose of providing a guarantee (i.e. protection of third parties acting bona fides) with the insertion of the exclusion Wessels, supra, para. 10638 submits that the law of a third non-EU state provides a creditor with sufficient grounds to defend an exception to the general principle of the application of the lex concursus. Miguel Virgós / Francisco Garcimartín, supra, nr.
The examples above suffice to demonstrate the uncertainties in the application of the conflict of law rules of the Regulation. Although the conflict of law rules in Articles 5-15 provide a harmonized miniature code of unprecedented value, it should be regarded with caution. As described above in Chapter 4, several European countries in relation to non-EU countries follow the model of “extending” (a selection of) the conflict of law provisions to their relationships with non-EU countries, for instance Germany, Spain and the Netherlands (draft legislation). The mini-code of choice of law provisions is to be regarded as a valuable tool and a useful point of departure for drafting certain topics. It is noted that “extension” has not to be taken literary as some of the “extended” provisions indeed are the result of a further study of the consequences of Article 5 – 15 of the Insolvency Regulation.

5. Recognition of Insolvency Proceedings

a. Automatic Recognition of a Judgment Opening Insolvency Proceedings

The Insolvency Regulation provides for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings, which come within its scope and of judgments handed down in direct connection with such insolvency proceedings (Article 16 InsReg). Automatic recognition should therefore mean that the effects attributed to the insolvency proceedings by the law of the State in which the proceedings were opened (lex concursus) extend to all other Member States. Recognition requires no preliminary decision or other formality by a court of the requested State (Article 17 InsReg). Within the territory of the Member States Article 16 establishes the general principle of recognition of a judgment opening insolvency proceedings, which have been opened by the competent authority of a Member State under Article 3 InsReg. The European Court of Justice 2 May 2006 (Eurofood)\(^\text{119}\) has ruled that the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States, “without the latter being able to review the jurisdiction of the court of the opening State.” A decision to open insolvency proceedings for the purposes of Article 16’s rules of automatic recognition is, according to the European Court, “a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor’s insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment implies that the debtor loses the powers of management that he has over his assets.”

An important effect of the recognition of insolvency proceedings opened in a Member State is the recognition of the appointment of the liquidator and of his power in all other Member States. By virtue of this recognition the appointed liquidator will be able to exercise his powers – conferred upon him by the law of the State of the opening – in other Member States. The nature, obligations and scope of the liquidator’s powers will be determined by the law of the State of the opening and of the proceedings in respect of which he was appointed. Article 18(1), last line, expressly stipulates that the liquidator may even transfer assets out of the State in which they are situated. In this regard the liquidator must respect however Article 137, are not convinced that the “literal interpretation of this omission” is simply a question of wording. However, they are silent on the argument that the purpose and rationale may allow a broader view.

\(^{119}\) European Court of Justice 2 May 2006 (Case C-341/04) (Eurofood).
5 (Third parties right in rem) and Article 7 (Reservation of title) since the proceedings cannot affect rights in rem of creditors or third parties over assets, situated at the time of the opening in a Member State other than the State of the opening of proceedings. The creditors can prevent such a transfer by requesting the opening of secondary proceedings concerning those assets, provided that the conditions laid down in Article 3(2) or Article 3(3) are fulfilled. The powers of the liquidator in the main proceedings are subject to two general restrictions: (i) the possible opening of secondary insolvency proceedings in another Member State, as the liquidator in the secondary proceedings will have exclusive powers over the local assets, and (ii) the liquidator’s obligation to comply with the law of the State within the territory of which he intends to take action exercising his powers. The liquidator shall exercise his powers without infringing the laws of the State in which he is about to take action (Article 18(3)).

b. Recognition of Other Judgments

The recognition of judgments relating to the conduct and closure of the insolvency proceedings and of judgments adopted in the framework of those proceedings is dealt with generally in Article 25 InsReg. Under Article 25(1), first subparagraph, judgments relating to insolvency proceedings (their conduct and closure) shall – like the judgment regarding the opening of insolvency proceedings – be recognised with no further formalities. The simplified system of exequatur provided for in the Brussels I Regulation 2002 is used for judgments adopted in the framework of insolvency proceedings. The Regulation also governs (see Article 25(1), second subparagraph) the recognition and the enforcement of judgments resulting from the insolvency proceedings. These are judgments “deriving directly from the insolvency proceedings and which are closely linked with them” (but not related to the opening, conduct and closure of insolvency proceedings). It includes judgments concerning actions to set aside acts detrimental to the general body of creditors (see now Article 13), concerning an action relating to the admission or ranking of a claim or a dispute between the liquidator and the debtor on the question whether an assets belongs to the insolvent debtor’s estate. Preservation measures ordered by a court having jurisdiction under Article 3(1), after the request for the opening of insolvency proceedings, are subject to the same system of recognition and enforcement, see Article 25(1), subparagraph 3. Actions deriving from law other than that relating to insolvency, although perhaps affected by the opening of proceedings, will lead to judgments other than those referred to in Article 25(1). They will deal for instance with actions on the existence or the validity under general law of a contractual claim or relating to its amount, actions to recover another’s property the holder of which is the debtor; and, in general, actions that the debtor could have undertaken even without the opening of insolvency proceedings. Recognition and enforcement of these judgments is subject to the 2002 Brussels I Regulation (see Article 25(2)). Article 25(3), finally, excludes from the obligation to recognize and enforce those judgments handed down in another Member State which might result in a limitation of the personal freedom or postal secrecy of the insolvent debtor or of any other person who may be affected by the limitations derived from the insolvency proceedings.121

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120 The quoted definition is in accordance with the decision of the European Court of Justice of 22 February 1979 (Case 133/78) (Gourdain/Nadler) and aims to avoid gaps between the Insolvency Regulation and the Brussels Regulation 2002.

121 The system of Article 3 and Article 25 related to the jurisdiction regarding (certain types of) insolvency judgements and their enforcement is generally seen as complex and difficult. See Bob Wessels, Article 25: A Hornets’ Nest, in: Insolvency Intelligence (forthcoming) and S. Riedemann, in: Pannen, Klaus (ed.), European Insolvency Regulation, Berlin: Walter de Gruyter, 2007, comments to Art. 25.
In September 2007 a reference for a preliminary ruling to the ECJ has been made by the Supreme Court in Poland122 in the case of the applicant MG Probud Gdynia Sp. z o.o. (“Probud”) versus Hauptzollamt Saarbrücken, a German agency for customs. The case relates to main insolvency proceedings against Probud opened in Poland. Probud has a bank account with a German bank. The German public administrative authorities (“Hauptzollambt Saarbrücken”) want to seize funds held in the bank account. The question referred to the ECJ is the following: “In the light of Article 25(1) et seq. of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, may the administrative authorities of the Member State in which secondary insolvency proceedings have not been opened and which must recognise the insolvency proceedings pursuant to Article 16 of that Regulation refuse, on the basis of domestic legal rules, to recognise decisions made by the State of the opening of insolvency proceedings relating to the conduct and closure of insolvency proceedings pursuant to Articles 31 to 51 of the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters?” It seems – the short description of the reference does not allow distinct comments – that the idea is that “domestic legal rules” relate to rules regarding tax or customs, which could be seen as rules of a public nature, although the referred questions does not mention Article 26 InsReg.

c. Public Policy

Recognition of judgments delivered by the courts of the Member States is based “on the principle of mutual trust and grounds for non-recognition should be reduced to the minimum necessary, see Recital 22. The Regulation is build on the model of automatic recognition; there will be no verification or review of the international jurisdiction of the court of the State of origin. In the State where recognition or enforcement is requested, the court may only decide whether the foreign judgment will have effects which would be “manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”, see Article 26. Public policy therefore operates as a general clause as regards recognition and enforcement covering fundamental principles of both substance and procedure. The interpretation of the European Court of Justice 2 May 2006 (Eurofood) of Article 26 of the Regulation is that a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings “was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys”.123

6. Secondary Insolvency Proceedings

a. Specifics of Secondary Insolvency proceedings

The Regulation permits the opening of secondary proceedings by the courts of the State where the debtor has an establishment in the meaning of Article 2(h), see Article 3(2) InsReg. If main proceedings have been opened in a State, those local proceedings can only be “secondary” proceedings. Secondary proceedings are the subject of the national law (lex concursus) of the opening State (Article 28). The Regulation, however, modifies the conditions established by the national law for the opening of insolvency proceedings in two

122 Case C-444/07 (MG Probud Gdynia Sp. z o.o. v. Hauptzollamt Saarbrücken).
123 European Court of Justice 2 May 2006 (Case C-341/04) (Eurofood).
ways: (i) the requirements of national law regarding the debtor’s insolvency does not need to be met, if the judgment that opens the main insolvency proceedings in another State, is recognised (Article 27, 1st sentence), and (ii) in accordance with Article 3(3) secondary insolvency proceedings opened after the main proceedings have been opened must be winding-up proceedings within the meaning of Article 2(c). Such proceedings are listed in Annex B. These provisions demonstrate that although references are made to a national insolvency proceeding, the Regulation stamps its own characteristics to these proceedings. Under the model of the Insolvency Regulation, their purpose is to realise the debtor’s assets. The court cannot open insolvency proceedings for the purpose of any reorganisation of the debtor’s business or of his financial situation.

