Source:
Bob Wessels, Amending the EU Insolvency Regulation: Shaken or Stirred?, in: Rebecca Parry (ed.), The Reform of International Insolvency Rules at European and National Level, Nottingham, Paris: INSOL Europe 2011, pp. 125 – 135.
ISBN 978-0-9558364-9-7

AMENDING THE EU INSOLVENCY REGULATION: SHAKEN OR STIRRED?

Bob Wessels

1. Introduction

On 27 April 2010, Ms Vivian Reding on behalf of the European Commission provided an answer to a question, put forward in the European Parliament regarding the EU Insolvency Regulation. She observed that "([i] the light of the numerous court cases that have been based on the regulation, it seems that the regulation has broadly reached its objective and it enhanced judicial cooperation in cross-border insolvency proceedings." I am not aware of any research supporting this observation. The court cases she is referring too many times are only published in sources available in a court's country and in the language the court uses (In Europe that will be over twenty languages. For instance in the Netherlands, the author's home country, I am aware of some 150 court cases regarding the EU Insolvency Regulation), but in law reviews or public sources outside the Netherlands only a few will have been published. Nevertheless, I am inclined to agree. On balance, the Regulations success should be measured by assessing the Insolvency Regulation's initial aims, centered around: (a) the proper functioning of the internal market (recital 2), (b) preventing the supply of incentives to seek more favorable legal positions (forum shopping, recital 4), (c) improvement of efficiency and effectiveness in cross-border insolvencies (recital 8), and introducing (d) 'uniform rules on conflict of laws rules' (recital 23).

Compared to the fragmented, uncertain and unpredictable 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 queries such as international jurisdiction, recognition of judgments, conflict of law rules, the position of creditors and the powers of insolvency 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.1 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. Mrs Reding continued: "Pursuant to Article 46 of the regulation, not later than 1 June 2012, the Commission shall present an application report and amendment proposal if needed. ….. Ten years after its entry into force, it is expected that the regulation will need a new facelift. Therefore, the Commission will

[1] See Allan Bloom et al., *Nortel Global Business Rescued via Formal Insolvency*, in: International Corporate Rescue 2011, 6ff, stating that it is very difficult to envisage that the favorable outcome of the Nortel Insolvency would have been achieved without the EU Regulation.

launch a large study on this issue at the beginning of 2011." On 10 January 2001 another Commissioner, Mr Michel Barnier, answered questions regarding the Commisions' for a new framework for crisis management in the financial sector by June 2011 in order to ensure that authorities throughout Europe have adequate tools and powers to deal with banks in difficulty and handle possible bank failures, including failures of cross-border banking groups, in an orderly manner. To complete his answer, Mr Barnier remembered the European Parliament that for "business and citizens" the Insolvency Regulation applies: "One objective of the regulation is to avoid forum shopping by enhancing judicial cooperation in cross-border insolvency proceedings. However it does not harmonise the conditions for filing an application for opening the insolvency proceedings, which is a matter of domestic insolvency law. By June 2012 the Commission shall present an application report and amendment proposal if needed."2 The last line nearly literary reflects the wording of Article 46. Interestingly, the provided answer opens the door for certain topics to be harmonized.

At the moment of writing this article (beginning of March 2011) the announced "large study" has not been launched yet. Although the overall balance of the application of the EU Insolvency Regulation appears to be positive, the handling of cross-border insolvencies within the Community could certainly be improved.3 A list of twenty recommendations follows below, presented with the intention of providing food for thought for the evaluation process pursuant to Article 46 InsReg. The list is by no means exhaustive.4 My suggestions have been limited to two or three per related topic, without detailed re-examination.5 Several times I provide in footnotes materials for further reading. For a list of suggestions for improvements, see also the comments of Moss and Paulus6 and of Omar.7
I will touch upon the following items: Insolvency Regulation as an EU measure (para. 2), matters of international jurisdiction (para. 3), conflict of law rules (para. 4), recognition of judgments (para. 5), communication and cooperation between the role players (para. 6), topics not dealt with in the Regulation (para. 7), and just a few words on the Insolvency Regulations' future (para. 8).

2. Insolvency Regulation as an EU measure

[2] Ms Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship. Mr Barnier is the Commission's member for Internal Market and Services. See www.europarl.europa.eu.