Although a secondary proceeding is limited by the territory of the Member State, the secondary liquidator has however the right to act outside his territory. He is by virtue of Article 18(2) authorised to recover an asset, moved out of that State after the opening of the secondary proceedings. Furthermore he can act outside his territory in case of fraud against the creditors of those proceedings according to Article 13 in conjunction with Article 4(2)(m). The local liquidator therefore may request the court of a Member State the return of the assets.

The right to request the opening of secondary proceedings is directly given to the liquidator of the main insolvency proceedings (Article 29(a)). The liquidator in secondary proceedings has, however, no right derived from the Regulation to request the opening of other secondary proceedings in another Member State. This illustrates the relationship of dependency of the secondary proceedings upon the main insolvency proceedings. Authorities and persons empowered by national law to request the opening of the insolvency proceedings, referred to in Annex B of the Regulation, are also entitled to request the opening of secondary proceedings. They are not limited by the requirement of having a specific interest, see Article 29(b). Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor’s assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security (Article 30).

**b. Communication and Cooperation**

The crux of the model of the Insolvency Regulation is that main insolvency proceedings and secondary proceedings can contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The Regulation is based on the rationale 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”, see Recital 20. For this reason Article 31(1) sets forth that, subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information, which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings. In addition to this mutual obligation to communicate information, they are bound by a mutual obligation to cooperate. See Article 31(2), which provides that, subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other. The liquidator in the secondary proceedings shall
give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings, see Article 31(3). The liquidator in the main proceedings will therefore be able to propose a restructuring plan or a composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.

The dominant position of the liquidator in the main proceedings finds its way in several way in Chapter III. He may apply for the opening of secondary proceedings in other Member States (Article 29), can ask liquidators in the secondary proceedings for information (Article 31(1)), can exercise the power to put forward certain proposals in the context of the secondary proceedings (pursuant to Article 31(3)), may request a stay of the process of liquidation in these secondary proceedings (Article 33(1)), may request the termination of a stay (Article 33(2)), may propose a rescue plan in the secondary proceedings (see Article 34(1)), also during the stay of the process of liquidation (Article 34(3)), may bar any rescue plan reached in secondary proceedings (Article 34(1), 2nd sentence), shall lodge in other proceedings claims which have already been lodged (Article 32(2)), may participate in the other proceedings on the same basis as the creditors (Article 32(3)), may collect any remaining assets from the secondary proceedings (Article 35), and may request that insolvency proceedings, opened previous to the main insolvency proceedings, will be converted into winding up proceedings (Article 37). These powers have their origin in the Insolvency Regulation and therefore may be regarded as the ‘community’ powers of the main liquidator. In addition, he may use in the whole of the EU (except for Denmark) the powers the law of the opening state provides him (Article 18).

The mutual duty to communicate and to cooperate is a fundamental element of the Regulation and therefore liquidators in both main and secondary proceedings must be seen as principle agents for realizing the goals of the Regulation (see Recital 2 and 3): “The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively” and where insolvency of businesses “also affects the proper functioning of the internal market,” the need for coordination of the measures to be taken regarding an insolvent debtor’s assets is in the hands of the liquidators. It should be emphasised that the duties of communication and cooperation are mutual, thus the main liquidator will also be obliged to inform the liquidator in secondary proceedings and to cooperate with him. Both liquidators shall “immediately” (Article 31(1) InsReg) communicate any information which may be relevant to the other proceedings, “in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.” However, the duty to communicate is not limited to procedural insolvency topics. Topics covered by the mutual duties to communicate could relate to: (i) the assets, (ii) the actions planned or underway in order to recover assets: actions to obtain payment or actions to set aside, (iii) possibilities for liquidating assets, (iv) claims lodged, (v) verification of claims and disputes concerning them, (vi) the ranking of creditors, (vii) planned reorganization measures, (viii) proposed compositions, (ix) plans for the allocation of dividends, and (x) the progress of operations in the proceedings. The above demonstrates that the duty to communicate includes several topics of a non-procedural nature.

In addition to the mutual duty to communicate, Article 31(2) establishes (‘Subject to the rules applicable to each of the proceedings’) a mutual duty to cooperate. The liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other. The liquidators have a duty to act in concert with a view to the development of proceedings and their coordination, and to facilitate their respective work. To ensure the smooth course of operations in the various proceedings and the alignment of distributions, sharing of information and cooperation between the liquidators is necessary. The structure of the cooperation required can be identified in Recital (20), partly cited above: (i) aim: 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; (ii) nature: the main condition being that the various liquidators “must cooperate closely, in particular by exchanging a sufficient amount of information.” The practical implications of cooperation (and communication) include: (i) the necessity of understanding the powers of the foreign liquidator and of having (general) knowledge of the insolvency law system of the other Member State, (ii) the use of a common language (English is most commonly suggested in this respect), (iii) the use of technology (special servers; chatrooms), (iv) the availability of translations and the burden of their costs.

Finally, also Article 31(3) reflects the dominance of the main proceedings. It provides that the liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings. Under the system of the Regulation it follows that the secondary liquidator informs, in a timely manner and under his own initiative, the main liquidator in order that the main liquidator will not be confronted with a fait accompli. As a consequence of this obligation the main liquidator may be able, for example, to prevent the sale of assets involved in the secondary proceedings, the preservation of which may be deemed desirable in respect of the reorganization of the business at the centre of main interests. Another consequence could be that he will request for a stay of the process of liquidation (Article 33). The obligation laid down in Article 31(3) concerns important assets or decisions, such as the continuation or cessation of the activities of the establishment in the secondary proceedings. It should however not be interpreted so widely that, in practice, it paralyses the work of the liquidator in the secondary proceedings. He is appointed in a national insolvency proceeding to which the law of the Member State within which the secondary proceeding are opened is applicable, see Article 28.

The model of coordination between liquidators, on which the Regulation rests, aims to ensure the greatest possible efficiency in the administration of winding-up of this one debtor’s estate. The provision relating to communication and cooperation itself leaves many open questions. Which information has to be shared? Should they contain copies of documents? Must they be translated? If yes, who will bear the costs? What is “immediately” communicate? What is an “early” opportunity for submitting proposals? What happens when the secondary liquidator does not take notice of such proposals of the main liquidator. Furthermore, the provision lacks a rule concerning how conflicts between the main and the secondary liquidator are to be decided. A central underlying ratio though is clear: close cooperation with trust between liquidators in main and secondary insolvency proceedings is indispensable in order to achieve an efficient and optimal administration of the insolvent debtor’s assets. The absence of guidance in Article 31 InsReg in general results in ad hoc and case-by-case communication and cooperation without a solid and practical framework which might guarantee the realisation of the overriding objective of enabling liquidators and courts to efficiently and effectively operate in cross-border insolvency proceedings in the context of
the Insolvency Regulation. A group of practitioners, supported by several judges, have discussed proposals to address the principal issue of the liquidators’ duties of communication and cooperation in cross-border insolvency instances. The result was published in October 2007 and laid down in a (non-binding) set of standards, called European Communication and Cooperation Guidelines For Cross-border Insolvency.125 The Guidelines (often referred to as “CoCo Guidelines”) reflect the central principle of cooperation and coordination between insolvency proceedings pending in two or more Member States and aim to serve as a realistic set of rules that should ensure as best as possible to make the Regulation work in practice, so that either liquidation or reorganisation of the debtor’s estate is dealt with efficiently.126

It is clear from the text of Article 31 InsReg that the Regulation only imposes a duty on the liquidators to communicate information and to cooperate as far as the relationship between main and secondary liquidators is concerned. Article 31 does not express a duty for any court involved in related proceedings. Nevertheless, in certain countries, judgments have accepted that a court is subject to the principles stated in Article 31.127 There is also some experience in cross-border European practice that, in other cross border insolvency cases, communication between courts (in England, Germany, the Netherlands and France) has proven efficient in the alignment of judicial developments in these cases.128 The CoCo- Guidelines include some non-binding recommendations for courts. They are for instance advised to operate in a cooperative manner to resolve any dispute relating to the intent or application of these Guidelines or the terms of any cooperation agreement or protocol (Article 16.2).129 Courts are advised to consider whether an appointment of the liquidator in main proceedings or a nominated agent of such liquidator as a liquidator or a co-liquidator in secondary proceedings would better ensure coordination between different proceedings under the courts’ supervision (Article 16.3), whilst it is recommended that to the maximum extent permissible under national law, courts conducting insolvency proceedings or dealing with requests for assistance or deciding on any matters relating to communications from other courts, should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the courts (Article 16.4). Court cases referring to the Guidelines have not been reported yet.

7. The Position of Creditors

Articles 39 – 42 InsReg contain provisions of information for creditors and lodging of claims. These provisions are applicable both to main proceedings and to secondary insolvency proceedings. Every creditor, who has his habitual residence, domicile or registered office in the Community, has the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor’s assets. This also applies to tax authorities

125 Drafted by Professor Miguel Virgós (Madrid, Spain) and Professor Bob Wessels (Leiden, The Netherlands).
127 See e.g. Higher Regional Court Vienna 9 November 2004, NZI 2005, 56 (Stojovic), deciding that, although according to the text, Article 31 of the Insolvency Regulation only obliges liquidators to cooperate, according to the prevailing opinion and under the UNCITRAL Model Law, this obligation also applies to a court.
128 These cases have not been reported.
129 The CoCo-Guidelines contain a “Checklist Protocol”.
and social insurance institutions (Article 39). Establishing the right of foreign creditors to lodge claims means that lodgement of their claims cannot be disallowed, not even on the grounds that the creditor is situated in another Member State or that the claim is governed by the public law of another Member State. However, in order to ensure equal treatment of creditors, the distribution of the proceeds must be coordinated. The system is that every creditor should be able to keep what he has received in the course of insolvency proceedings, but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims (so called ‘hotchpot-rule’, see Article 20).

Without any delay the court having jurisdiction or the liquidator must inform known creditors, who have their habitual residence, domicile or registered office in the other Member States, about the opening of insolvency proceedings and the need to lodge their claims (see Article 40(1)). The Regulation aims to improve the situation of intra-Community creditors situated outside the Member State in which proceedings are opened. The liquidator’s duty to inform creditors situated in the State in which proceedings are opened, is governed by national law. The Regulation does not take into consideration creditors from outside the European Community to whom the national law of the State in which the proceedings are opened, applies; this law determines whether creditors located outside the EU should be informed.130

8. Reorganisation and Winding-up of Financial Institutions

The EC Directives with regard to reorganization and winding-up of financial institutions contain rules that relate to insolvency proceedings to those debtors whom the Regulation does not apply (Article 1(2) InsReg). The Directives create their own model. In the Directives the jurisdiction of courts is not based on COMI and secondary proceedings can not be opened. The idea is that of a single entity approach131 in which for instance a bank is wound up as one legal entity and that the supervision of the home Member State should not be interrupted. For this reason Article 3(1) Directive 2001/24 captures the question of the exclusive international regulatory authority (“jurisdiction”) and the principle of unity. Exclusive jurisdiction is provided to the home Member State’s administrative or judicial authorities to decide on the implementation of one or more reorganization measures. Decisive is (not COMI, but) the institution’s registered seat. The single entity approach follows from the addressees of the measures “in” a credit institution “including branches established in other Member States.” Article 9(1) with regard to winding-up proceedings contains too the provision of international jurisdiction and the single entity approach, see Recital 10: “Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings (principle of unity). These

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130 Article 40(2) InsReg lays down the form and the content to be taken by the information provided for creditors. The liquidator is required to send a notice to each creditor. This notice has to state the time limits for lodging claims, the legal consequences laid down for failing to meet those time limits and the person or body with whom claims must be lodged. It must specify whether creditors with preferential claims or claims secured in rem, are required to lodge them.

131 Recital 4 of Directive 2001/24 states that where, while in operation, a credit institution and its branches form a single entity, which is subject to the supervision of the competent authorities of the State where authorization valid throughout the Community was granted, it would be “particularly undesirable to relinquish such unity” between an institution and its branches where it is necessary to adopt reorganization measures or open winding-up proceedings. The remarks in the text made are mainly limited to credit institutions (banks), but equally apply to insurance companies.
proceedings should produce their effects throughout the Community and should be recognised
by all Member States. All the assets and liabilities of the insurance undertaking should, as a
general rule, be taken into consideration in the winding-up proceedings (principle of
universality).” The assets of the bank in its home State jurisdiction are therefore encompassed
in the liquidation, which assets include the assets of branches in a host State jurisdiction.132
All worldwide creditors can prove their claims in the unified proceeding, to which the lex
concursus of the opening State applies. As secondary proceedings under the applicable unity
principle are not allowed, Articles 27 – 38 InsReg (Secondary proceedings) are not mirrored
in the Winding-Up Directives, which makes sense. For this reason the duty to cooperate and
communicate information between insolvency liquidators (Article 31 InsReg) has no mirror
rule in the Directives, as these do not provide a system of main and secondary proceedings.
Finally, the public policy defense of Article 26 InsReg, which is aimed at the refusal to
recognize insolvency proceedings opened in another Member State or a judgment handed
down in this context, does not work in the single entity approach. The latter approach
presumes automatic recognition and does not allow a host Member State to call in its public
policy against a reorganization measure of a winding-up decision which has its source in the
home Member State.

The Insolvency Regulation deals primarily with intra-Community effects of cross-
border insolvency matters, what has been called: “The Community Connection.”133 The
territorial scope of the Directives 2001/17 and 2004/24 is wider and include all 25 Member
States, therefore including Denmark. In addition, the single entity-approach includes all of the
EEA (European Economic Area), which would be the EU Member States plus Norway,
Iceland and Liechtenstein. In general, the EU Insolvency Regulation only applies to intra-
Community relations; in cross-border insolvency cases relating to non-EU states the rules of
general private international law or specific legislation of a country in this field apply.134 The
provisions of Directive 2001/24 concerning the branches of a credit institution having a head
office outside the Community also apply to non-EU banks, but only where that institution has
branches in at least two Member States of the Community, see Article 1(2) providing a de
minimis-rule when it comes to the reach of this Directive beyond the EC Community.
Directive 2001/24 applies to the branches of a non EU-bank when such bank “has branches in
at least two Member States of the Community.” The way it applies has to be taken from
Recital 22: “Where a credit institution which has its head office outside the Community
possesses branches in more than one Member State, each branch should receive individual
treatment in regard to the application of this Directive.”135 In addition to the different
geographical scope, both Directives introduce in comparison to the Insolvency Regulation a
different substantial scope. Several key definitions with regard to the Directives relate to
“reorganisation measures” which fall outside the scope of the definition of “collective