[3] In this way too for instance Jérôme Carriat, *The European Insolvency Regulation*, in: Henry Peter, Nicolas Jeandin and Jason Kilborn (eds.), The Challenges of Insolvency Law Reform in the 21st Century, Schulthess, Zürich-Basel-Genf, 2006, 331; J. Carriat, *La coordination des droits nationaux par le droit communautaire, Bilan de l'application du règlement communautaire du 29 mai 2000*, in: Le traitement des difficultés des entreprises dans le marché unique européen, Petites Affiches, du 19 octobre 2006, n° spécial.

[4] This article is an adapted version of: B. Wessels, *Twenty Suggestions for a Makeover of the EU Insolvency Regulation*, in: International Caselaw Alert, No. 12 – V/2006, October 31, 2006, pp. 68-73, which has been available at a website (www.eir-database.com), which is not accessible anymore since early 2008.

[5] What follows is extensively discussed in Bob Wessels, *International Insolvency Law*, Deventer: Kluwer, 3rd ed., Chapter IV (forthcoming).

[6] Gabriel Moss and Christoph Paulus, *The European Insolvency Regulation – The Case for Urgent Reform*, in: Insolvency Intelligence, October 2005,1ff.

[7] Paul J. Omar, Addressing the Reform of the European Insolvency Regulation: Wish list or Fancies?, in: Insolvency Intelligence, January 2007, 7ff.

(i) *Unflexible tool.* In her answer, Ms Reding explained: "The Commission monitors the smooth and correct implementation of the regulation as follows: opening of infringement proceedings against any Member State whose insolvency law would not comply with the provisions of the regulation, amending the annexes to the regulation about the lists of insolvency proceedings and liquidators in view of taking into account changes in national insolvency law." As far as I know infringement proceedings have not occurred. A case however can be made regarding domestic insolvency legislation which, allegedly, does not allow to pay any costs or ongoing payments, which have been made by a liquidator in main proceedings, but for the benefit of ongoing activities in another Member State, when in the latter State a while later secondary proceedings have been opened. The domestic provision which would allow these costs only as (for instance) a claim against the estate and not (for example) as a debt of the estate in the secondary proceeding, is clearly at odds with the system and rationale of the Regulation.

Changes over time in all Member States (based on economic changes or shifts in policy priorities) can only find their way into the Regulation under the method laid down in Article 45 of amending the Annexes. These Annexes have indeed been amended several times.8 The reasons behind these notifications could shed light on related questions but such reasons are unknown or at least not published. It would furthermore be interesting to discover whether other countries also requested amendments to the Annexes which were rejected by the Commission.

The Regulation, binding in its entirety and directly applicable in the Member States, is the EU's most forceful measure relating to the individual jurisdiction of a Member State. In a closed-list system (only those insolvency proceedings will be recognized which are listed in Annex A) the system of amending the Annexes can work, provided that these amendments are made preferably at the date that any renewed national insolvency law comes into force. My experience however is that the amendments to the Annexes only are published some six to twelve months later than the national "entry in to force" date, leaving an undesirable vacuum

---

8 The Annexes were amended in the following order:

- Council Regulation (EC) No 603/2005 of 12 April 2005 (OJ L 100 of 20 April 2005, with a correction in Annex C regarding Hungary by a Corrigendum, OJ L 49/36 of 17 February 2007) amended the lists of insolvency proceedings, winding up proceedings and liquidators detailed in Annexes A, B and C of the Regulation, in order to take into account changes in legislation in a number of Member States (namely: Belgium, Spain, Italy, Latvia, Lithuania, Malta, Hungary, Austria, Poland, Portugal and the United Kingdom);
- Regulation (EC) No 694/2006 of 27 April 2006 (OJ L 121 of 6 May 2006) amended Annex A (insolvency proceedings referred to in Article 2 of the Regulation) and Annex C (the liquidators referred to in the same article) concerning France;
- Following the enlargement on 1 May 2004, the Regulation itself was amended by the act concerning the conditions of accession to the EU of ten new Member States (OJ L 236 of 23 September 2003. Entry into force: 1 May 2004). Regulation (EC) No 1721/2006 (OJ L 363 of 20 December) adjusted the provisions of this Regulation again, to reflect the accession of Bulgaria and Romania, on 1 January 2007. In general on the accession of these two countries, see Van den Oosterkamp / Galama, SEW 2007, 8ff.;
- Council Regulation (EC) No 681/2007 of 13 June 2007 (OJ L 159 of 20 June 2007) amended the Annexes A, B and C for the following Member States: the Czech Republic, Romania, Italy, Sweden, the United Kingdom and Ireland;
- In 2008 the Annexes have been amended again at the request of Estonia (OJ L 213 of 8 August 2008);
- In March 2010 the publication followed of Implementing Regulation of the Council (EU) No 210/2010 of 25 February 2010 (OJ L 65 of 13 March 2010) amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings and codifying Annexes A, B and C to that Regulation.

for the mentioned period.