132 A host Member State is the Member State in which a credit institution has a branch or in which it provides
services.
133 Miguel Virgós / Francisco Garcimartín, supra, nr. 22.
134 See Marquette and Barbé, Council Regulation (EC) No. 1346/2000. Insolvency Proceedings In Europe and
Third Countries. Status and Prospects, in: Nuys & Watté (eds.), International Civil Litigation in Europe and
Relations with Third States, Bruylant, Bruxelles, 2005, 419.
135 It is discussed whether it is the intention in a situation of a non-EC bank with two or more branches to provide
for a single insolvency proceeding in relation to all the branches within a Member State. The text of Directive
2001/24 is unclear and therefore it is uncertain which court should open unitary insolvency proceedings and
whether assets of both branches should be pooled together in one single proceeding, see Bob Wessels,
Reorganisation and Winding Up of Branches of Non-European Insurance Companies and Banks, Journal of
insolvency proceedings,” as provided in Article 1(1) InsReg. The Directives are not supported by Annexes, which lists mentions in each Member State’s authentic language, the type of measures or proceedings concerned, as Annexes A and B to the Insolvency Regulation do. The Directives introduce a different general rule of applicable law. Article 10(1) Directive 2001/24 contains a similar rule of the applicable law as Article 4(1) InsReg to the winding-up proceeding, but a credit institution is wound up in accordance with “the laws, regulations and procedures”, which seem wider than the “law” applicable in the meaning of article 4(1) InsReg. 136 With regard to rights in rem, reservation of title and the right to set-off (Article 21 – 23 Directive 2001/24) the Directive has adopted in principle the rules as arranged in Article 5 – 7 of the Insolvency Regulation, but adds exclusions to “the laws, regulations and procedures” which relate to netting and repurchase contracts.137

9. Conclusion

A generally felt assessment is that the EU Insolvency Regulation works quite well. The measurement should be taken by assessing the EU Insolvency Regulation’s initial aims, centred around: (a) the proper functioning of the internal market (Recital 2), (b) preventing the supply of incentives to seek more favourable legal positions (forum shopping, Recital 4), (c) improvement of efficiency and effectiveness in cross-border insolvencies (Recital 3), and (d) a harmonized system of conflict of law rules. Compared to the fragmented and uncertain state of affairs of some ten years ago, an enormous step forward has been made in providing a recognizable framework for cross-border insolvency, especially with regard to international jurisdiction, recognition of judgments, choice of law provisions, position of creditors and powers of office holders. Cross-border insolvencies in the EU have become much more predictable and a step in the right direction has been made by the moderate choice for a model of coordinated universality. The significance and influence of the Regulation in terms of the search for solutions to problems arising in cross-border insolvencies cannot be overestimated. Insolvency specialists and advisers in the field of financial relationships will have to be more than aware of the Regulation’s existence and the way in which courts in several jurisdictions have interpreted its provisions. The provisional conclusion therefore is that the balance appears to be positive.

On the other hand the handling of cross-border insolvencies within the Community could certainly be improved. Last year Wessels published a list of 20 recommendations, which list is by no means exhaustive.138 For a list of suggestions for improvements, see too

136 Wessels suggests to refer to “laws, regulations and practices” as the “lex domus”, in contrast to the lex concursus as meant in Article 4(1) InsReg, submitting that “regulations” and “procedures”, not being “law” in a strict sense, could be regulations following from capital adequacy standards, from information standards to use in reporting lines to the supervisory authorities or preventive procedures with regard to safety in use of technology. See Bob Wessels, Commentary on the Directive 2001/24/EC on the reorganisation and winding up of credit institutions, in: Gabriel Moss and Bob Wessels (eds.), EU Banking and Insurance Insolvency, Oxford University Press 2006, 47, at 67.

137 Its lack of definition and the fact that both exclusions relating to netting and repurchase agreement seems to preclude any action for voidness, voidability or unenforceability which may be taken to set aside netting agreement under the law of the contract which governs such agreements has been criticised, see Wessels, supra footnote 125, at 92.

the comments of Moss and Paulus\textsuperscript{139} and of Omar.\textsuperscript{140} Wessels’ recommendations are presented with the intention of providing food for thought for the evaluation process pursuant to Article 46 InsReg. Article 46 provides that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation, which shall be accompanied if need be by a proposal for adaptation of the Regulation. His observations relate among others to the inflexible nature of a Regulation as a Community measure itself, the lack of a European wide system of registration of openings of insolvency proceedings and related decisions, the uncertainties the conflict of law rules present and the unsatisfactory procedural framework of the Regulation. This may be explained by the connection between the origins of the Regulation and what is (now) the Brussels Regulation 2000. The Insolvency Regulation aimed to close a gap in the system of international jurisdiction and recognition of judgments relating to civil, commercial and insolvency matters, but courts in Germany and the Netherlands nevertheless have given rulings which are based on the assessment that both Regulations were not applicable.\textsuperscript{141} Also alignment with other areas of EU law, particularly EU corporate law is lacking, e.g. alignment with the (future) EC directives relating to transfers of corporate seats and cross-border mergers and the characterisation of certain rules as falling under the domain of insolvency law or corporate law.\textsuperscript{142} In addition, the Regulation’s compatibility with domestic legal systems of Member States leave much to the activity of Member States, where some guidance from the Regulation would have been welcome, e.g. Articles 31-37 and the lack of any procedural rules.\textsuperscript{143}

Another group of recommendations relate to the topic of international jurisdiction. In dozens of court cases the general description for “centre of main interest” is not sufficient to encompass all types of debtors, e.g. natural persons as private persons, natural persons as professionals, smaller companies and larger (groups of) companies with segregated “management and control” (“head office functions”) and factual operations. In addition, the “COMI” decision seems to be too “compressed” as a court’s decision on the opening of insolvency proceedings also comprises – by matter of law – the decision concerning the applicable law, the extension of this law and of the powers of the liquidator throughout Europe. There is no guarantee that the information the court receives is complete, an uncontested decision can be made by a party who has an interest. Several procedural rules lack or seem vague, e.g. the procedural rights and duties of parties – including creditors – to be involved in the “COMI” decision, including the full and fair opportunity to present the

\textsuperscript{139} Gabriel Moss and Christoph Paulus, supra nt. 58.
\textsuperscript{141} See for instance District Court Frankfurt am Main 26 January 2006, ZIP 2006, 796 and District Court of Rotterdam 7 June 2006, JOR 2006/52. The Frankfurt decision has been referred to the European Court of Justice by the German Supreme Court, with its judgment of 21 July 2007.
\textsuperscript{143} See however the European Communication and Cooperation Guidelines For Cross-border Insolvency, referred to above.
facts and the law of a parties’ case and, likewise, the same opportunity to comment on
evidence and legal arguments provided by other parties.144

This section opened with the contention of the Spanish professors Virgós and
Garcimartín in that the Insolvency Regulation constitutes the general rule, where the
Directives 2001/17 and 2001/24 form special rules, but “…. they all form the “hermeneutic
circle” within which interpretations should be made. The idea that all these rules must be seen
as parts of a consistent (although unfinished) statutory scheme is important.” It is submitted
that within the field of the regulation of insolvency or ‘near-insolvency’ situations the
Winding-Up Directives 2001/17 and 2001/24 form an important part of the legal and
regulatory framework concerning the European single market for the insurance and the
banking sector. It has been demonstrated above that both Directives encompass three
principles, namely (i) “single entity,” the credit institution in the home Member State and the
branch in another Member State form one legal entity, (ii) “unity,” resulting in only one
competent authority, exclusively empowering the home country authority, or one winding-up
proceeding with no secondary proceedings elsewhere, and (iii) “universality,” the effects of
reorganization measures or winding-up proceedings and its applicable law (being “the laws,
regulations and procedures.” Both Directives add an important component to the rather fresh
EU rules regarding jurisdiction, recognition and conflict of law rules concerning insolvency
proceedings. The Directives require an early exchange of information between supervising
authorities and enable for coordination of reorganization measures or winding-up proceedings
for insurance undertakings and banks with branches in other Member States. Both Directives
are EU legal measures and therefore obviously the natural limitation applies: the Directives
mainly focus on Europe, including the other EEA countries, although they both contain
several provisions, which are of importance for branches of non-EU insurance undertakings
and credit institutions. Certainly, there is a “hermeneutic circle” in the context of general rule
– special rules (Regulation – Directives). In this respect the Directives should be interpreted in
alignment with the EU Insolvency Regulation (e.g. type of proceedings; conflict of law rules).
In addition one will have to swing around that circle in that with regard to financial
institutions specific community principles (free establishment), particular financial sector
principles (“single entity”; “unity”) and norms (“laws, regulations and procedures”) come into
play, and these will apply in a wider pitch, including the EEA countries and affecting
branches of non EU banks.