Where the Insolvency Regulation connects to existing and new domestic insolvency proceedings, the system of automatic recognition of other Member State's collective insolvency proceedings relies heavily on the principle of mutual trust, see Article 81 (1) TFEU (ex Art. 65 TEC): "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States." In some cases however, one can wonder whether a new domestic proceeding indeed characterises as a "collective insolvency proceeding" in the meaning of Article 1(1), although I immediately agree that there are no "global" norms to interpret the four criteria that have to be met to match the definition of collective insolvency proceedings in Article 1(1). The French insolvency proceeding "Sauvegarde" seems to be a good candidate for discussion9, as well as the Belgian proceeding "La réorganisation judiciare par transfert sous autorité de justice" (Judicial reorganisation by transfer under court supervision). Regarding the latter example I understand that the Procureur General of the Court of Appeal of Liège in Belgium has filed an appeal against the opening decision of such a proceeding, with the argument that this proceeding, although listed in Annex A, is not within the scope of the Insolvency Regulation because it can not be regarded as a collective insolvency proceeding in the meaning of Article 1(1).

As indicated, the procedure Article 46 provides is 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. In the dynamic and developing legal environment of international insolvency this process can be viewed as slow and reactive. A pro-active process e.g. by a Committee of experts (as in the EU banking industry) would be more appropriate. If the process were pro-active, the Council or the European Parliament could make recommendations, on the request of the Committee, or the Committee of experts could do so on its own initiative.

(ii) *Rescue culture*. With regard to the Regulation itself, it is seldom appreciated in literature or practice that the Regulation is the result of forty years of negotiation between representatives of a group of countries that, over the years, increased from six to fifteen. The result is a compromise between the different underlying policies of insolvency law systems of the various Member States. The final outcome in the early to mid-1990's was reached at a time when several of the Member States were considering or introducing certain types of reorganisation proceedings alongside the winding-up proceedings that had been in operation for several decades (or longer) in most European states. The Regulation is therefore rather focused on liquidation. In addition, special rules relating to the insolvency of natural persons were in the making in several countries. Consumer insolvency must have been hardly in the drafters' mind, some two decades ago.

The Regulation is furthermore applicable to twelve Member States, that have not taken part in any of these discussions. Given this history one may wonder whether the Regulation sufficiently promotes a rescue culture, for example, the existence of secondary proceedings, which seem to fit when in the other Member State main insolvency proceedings are liquidation proceedings too. Rescue plans in secondary proceedings are only permitted when

[9] See also Michel Menjucq, *Droit français des faillites internationales: De Daisytek A EMTEC, Les Faillites Internationales*, Colloque du 30 novembre 2007, Société de Législation Comparée, Centre Francais de Droit Comparé, Volume 10, 117 (2007c).

the domestic insolvency law allows for them (Article 34), which is only a small support for chances of reorganisation. Should the regulation include a power for the court to allow for another type of proceeding to be opened? Raising the question is answering it. In addition, research should provide answers to the question whether the Regulation is also beneficial to the domestic insolvency proceedings of the new Member States in the Middle and the East of Europe.

(iii) *Procedural framework.* The procedural framework of the Regulation can be considered to be unsatisfactory. This may be explained by the connection between the origins of the Regulation and what is (now) the Brussels Judgment Regulation 2002. The Insolvency Regulation may have closed a gap in the system of international jurisdiction and recognition of judgments relating to civil, commercial and insolvency matters, but 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.10 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, or rules regarding registration and publication. Not exiting, but they are necessary.

(iv) *Method of interpretation.* With the entry into force of the Lisbon Treaty, the slow process of having references to the Court of Justice of the EU (only allowed by the court of the highest instance of a Member State) has been abolished. The method of interpreting the Regulation is still under development. Traditional sources for interpretation, such as the historical genesis of the Regulation, are very hard to find and court cases (until now at least some 500) are not published in a central source, which is easily accessible. Therefore, in day-to-day practice, there is no opportunity to develop a shared approach to certain topics. In addition, the status of the Virgós/Schmit Report (1996) is somewhat uncertain and the various languages of the Regulation that were examined for the purposes of this publication (Dutch, English, German and French - four of the over twenty authentic languages of the Regulation) give rise to several differences in interpretation. The application of the Regulation in relatively small cases seem costly and any delay will have an influence on the possibility of continuing the debtor's business.