At least three other topics deserve to be mentioned in the category of what is not
offered under the Insolvency Regulation. As recital 11 indirectly indicates, the Insolvency
Regulation is based on the idea, generally accepted over the last few decades, that
harmonisation of domestic rules relating to insolvency was impossible given the differences
in substantive laws, including preferential rights, but for instance also the methods with which
businesses are financed (by the family, the bank or through the stock market), protection
policies of certain interest groups and different cultures in relation to the social phenomenon
of “insolvency”. 145 It should nevertheless be mentioned that several provisions of the
Regulation are characterized as substantive rules and are therefore now accepted throughout
Europe as unified rules concerning the topics to which they relate, see for example Articles

144 See Samuel L. Bufford, Center of Main Interests, International Insolvency Case Venue and Equality of Arms:
The Eurofood Decision of the European Court of Justice, in: Northwestern Journal of International Law and
Business, January 2007, 351.
145 Bob Wessels, Insolvency Law, in: Jan M. Smits (ed.), Encyclopaedia of Comparative Law, Edgar Elgar,
A next step to be taken is an assessment of the topics (procedural; substantial) which may be ready for (degrees of) harmonisation.\footnote{See Bob Wessels, Europe Deserves A New Approach To Insolvency Proceedings, contribution to the Colloquium “Two hundred years Commercial Code of Belgium”, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweeënhonderd jaar Wetboek van Koophandel, Brussel: Larcier, 2007, 267ff (also published in: 4 European Company Law, December 2007, p. 253-258).}

\section*{Ch. 6 Convergence Through Legislation and Professional Cooperation}

The challenges of coordinating vastly divergent insolvency procedures were significantly more acute as recently as the 1990s. Since that time, two important developments have smoothed the jagged conflicts among insolvency laws—at least modestly—in different but connected ways. First, some of the most fundamental conflicts of approach to insolvency cases are fading away as individual states converge around a rescue model. States are increasingly adopting and enhancing insolvency laws designed to facilitate reorganization of faltering businesses rather than immediately resorting to liquidation.

Second, as often occurs in the business context when legislators fail to provide a top-down solution, insolvency professionals and courts have stepped in to drive a bottom-up approach of organizing private cooperation on an ad hoc basis. Organizations of international insolvency practitioners have advanced a gradually expanding series of principles for both formal and informal processes, and courts in individual cases—particularly those in Canada and the United States—have adopted individualized regimes of cooperation with their foreign counterparts. These principles and the practices arising from them have laid the groundwork for an increasingly robust and effective cross-border insolvency industry even before the advent of specific international insolvency legislation.

\section*{B. Alignment By Courts and Practitioners}

As the battle over the best theoretical model for coordinating cross-border insolvencies raged, the exigencies of rapidly globalizing commercial reality spurred important developments on the ground. Unable to wait for a legislative solution to coordinating international conflicts in insolvency matters, courts and practitioners implemented their own arrangements to overcome individual clashes, generally one case at a time. At first hastily assembled to deal with time-sensitive crises, these solutions were refined over time and ultimately developed into an authoritative body of commercial “best practices.” This front line activity has played a crucial role not only in solving day-to-day problems, but also in informing the parallel development of national and international statutes on the best means of achieving cooperation in international insolvencies.\footnote{See Bob Wessels, Europe Deserves A New Approach To Insolvency Proceedings, contribution to the Colloquium “Two hundred years Commercial Code of Belgium”, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweeënhonderd jaar Wetboek van Koophandel, Brussel: Larcier, 2007, 267ff (also published in: 4 European Company Law, December 2007, p. 253-258).}

\section*{2. Governance By Private Agreement: Cross-Border Insolvency Protocols}

While efforts were underway to encourage a principled legislative solution, insolvency professionals had to find ways of assuaging pressing conflicts under existing law. Acknowledging the desirability of theoretical purity and legislative unity on the one hand, insolvency professionals could not wait for these goals to be attained. Doing what they do
best, these professionals acted decisively within the existing legal framework to craft practical solutions in several early cases of acute international conflict. These solutions are a mix of codification of case-by-case experiences and expectations of or desires for practical directions in certain circumstances of how to best solve certain matters. Creative lawyers, accountants, and judges implemented their own solutions on an ad hoc basis through private agreements, generally confirmed by court order. The hard-won knowledge and successes obtained in these early cases laid the foundation for a more standardized later practice that remained flexible enough to accommodate the particulars of these complex cases.

a. Macfadyen

An early example of this type of private ordering already occurred in 1908 in a case involving partnership assets in England and India. A certain Mr. Macfadyen had been one of three members comprising two merchant and banking partnerships. The one in London bore his name, P. Macfadyen & Co., while the one in Madras, India, bore the name of one of his two partners, Arbuthnot & Co. Upon Macfadyen’s death in 1906, creditors filed involuntary bankruptcy petitions against the London partnership, and the other partners petitioned the Insolvent Court at Madras for an order under the Indian Insolvent Debtors Act affecting the Madras partnership. The trustee in the London case and the official assignee in the Madras case thus had to coordinate the collection, realization, and distribution of the partnership assets among the 1036 creditors of the English partnership (owed about £400,000) and the 7000 creditors (“mostly natives”) of the Indian partnership (owed over £1 million).

The two administrators negotiated an arrangement in which they would treat the two partnerships as one firm, distributing all available assets ratably to all creditors whose claims had been admitted by either the London trustee or the Madras official assignee (a fascinating sort of protean claims facility). The London trustee and the Madras official assignee undertook to exchange lists of admitted claims, each submitted to be bound by the determinations of the other as to admitted claims, and whichever of them ended up with a surplus of assets to make a globally ratable distribution would “remit to the other such balance as may be necessary in order to ensure such rateable distribution.”

The London and Madras courts each confirmed the proposed arrangement, perhaps the very first instance of what would come to be called a cross-border insolvency protocol. The English court overruled an objection by an English creditor (who apparently realized that the ultimate transfer of assets would likely be in the direction of the Madras proceedings, given the much larger claims there). Observing that the agreement constituted “clearly a proper and common-sense business arrangement . . . manifestly for the benefit of all parties interested,” the English court apparently relied on its inherent common law power to approve of this innovation. Given that India was still an English colony in 1908, and the Madras assignee was likely a British envoy himself, it is not altogether surprising that such an arrangement could be established and approved with such ease. Later, when conflicts arose between different nationalities and separate sovereign courts, modern protocols would seldom if ever deal directly with such divisive issues as transfers of value between proceedings.

b. Maxwell

The modern era of cross-border insolvency protocols began in mid-December 1991, with a classic clash of insolvency cultures intentionally inflamed by the debtor’s management.
After the mysterious death of Robert Maxwell, the $2 billion media and communications empire that Maxwell’s personal charisma had largely held together began to come apart at the seams. The directors of the U.K.-registered holding company at the head of the empire, Maxwell Communication Corporation plc (“MCC”), feared that a breakdown of relations with lenders would lead to an insolvency petition in the U.K., which would oust the directors from control. To preempt this and to find a more reorganization-friendly venue, the MCC directors initiated voluntary insolvency proceedings in New York under Chapter 11 on December 16, 1991, which would allow them to remain in control as “debtor-in-possession” during a reorganization attempt. The U.S. filing made substantial sense apart from the bid to retain management control, as MCC’s primary operating subsidiaries and assets, Macmillan Inc. and the Official Airline Guide (collectively with their key sub-subsidiaries, “the M&O Group”), were located in the United States. To avoid liability for trading while insolvent, and to stave off the advances of U.K. creditors beyond the practical reach of the U.S. automatic stay, the MCC directors also petitioned for an administration order in London the very next day.

A colossal conflict of jurisdictions was thus imminent, which began to materialize immediately when the London court rebuffed MCC management by rejecting their nominee and appointing the creditors’ choice (three accountants from Price Waterhouse) as joint administrators. Price Waterhouse immediately obtained an order from the U.K. court compelling the MCC directors to dismiss the U.S. Chapter 11 proceedings. Instead, the MCC directors sought to defuse the situation by applying for the appointment of a neutral examiner. The U.S. judge, Tina Brozman, appointed U.S. lawyer Richard Gitlin as examiner with expanded powers, and she directed him to act essentially as an envoy to liaise with the joint administrators to find a way to assuage the jurisdictional conflict without demanding unconditional capitulation from the U.S. side. The U.K. administrators greeted the U.S. examiner with a motion to vacate his appointment and to have the MCC directors imprisoned if they failed to dismiss the U.S. proceedings. Nonetheless, beginning the weekend of December 21 and 22, with a break for Christmas the following week, the insolvency professionals, company management, and lenders, all represented by counsel, engaged in whirlwind negotiations in New York and London for a power-sharing arrangement that finally emerged on December 31, 1991.

The resulting “Protocol” clearly reflects the crisis that led to its creation: the clash in corporate governance between the debtor-in-possession model of the Chapter 11 reorganization and the administrator model of the U.K. administration. Neither side wanted to give up control of ongoing operations and the reorganization process, but neither side had sufficient power to consolidate control over the entire entity. The opposing sides were not immediately prepared to move beyond their own local perspectives; as a member of the U.S. side put it, “we weren’t really listening to Price Waterhouse’s side of the story . . . [and a]s far as Price Waterhouse were concerned the whole Chapter 11 situation should just go away.” Gradually, though, the two vying camps realized and accepted that cooperation was the only path to avoiding mutual assured destruction of an otherwise viable company through endless trans-Atlantic litigation. The protocol’s principle purpose was to cede sufficient control to satisfy the U.K. administrators, but to give the U.S. examiner a control stake and maintain current management in place so as not to disrupt operations. As the examiner put it, “we tried to understand what it was Price Waterhouse needed under UK law to be able to fulfill their duties, while we could persevere with Chapter 11, that is, keep the US checks and balances. That way we ended up with the Protocol.”
Unlike the standard voluminous corporate agreement, the Maxwell protocol spans only a few pages and contains relatively little detail. The bulk of its seven provisions divides management authority within the Maxwell enterprise and vaguely calls for good faith cooperation and coordination between the U.S. examiner and the U.K. joint administrators in the ongoing management and reorganization processes. While the joint administrators were recognized as the debtor-in-possession and exclusive corporate governance of the U.K. parent company (MCC), they agreed to “attempt, in good faith, to obtain the prior approval of the Examiner” for causing MCC or any member of the M&O Group to commence material legal proceedings, borrow funds, or encumber assets, converting any of the cases to a liquidation, or filing a plan of reorganization. In contrast, the Chairman/President/CEO of the M&O Group, MCC’s key U.S. operating companies, was to retain most of his management power, and the joint administrators and the examiner were to “consult together and together agree as to the appropriate composition” of independent outside directors to fill the remainder of the M&O Group’s board positions. The joint administrators were empowered to investigate the financial dealings of the group, but they had to report on the details to the examiner weekly.

Even for MCC subsidiaries outside the M&O Group, the joint administrators agreed “in good faith, to attempt to obtain the prior consent of the Examiner” and Bankruptcy Court approval for transactions involving selling or encumbering assets, or borrowing or lending funds, worth more than £25 million. If the amount involved was less than £25 million but more than £7 million, simple “prior notification to the Examiner” was required, and no prior notice was required for transactions involving less than £7 million. Finally, the protocol announced that the parties’ objective was for the joint administrators, the examiner, and the M&O Group’s current Chairman/President/CEO to consult with each other and propose “essentially similar arrangements” for a plan of reorganization and scheme of arrangement for the M&O Group, which they ultimately did successfully.

The Maxwell protocol would not be repeated in later cases. It was carefully and painstakingly designed to overcome a particular crisis under severe time pressure. Without a solid precedent for cross-border cooperation and time to develop broader principles, the Maxwell protocol intentionally left aside issues that would require resolution later in the proceedings (e.g., distribution and sharing of value, including priorities, as well as choice of law in avoidance actions, which the courts were called upon to resolve later in the case). Later protocols would incorporate more provisions that would further lubricate the mechanisms of international cooperation. Nonetheless, the Maxwell protocol set the stage for a particularly effective kind of practitioner-designed and -implemented cross-border cooperation.

c.  Olympia & York

The tremendous success that the Maxwell protocol enjoyed in overcoming that corporate and insolvency governance crisis soon prompted the interest of another set of insolvency professionals facing a broadly similar crisis. Olympia & York Developments Ltd. was the Canadian parent of a $20 billion family of real estate development companies with holdings in Canada, the U.S., and the U.K. Facing an impending liquidity crisis, Olympia & York filed a petition under the Canadian Companies’ Creditors Arrangement Act, and it and several of its U.S. subsidiaries filed Chapter 11 petitions in New York, as well, in May 1992. Like in the Maxwell case, the management of the U.S. subsidiaries faced a
governance challenge from the Canadian administrator, which was ultimately allayed by negotiating a governance protocol through the offices of an examiner appointed by the U.S. Bankruptcy Court. Indeed, the insolvency professionals working on the Olympia & York case called Richard Gitlin (the U.S. examiner in the Maxwell case) to ask for a copy of the Maxwell protocol.146

The modest Olympia & York protocol dealt almost exclusively with the composition and indemnification of the governing boards of the U.S. subsidiaries, allocating one position for the Canadian administrator, one for the current U.S. management, and the remainder to a series of identified outside directors, though leaving the current officer corps in place. The Olympia & York protocol reads like the Board of Directors section of the by-laws of a closely held corporation, addressing such issues as quorum, notice, and agenda for meetings. It left aside most questions of management and restructuring cooperation for later (which were successfully navigated through the efforts of the Canadian and U.S. judges). Here again, the Olympia & York protocol would not serve as a model for future cases, but it further developed the practice of insolvency professionals implementing their own innovative solutions to cross-border conflicts not addressed by domestic or international law.

d. Nakash

Several years later, Richard Gitlin was called upon once again to resolve an escalating clash of jurisdictions in the 1994 bankruptcy of Joseph Nakash and an Israeli bank of which he was a former director.146 The protocol ultimately confirmed by the U.S. and Israeli courts regulated the conflict arising from the Israeli official receiver’s enforcement of a $160 million Israeli judgment against Nakash’s assets (in the U.S. and third countries) in violation of the stay in Nakash’s U.S. bankruptcy case. Despite the objections of the debtor, Gitlin as examiner and the Israeli receiver were able to smooth over their confrontation while explicitly respecting the sovereign independence and territorial authority of the U.S. and Israeli courts. The two courts agreed to recognize and hear both the examiner and the official receiver and “to cooperate and coordinate with each other in good faith.” Each court reserved its own, and mutually acknowledged the other’s, authority over actions taken within their territories, but for actions to be taken outside Israel and the U.S., the protocol called for requests to be lodged with both courts, who would “seek to coordinate their efforts” not only through the intermediaries, but also perhaps “via telephonic conference.” This protocol marks one of the first instances of the courts expressing a desire and willingness to cooperate and communicate directly with each other.

The Nakash protocol also introduced what would become a standard series of “mutually desirable goals” to be achieved through the protocol, including “harmonization and coordination” of the conflicting proceedings, “honoring the integrity” of the courts, promoting an “orderly and efficient administration” of the cases, maximizing the value of the debtor’s worldwide assets, and minimizing costs through coordinated activities and sharing of information. The Israeli receiver would continue his investigation of Nakash’s worldwide assets, agreeing to share information with the examiner and to convey to any relevant court the examiner’s opposition, if any, to any proposed action to be undertaken. As usual, the difficult issue of distribution of value was set aside for later, though the protocol called for assets to be “preserved and maintained in situ for the benefit of all creditors of the Debtor wherever located,” suggesting a universalist orientation.
The December 1994 Commodore protocol marks the beginning of a new era, in which protocols developed from one-time-use measures of crisis aversion into more generally applicable planning documents, much like a standard business operating agreement. The Commodore protocol established a planning goal “to provide a framework for the efficient and effective administration of the bankruptcy cases”—a formulation that would reappear in many future protocols alongside the goals listed in the Nakash protocol.

Commodore Electronics Limited (“CEL”) and Commodore International Limited (“CIL”) were subject to liquidation proceedings in the Bahamas when creditors filed involuntary bankruptcy petitions against the two companies in New York. The joint Bahamian liquidators moved in the U.S. Bankruptcy Court for abstention and ancillary relief, but they feared that relief would be denied, thrusting them into a conflict with a U.S. trustee’s parallel efforts to sell the companies’ assets. To resolve the potential jurisdictional conflict, the liquidators and the creditors agreed to allow the liquidators to convert the U.S. proceedings to voluntary Chapter 11 cases, with the liquidators acting as debtors-in-possession. Reminiscent of the Maxwell compromise, the Commodore protocol required the consent of the creditors’ committee if the liquidators proposed to borrow or lend funds, encumber assets, or sell assets outside the ordinary course worth more than $250,000. Books, records, reports, and other information relating to asset sales and litigation was to be exchanged between the liquidators and the creditors’ committee, “subject to appropriate confidences.”