(v) *Uncertain terms and expressions.* Finally, the Regulation uses several uncertain terms, other than the obvious ones ('centre of main interest'; 'establishment'; 'public policy'). Examples of important but ambiguous or incomplete terms are 'the time of opening of proceedings' (Article 2(f)), the localisation rules (Article 2(g) for instance in relation to contracts, for shares or for IP-right, and 'claims' of tax or social security authorities (Article 39) which may be filed in all proceedings (do such claims also cover interest and fines?).

3. Matters of international jurisdiction

The following remarks may be made in relation to the topic of international jurisdiction:

[10] See Bob Wessels, *The EC Insolvency Regulation: Three Years in Force*, in: European Company Law, June 2005, Issue 2, 50ff, and Paul Omar, *The Convergence of Company and Insolvency Initiatives within the European Union*, in: European Company Law, June 2005, Issue 2, 59ff.

(vi) *COMI.* As demonstrated in various 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.[11] The COMI debate is ongoing, especially in relation to groups of companies. I refer to literature.[12]

(vii) *Compressed decision.* The 'COMI' decision seems to be too 'compressed' as the courts decision on the opening of insolvency proceeding also comprises the decision concerning the applicable law, the extension of this law and the powers of the liquidator throughout Europe.[13]

(viii) *Information.* 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.

(ix) *Proof.* Moreover, in general it is uncertain what will amount to sufficient proof on behalf of a debtor which has its COMI in a certain State (is it sufficient that the courts are satisfied or should proof be beyond a certain degree of doubt?). Courts still follow different approaches with regard to the strength of the presumption that a debtors' registered office is the location of his COMI.

(x) *COMI shopping.* In addition, following analysis of several court cases, it appears that the COMI operates as a movable object, which may be moved (manipulated) by certain debtors in a manner that is equivalent to forum shopping (so called 'migration').[14]

(xi) *Establishment.* Although the local effect of secondary insolvency proceedings seems to function well, its legal form and strict nature (domestic liquidation proceedings) may be open for debate. Any alternative should have a stronger supportive function for the main

---

[11] The decision of the European Court of Justice 2 May 2006 (C-341/04) only provides a first step in clarifying the interpretation of COMI, see Bob Wessels, *The place of the registered office of a company: a cornerstone in the application of the EC Insolvency Regulation*, in: European Company Law, August 2006, 183ff.

[12] Gerard McCormack, *Jurisdictional Competition and Forum Shopping in Insolvency Proceedings*, Cambridge Law Journal, 68(1), March 2009, pp. 169ff.; Bob Wessels, *The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation*, European Company Law, August 2009, pp. 169ff.; A. Walters and A. Smith, *'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales*, International Insolvency Review, Winter 2010, Vol. 19, Issue 3, 181ff.; Gabriel Moss, *International jurisdiction of Courts in the USA and England*, in: Anthon Verweij and Bob Wessels (eds.), Comparative and International Insolvency Law. Central Themes and Thoughts, Nottingham-Paris, INSOL Europe, 2010, 40ff.; Joseph Spooner, *Long Overdue: The Reform of Irish Law as A Case Study of Divergences and Convergences in National Personal Insolvency Laws in the Context of European „Bankruptcy Tourism"*, International Insolvency Conference 2010, Nottingham Law School (www.ntu.ac.uk); Bob Wessels, *Worldwide COMI battle continues*, in: Eurofenix Summer 2010, 22ff; Bob Wessels, *COMI: Round Three!*, Tijdschrift Financiering, Zekerheden en Insolventiepraktijk (FIP), December 2010, 224ff.

[13] See 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.

[14] Regarding the Schefenacker case, Bob Wessels, *Corporate migration or COMI manipulation*?, in: Ondernemingsrecht 2008-1, 28 januari 2008, 34ff. See also Wolf-Georg Ringe, *Strategic Insolvency Migration and Community Law*, in: Wolf-Georg Ringe, Louise Gullifer and Philippe Théry, Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK, Hart Publishing, 2009, 71ff.

proceedings, including wider powers for the main liquidator to shape the organisation of this function. To conclude on the subject of jurisdiction, some courts have ruled that an 'establishment' can also function as the registered office of a subsidiary whose insolvency has been opened in another Member State (where 'head office functions' of the parent are centralised). Although the history of the Regulation does not seem to provide support for such decisions, the consequence is that uncertainty remains concerning how the decision, which includes the applicability of a foreign lex concursus and the powers of the liquidators appointed, relates to the domestic corporate or insolvency law duties of the management of the subsidiary.

4. Conflict of law rules

The conflict of law rules in Articles 5-15 provide a harmonized miniature code of unprecedented value. Nevertheless, it is submitted that the elaboration gives rise to uncertainty in relation to several central terms and ambiguity which results from unclear formulations:

(xii) *Vague terms.* Vague terms include 'Opening of insolvency proceedings' and 'shall not affect' in Articles 5-7, 'law' in Articles 6 and 14, 'State' in Articles 8, 10, 11, 13 and 14, and 'solely', which appears in Articles 8, 9, 10 and 15. Related questions also arise from the differences in the Dutch, English, French and German texts of Articles 5-15. In certain cases such differences may give rise to the view that the current formulation of certain choice of law provisions should be amended.

(xiii) *Policy choices.* The conflict of law rules reflect the policy choices of a large majority of Member States at a certain moment in time. Such policies may have changed in recent years, e.g. the choice for Article 5 as a 'hard and fast rule,' which results in the over-protection of secured creditors. The protection offered in relation to contracts concerning immoveable property (Article 8) seems ready for reconsideration as certain other contractual positions, e.g. with regard to consumers, may in current times lead to an exception to the applicability of the lex concursus. Several changes in respect of these choices might be on the wish list of those Member States which joined the EU in 2004. It may be premature to assess whether the Regulation has been sufficiently successful in avoiding forum shopping. In practice doubts are expressed, in short: (1) in 'a race to the court' the first judgment determining COMI wins, (2) the set of choice of law rules may promote financial engineering in the choice of jurisdiction (to limit risks) and optimize set-off, and, in general, (3) will the whole PIL insolvency framework be sufficiently coherent?

5. Recognition of judgments

The Chapter on recognition of insolvency proceedings also comprises rules on publication.

(xiv) *European publications.* It is undisputed that in the mid 1990s there was no thought of a European Insolvency Case Register in the minds of the drafters. However, nowadays, it seems a natural course of action to establish a European web-based register. This is compatible with the aim of improving judicial cooperation. The web-based register could consist of judgments opening insolvency proceedings to avoid courts in other Member States

opening main insolvency proceedings where such proceedings have already been opened against the same debtor. Furthermore the liquidator's appointment (Article 19) and any supplemental Orders given by a court may be listed on such a register. The relationship between domestic registrations is an item for further discussion.

(xv) *Recognition of related judgments.* Another shortcoming is the unnecessary complexity of the system established for the recognition of insolvency-related judgments (Article 25). I refer again to literature.15

6. Communication and cooperation

The mutual duties with regard to communication and cooperation (Article 31) are unsatisfactory in at least two ways:

(xvi) *Content.* There is inadequate detail with regard to the duties of liquidators, who therefore may be insufficiently aware of their mutual duties on a European level, in respect of working towards a common goal and the ultimate unity of the process of administering the debtor's estate as an economic unit. The introduction of a non-binding set of European Communication & Cooperation Guidelines for Cross-border Insolvency by the end of 2007, although used in practice (e.g. the Lehman Brother protocol), only is a first step too improvement. The mutual interwovennes of the proceedings (originating from procedural rights of the main liquidator) and of the claims of creditors (lodging; comparing; distribution) assume the adequate and unconditional realisation of mutual duties with regard to information and cooperation. Secondly:

(xvii) *Communication and cooperation between courts.* 'Court-to-court communication and cooperation' is not required or provided for under the Regulation. This can be considered somewhat peculiar as within the field of international insolvency as 'communication and cooperation' in cross-border cases has become a guiding practice in large parts of the world and has recently found its way to countries which have adopted Articles 25 – 27 UNCITRAL Model Law. Court-to-court communication and cooperation is now largely based on the principle of Member States' (judicial) cooperation in the area of freedom, security and justice.16

It may be noticed at this juncture that a European insolvency industry hardly exists, most practitioners work in their own jurisdiction, a European Insolvency Institute comprising academics, judges and practitioners from the majority of Member States involved is still lacking, let alone the availability of structured education on a European basis and a 'European' licensing system for practitioners.17

---

[15] Anatol Dutta, *Jurisdiction for insolvency related proceedings caught between European legislation*, Lloyd's Maritime and Commercial Law Quarterly 2008, 88ff.; Bob Wessels, *Article 25 of the Insolvency Regulation: A Hornets' Nest*, Insolvency Intelligence, October 2008, pp. 135ff.