Because the Commodore protocol quickly resolved the potential governance conflict that led to the Maxwell and Olympia & York protocols, it focused instead on prospective planning for case administration. It clearly assigns exclusive authority to the Bahamian and U.S. courts with respect to the liquidators’ retention, fees, and case administration activities in the Bahamas and the U.S., respectively. Delving into details left open in earlier protocols, the Commodore arrangement provides for mutual recognition of claims filed and allowed in either the U.S. or the Bahamas, provides for the appointment of accountants and retention of counsel for the parties, including addresses for notices. One of the key provisions allows the liquidators to deposit estate funds in accounts outside the U.S., though as in other protocols, the issue of their ultimate distribution is left open, with an expression of intent that the assets be “liquidated and distributed . . . in as economical and efficient a manner as may appear practicable . . . with one court deferring to the judgment of the other where feasible.”

3. The Cross-Border Insolvency Concordat and Recent Protocols

To further the development of cross-border insolvency protocols as standardized planning tools, Committee J of the IBA took up the laboring oar again to build on existing protocol practice and draft another set of principles for general application. Along the way, it also sought to drive international insolvency practice further in the direction of universalism. The project was launched in 1993 and consummated with the adoption by the IBA in 1996 of ten principles comprising the Cross-Border Insolvency Concordat.146 The drafters intended these principles to be a starting point rather than an end result, “an evolving work that will be modified to reflect the experiences that members of the international insolvency community gain from working with its concepts and applying it in practice.” As another gap filler—somewhat akin to the MIICA, discussed above—the Concordat was designed to “guide
practitioners in harmonizing cross-border insolvencies,” most likely by implementing its principles through case-specific protocols.146

Like the MIICA, the Concordat unabashedly endorses a strong form of universalism from the outset. Though later cases would seldom if ever be able to achieve this posture before the advent of cross-border insolvency legislation, the first two principles advocate a “main proceedings” model, with a single administrative forum coordinating worldwide proceedings, complete with asset transfers from non-main proceedings to the main forum following satisfaction of local secured and privileged creditors.146

Accepting then-current reality, however, the bulk of the Concordat applies to the situation that had arisen and would continue to arise most commonly; i.e., two or more battling fora, neither of which prepared to cede authority, in need of coordination and cooperation. In that context, the Concordat advocates coordination and protocols in general,146 along with several specific measures that had been applied and/or would become common in cross-border cases. These include recognition, right to be heard, and notice extended to the official representatives of all fora, though shielding them from subjecting themselves to the jurisdiction of foreign fora for matters not related to the insolvency administration.146 Additionally, the Concordat extends similar rights to all creditors to appear and be heard in any forum, along with access to information publicly available in any form, and it calls on creditors to file claims in only one forum (with application of the hotchpot rule if claims are filed in multiple proceedings).146 As to the difficult issue of asset distribution, which early protocols had deftly avoided, the Concordat adopts a dual model of territorial administration of assets and determination of secured and priority status for claims, but ultimately universal pro rata distribution of value to general creditors.146

The Concordat takes a controversial and somewhat confusing stance with respect to choice of law in avoidance actions, a stance that only a few later protocols would emulate. On the one hand, each forum is encouraged to determine the validity and value of claims, as well as their secured status and right to set-off, according to standard principles of conflicts of laws/private international law (most likely applying the law of the territorial location of the relationship giving rise to the claim or the property subject to an encumbrance). A default choice for forum law as to avoiding actions and other “substantive” rules is specifically rejected. With particular respect to “voiding rules” (e.g., preference and fraudulent conveyance avoidance), the Concordat emphasizes that creditors are subject to any given forum’s rules only if they would be subject to that forum’s jurisdiction in an ordinary lawsuit concerning the transaction and the transaction has some significant relationship with the forum.146

All of these protective caveats notwithstanding, the Concordat adopts a simple policy favoring voidability if at all possible (that is, applying any available forum’s voiding rules) “to maximize recoveries.”146 A similar principle applies to so-called “administrative rules,” such as rules allowing for the rejection of burdensome executory contracts and unexpired leases. Unlike the principle for voiding powers, however, this principle is subject to a sort of lex loci contractus proviso; that is, a Forum A insolvency representative might use Forum B contract-rejection rules against a creditor (even if Forum A law does not allow for this), but not if the contract at issue was to be performed in Forum A.146 These complex proposals have garnered much less of a following than the more general notions of maximum cooperation, access to information, and universal notice and right to be heard.
a. Everfresh and Other Early Post-Concordat Protocols

The Concordat received a warm reception even before its official adoption, and it began to “evolve” immediately, as parties and courts experimented with some of its key principles in cross-border protocols. As luck would have it, two months after the Council of the IBA’s Section on Business Law approved the Concordat, a cross-border case emerged in which both judges and at least one party counsel had been involved in the drafting of the Concordat. Not surprisingly, therefore, the protocol developed to coordinate the parallel Canada-U.S. reorganization proceedings for Everfresh Beverages, Inc., in late 1995 strongly and specifically endorses the Concordat and implements many of its principles. Indeed, the Everfresh case saw the first Canada-U.S. cross-border joint hearing (by conference telephone, with counsel participating), which would become more common in later cases.

Though it did not have to deal with a looming cross-border governance crisis, like earlier models, the Everfresh protocol called for the Canadian receiver and the U.S. debtors-in-possession to cooperate and coordinate their two “reorganization” proceedings, including the development of similar plans of sale and distribution of all of the companies’ assets. Official representatives in both cases were to receive notices of all proceedings in each forum (pursuant to a detailed list of notice parties and addresses), creditors could file claims in either case (dual filings would be subject to the hotchpot rule), and all creditors were allowed to appear and be heard in either forum and to examine publicly available information.

Acknowledging the continuing power of territorialism, assets were to be disposed of and their proceeds distributed under the exclusive authority of the court in, and pursuant to the law of, the country to which the former business giving rise to individual assets had been related (that is, assets arising from the Canadian business were to be disposed of and distributed pursuant to Canadian law and Canadian court approval and vice versa for U.S. assets). Assets arising from the business in both countries would be subject to joint jurisdiction. The protocol gave a nod to universalism in providing that the treatment of general creditors would be coordinated through a Canadian proposal and U.S. plan “substantially similar to each other.” Because the U.S. voiding rules were broader than those of Canada, the Everfresh protocol followed the expansive Concordat approach in applying U.S. voiding laws to any counterparty subject to general U.S. jurisdiction, though avoiding actions could be taken by the Canadian receiver only with the “express written consent of the Debtors or as may be directed by the Canadian court.”

With an authoritative model that had already been largely adopted in one case, protocol practice became more and more standardized in the later 1990s. Future protocols would not follow the Concordat as explicitly and closely as in the Everfresh case, but the imprint of the IBA’s work would remain visible as protocols entered their next phase of development toward a more standardized model. Particularly after the mid-1990s, most protocols involved Canada-U.S. cases, but the Swiss-U.S. case involving the metal commodities-trading company AIOC Resources, AG, represents one of the exceptions. The spring 1998 protocol for coordinating the winding up of AOIC’s operations explicitly referred to and adopted some of the provisions of the Concordat. Much like the similar earlier case involving the liquidation of the Commodore companies (see above), the AOIC protocol provides for cross-recognition of claims and joint administration of the winding-down of the companies, subjecting most asset-disposition decisions to an “attempt in good faith to obtain
the consent” of each trustee and calling on the U.S. and Swiss trustees to “coordinate mechanisms for providing distributions and recoveries to creditors . . . wherever located.”

Back in North America, when the theatrical production company Livent commenced joint proceedings in Toronto and New York, the protocol that emerged in June 1999 to coordinate the sale of theater assets in both countries tracked the Everfresh protocol in most respects word for word. The primary innovation of the Livent protocol was an explicit allowance for joint hearings, which in the event were ultimately accomplished by multicast closed-circuit satellite television feed linking the courtroom “studios” in Toronto and New York.146 The television link proved more effective and satisfying to most involved than earlier telephone conference in Everfresh had been.146

In addition to authorizing joint hearings, the Livent protocol included detailed guidelines on court-to-court communications, allowing the two courts to sit jointly, if desired, requiring advance filing of identical written materials in both courts upon which parties intend to rely during joint hearings, directing parties to submit applications only to the court in which they were primarily appearing (unless otherwise specifically allowed by the other court), and permitting the two judges to communicate directly with each other in advance of the joint hearing (with or without counsel present) to establish guidelines for the hearing, as well as after the hearing to coordinate “substantively consistent rulings.”146

For perhaps the last time, the Livent protocol adopted the Concordat’s expansive application of voiding actions, subjecting all contracts to rejection and all pre-insolvency transactions to avoidance under the expansive U.S. law, so long as the counterparty to such a contract was subject to U.S. personal jurisdiction and the counterparty to a voidable transaction could be sued in the U.S. on a simple lawsuit on the same transaction (that is, subject to both personal and subject matter jurisdiction in the U.S. under the forum’s conflict-of-laws principles). Later protocols would not take this approach. As discussed immediately below, the Loewen model would say nothing about voiding actions, and the one later protocol that addressed the issue would select the avoiding law of the transferee/counterparty.146 That is, recipients of fraudulent conveyances and preferential transfers were subject to the voiding laws of their own jurisdiction, not necessarily U.S. law by default.

b. The Loewen Model

A few weeks later, in late summer 1999, protocol practice would reach an evolutionary plateau. The carefully designed and limited protocol submitted and approved as a first-day order by the Delaware and Toronto courts in the mega-bankruptcy of the Canada-U.S. funeral conglomerate, Loewen Group, Inc., would become the model followed in at least a dozen Canada-U.S. cases over the next several years.146 Beginning with the familiar expression of “purpose and goals” begun as early as the Nakash protocol (see above), the Loewen protocol also carries forward the Nakash emphasis on independence and integrity of the courts involved and the strict territorial division of authority between them, particularly with respect to approvals of professional retention and fees.146 That being said, each of the two courts also agreed to “use its best efforts to coordinate activities with and defer to the judgment of the other Court, where appropriate and feasible.”146 Direct court-to-court communication and joint hearings were again explicitly allowed, including the detailed communication guidelines appearing in the Livent protocol (see above). Some later protocols
following this model would incorporate the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases.146

The standard Maxwell-era statements about cooperation and coordination lay the foundation for the Loewen protocol, though now without the “attempt” and “in good faith” caveats and no detailed listing of specific actions and decisions to be coordinated. By this point, the notion of cooperation and coordination had apparently become so second-nature in Canada-U.S. cases that additional detail was no longer necessary. As in the Concordat, all parties were given the right to appear and be heard in either court, in addition to notice pursuant to a detailed noticing list. An innovative substantive innovation in the Loewen model was an explicit joint recognition of the stay (moratorium) imposed in each jurisdiction and an agreement by each court to “extend and enforce” the foreign stay domestically, along with the right to consult with the foreign court on “the interpretation and application” of its stay, with protocols in the most recent cases incorporating a process for soliciting and subjecting such advice to party review.146

Perhaps the Loewen protocol was so successful as a model for later cases because it says so little, leaving most questions open for future resolution through inter-court cooperation. It says nothing, for example, about asset disposition, claims resolution, value distribution, or choice of law in contract rejection and voiding actions. This model relies on the cooperative initiative of the courts involved. With respect to future disputes, the Loewen protocol introduced a creative dispute resolution provision. If a dispute is submitted to one court, that court must “consult with the other Court,” but it then has three options subject to “its sole and exclusive discretion”: render a binding decision on its own, transfer the matter to the other court and defer to that court’s sole determination, or seek a joint hearing and a joint resolution.146

The Loewen model has solidified the use of protocols in cross-border insolvency cases, particularly those involving Canada and the United States. Beginning as a means to overcome the lack of statutes or treaties for cross-border cooperation, protocols now seem unlikely to fade out of existence as such statutes have finally become part of domestic law. They will continue to complement the more general mandates of cooperation in the UNCITRAL Model Law, adopted as Chapter 15 of the U.S. Bankruptcy Code, and Canadian domestic legislation implementing many of the Model Law’s principles. Most importantly, through these protocols, insolvency courts and professionals have developed years of experience and a rich culture of working together to maximize value, equalize distributions, and implement effective regionally coordinated reorganization plans.

c. Other Protocols

Because such a vibrant tradition of interaction has developed between Canadian and U.S. bankruptcy professionals, the bulk of modern protocols have arisen in Canada-U.S. cases, and they leave to the courts and parties the details of how cooperation will be effectuated. The few modern protocols governing relations between other countries follow the Loewen model in a general way, including the formulaic list of “goals” to be achieved through cooperation, division of authority over professionals and fees according to territorial location, and provisions for universal notices and opportunity to be heard. But these other protocols are *sui generis*, dealing in greater detail with more specific coordination challenges.
Secondly, it is a popular criticism that the Regulation lacks provisions concerning multinational groups of companies. The history of the Regulation and its basis in the EC Treaty points at the fact that the Regulation is a measure concerning “procedural law”, necessary for the creation of one European “an area of freedom, security and justice”, which calls for measures relating to judicial cooperation in civil matters needed for the proper functioning of the internal market. This area falls within the scope of Article 65 of the EC-Treaty. The Insolvency Regulation therefore is not related to the development of a system of “corporate law” or the idea of free establishment as meant in article 42ff of the EC-Treaty.

More elaborate provisions dividing responsibilities and scheduling sharing of information appear, for example, in the protocols governing the investigation and liquidation of the investment firms Manhattan Investment Fund Limited (Bermuda-British Virgin Islands-New York 2000) and Inverworld Inc. (Cayman Islands-U.K.-Texas 1999). These protocols elaborate on the general requirement of good faith cooperation by calling for the liquidators/receivers to develop and circulate written proposed agendas for meetings, file monthly status reports with all relevant courts, participate in conference calls or in-person meetings, and coordinate lists of specific tasks. As in Everfresh and Livent, the proceeds of asset liquidations in these other cases were to be dealt with territorially; that is, they would remain in the jurisdiction where the original assets were located (with no clear rule for identifying the location of intangible assets like securities contracts), subject to a potential joint order allowing them to be deposited in one central account for later division and distribution. Only a vague shadow of influence from the Concordat is perceptible in these “other” protocols, though they demonstrate the wide acceptance of a modern ethos of cooperation and maximum harmony in cross-border insolvency administration.

In continental Europe, protocol practice is less developed, though that may be changing. In late summer 2006, what may be the first intra-European protocol was adopted in the case of the mobile phone manufacturer Sendo. The administrators of the main English insolvency case and secondary proceedings in France agreed on a protocol to coordinate the two proceedings, consistent with the European Insolvency Regulation. A similar clash of “main” and “secondary” proceedings was averted that same year in the case of Collins & Aikman. Rather than hammer out a protocol after the fact, however, the English administrators met preemptively with committees of local creditors to convince them not to file “secondary” proceedings in Germany and Spain. The administrators “gave [the creditors] assurances to the effect that local priorities would be respected,” largely preventing the intervention of secondary proceedings and facilitating the sale of the group business. Creative lawyering was again required in order to find statutory authority to fulfill these assurances (in apparent contravention of the European Insolvency Regulation), but English counsel managed to do so. Like in North America, statutory law now compels European insolvency professionals to consider and coordinate with foreign insolvency proceedings (at least in other European Member States), but the details of that cooperation seem likely to be worked out through the initiative of insolvency professionals there in developing protocols or similar official agreements.
Nevertheless, as has been demonstrated, several court cases demonstrate the need for the Regulation to provide a solid set of rules, not just those related to “international jurisdiction” of a court. Changes could also be considered with regard to the nature of secondary proceedings, to the powers of the main liquidator, the establishment of a committee of creditors which duly represents the involved corporate debtors (parent company and subsidiaries) or certain forms of consolidation and the treatment of inter-company loans.

Finally, the EU Insolvency Regulation in principle only has intra-Community effects. When the centre of a debtor’s main interests is in a Member State and the Regulation is applicable, its provisions are restricted to relations with other EU Member States. Reference is made to Chapter 4 in which forms of unilateral initiatives concerning the treatment of cross-border insolvency law from different countries are described, and Chapter 7, in which the UNCITRAL Model Law is discussed, including the forms and results of enactments in some ten countries.