[16] Bob Wessels, *Judicial Coordination of Cross-border Insolvency Cases*, Inaugural lecture, University of Leiden Law School, 6 June 2008, Deventer: Kluwer 2008.

[17] For some ideas, see Björn Laukemann, *Die Unabhängigkeit des Insolvenzverwalters. Eine rechtsvergleichende Untersuchung*, Heidelberger Rechtswissenschaftliche Abhandlungen, Tübingen: Mohr Siebeck 2010, 398ff.

7. What is not offered under the Regulation

Two other topics deserve to be mentioned in the category of what is not offered under the Insolvency Regulation:

(xviii) *No group provisions*. I have always been reluctant to criticize the Regulation for its lack of provisions relating to the insolvency of one or more companies, which, along with other companies, form a group of corporations. In my view critics have paid too little attention to the history of the Regulation and its basis in the Treaty of the Functioning of the European Union as a measure concerning 'mutual recognition of judgments', and therefore 'European procedural law', not related to 'corporate law' or the idea of free establishment. Nevertheless, 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), certain forms of consolidation and the treatment of inter-company loans.

(xix) *No relationships with non-EU Member States.* To a great extent the Regulation only applies within the territory of the Community (except for Denmark). The consequences for debtors or creditors outside of the Community are small.[18] The reason for the limitation can be understood in a historical and political context, but is clearly at odds with growing patterns of business and financial relationships. Commonly, in trading or financial relationships with e.g. Denmark, Norway, Switzerland, Turkey or Japan and the USA the COMI is located outside the Community, thus, a debtor will remain untouched by the Insolvency Regulation.

(xx) *No harmonisation*. 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. See my earlier publication[19] with reference to, for example, differences in the way in which businesses are financed, protection policies of certain interest groups and different cultures in relation to the social phenomenon of 'insolvency'. 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 7(2), 20, 29-35, 39 and 40, whilst other suggestions for approximation have been mede.[20]

---

[18] Vanessa Marquette and Candice Barbé, *Council Regulation (EC) No. 1346/2000. Insolvency Proceedings In Europe and Third Countries. Status and Prospects*, in: A. Nuyts & N. Watté (eds.), International Civil Litigation in Europe and Relations with Third States, Bruxelles: Bruylant, 2005, 419ff.

[19] Bob Wessels, *Insolvency Law*, in: Jan M. Smits (ed.), Encyclopaedia of Comparative Law, Edgar Elgar, London, 2006, pp. 294-311.

[20] Bob Wessels, *Europe Deserves A New Approach To Insolvency Proceedings*, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 267.; Christoph Paulus, *A Vision of the European Insolvency Law*, 17 Norton Journal of Bankruptcy Law and Practice 2008, 607ff.; Tuula Linna, *Europeanization of Insolvency Law*, in: Laura Ervo, Minna Gräns, Antti Jokela (eds.), Europeanization of Procedural Law and the New Challenges to Fair Trail, Groningen: Europa Law Publishing 2009, 151ff.; Gerard McCormack, *Time to Revise the European Insolvency Regulation*, in: Bob Wessels and Paul Omar (eds.), The European Insolvency Regulation: An Update, Nottingham-Paris: INSOL

8. Future

Is there a future for the Insolvency Regulation? There certainly is. The Regulation has laid a basis for cross-border insolvency solutions. Some parts in the basis should be renewed, other parts should be added to create a European house in which one can live with some comfort. With the Commissions' launch of a large study many conferences and seminars will debate all sorts of topics to improve the system and the content of Regulation. One may just expect (or at least hope) that organizers of such conferences do not limit themselves to discussion, but provide a report of them and publish it, in a serious aim to contribute to an improved framework for cross-border insolvency.

Europe, 2010, 75ff.; Gabriel Moss, *A Practioner's Perspective on the Possible Evolution of European Insolvency Law*, in: Bob Wessels and Paul Omar (eds.), Insolvency Law in the United Kingdom: The Cork Report at 30 Years, INSOL Europe, Nottingham-Paris, 2010, 107ff.; Bob Wessels, *Harmonization of Insolvency Law in Europe*, European Company Law 2011, 27ff.