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Key words – Insolvency, Europe, Reform, Insolvency Regulation

Abstract

This paper critically evaluates the recasting of the European Insolvency Regulation - Regulation (EU) 2015/848 - in the context of the EU Europe 2020 growth strategy. According to the Council of Ministers, through the protection of creditors and the survival of business, the new legislation should contribute to the preservation of employment in these challenging times. The paper argues that worthwhile improvements have been made by extending the scope of the regulation; clarifying and confirming contentious areas of interpretation; smoothening the inter-relationship between main and secondary insolvency proceedings and improving information flows. But the overall effect is to enhance complexity. The recast Regulation carries the whiff of political compromise and, at times, seems to point in different directions at the same time.

Something old, something new – recasting the European Insolvency Regulation

Gerard McCormack*

The Europe 2020 strategy promulgated by the European Union¹ talks about fostering economic recovery and sustainable growth. The objective is to facilitate a situation where economic and social systems are adaptable, resilient and fair; where economic activity is sustainable and where human values are respected. Part of the 2020 strategy involves a European Commission recommendation on a new approach to business failure and

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¹ See *Europe 2020 – A European Strategy for Smart, Sustainable and Inclusive Growth* (2010).

insolvency² and also possible new harmonisation measures on the qualifications and conduct of insolvency practitioners and the avoidance of transactions that are antecedent to insolvency proceedings.³ But an important part of the strategy also involves recasting the Insolvency Regulation.⁴

Political agreement on the text of the Regulation was reached in December 2014; it was formally adopted by the European Parliament on 20th May 2015 and was published in the Official Journal on 5th June 2015.⁵ Most of the provisions will come into force on 26th June 2017.⁶ According to the President of the European Council: 'The new legislation, through the protection of creditors and the survival of business, will contribute to the preservation of employment in these challenging times'.⁷

² See Commission Recommendation of 12th March 2014 - C(2014) 1500 final and see also the Commission Communication *A New European Approach to Business Failure and Insolvency* COM (2012) 742.

³ See generally the European Parliament report *Harmonisation of Insolvency Law at EU Level* available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings/_empl_study_insolvencyproceedings_en.pdf/.

⁴ See Press Release, *New Rules to Promote Economic Recovery*, 4th December 2014 – available www.consilium.europa.eu/uedocs/NewsWord/en/jha/146041.doc/. For the original European Commission recommendations for reform of the Regulation, see *Proposal for a new Regulation* COM (2012) 744 and see also *Report from the Commission on the application of Council Regulation (EC) No 1346/2000* COM (2012) 743 and the Hess–Oberhammer–Pfeiffer external evaluation of the Regulation commissioned by the European Commission – see JUST/2011/JCIV/PR/0049/A4.

⁵ Regulation (EU) 2015/848 - OJ L 141, 5.6.2015.

⁶ Articles 84 and 92.

⁷ Press Release n 4 above.

This is a bold claim but also one that is sufficiently vague that it is difficult to disprove. What one can safely say however is that the changes to the original Insolvency Regulation – Regulation 1346/2000 – are not as far reaching and fundamental as the language might imply.⁸ The recast does not alter the structure of the original though it does engraft a potential new set of group co-ordination proceedings. But the main thrust of the changes involves incremental measures designed to extend the scope of the regulation; to clarify and confirm contentious areas of interpretation; to smoothen the inter-relationship between main and secondary insolvency proceedings, and to improve information flows including through the inter-connection of national insolvency registers. On the whole, there are worthwhile improvements but the overall effect is to double the length of the Regulation and to enhance complexity. In part, the new Regulation carries the whiff of political compromise seeming to point in two different directions at the same time.⁹ But the process of creating an ever-closer Union, to which the UK remains signed up, remains an uneven one.¹⁰

This paper will take the rough with the smooth and analyse and evaluate the recast Regulation under the following heads (1) general philosophy and structure; (2) scope; (3)

⁸ The original Commission proposals for revision of the Insolvency Regulation have been described by leading commentators as “very decent” – G. Moss QC [2013] *Insolvency Intelligence* 55 - and as a “modest attempt to improve the status quo” – H. Eidenmuller, ‘A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond’ (2013) 20 *Maastricht Journal* 133 at 150.

⁹ See generally F. Mucciarelli, ‘Not Just Efficiency: Insolvency Law in the EU and its Political Dimension’ (2013) 14 *European Business Organization Law Review* 175.

¹⁰ See written ministerial statement of 15th April 2013 “Government consider that it is in the UK’s interest to opt in to the proposal because it will be of general benefit to creditors and businesses in the UK and EU” - available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130415/wmstext/130415m0001.htm>.

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jurisdiction for opening insolvency proceedings; (5) Applicable law; (6) insolvency registers and greater transparency ; (7) groups of companies. A final section concludes.

1. General philosophy and structure

The recast regulation has the same general philosophy and structure as the original.¹¹ It is essentially a private international law measure rather than a measure of substantive harmonization though it does establish basic minimum European standards in respect of the treatment of foreign creditors and notification of proceedings and also, to a certain extent, on the powers and duties of insolvency practitioners.¹² The Regulation allocates jurisdiction to open insolvency proceedings and determines the applicable law in respect of such proceedings.

The preamble to the Regulation locates it in the context of creating a European area of freedom, security and justice.¹³ It refers to the cross-border activities of business entities as European markets become more integrated and also to the need to prevent asset transfers or forum manipulation to the detriment of the general body of creditors. Jurisdiction to open main insolvency proceedings is given to the State where a debtor has its centre of main interests (or ‘COMI’) with jurisdiction to open secondary proceedings given to the State where the debtor has an ‘establishment’.¹⁴

¹¹The background of underlying principles and detailed rules in the original Regulation are explained in the Virgos-Schmit report on the draft EU Convention on Insolvency Proceedings, which preceded the Regulation. This report has no official status but has been used as persuasive authority — *Re Olympic Airlines SA* [2015] UKSC 27 at paras 9,10 - and can be found at <http://aei.pitt.edu/952/>.

¹² See Articles 48 and 49. Art 49 is the same as Art 35 in the original whereas Art 48 is a new provision.

¹³ See Recitals 2-5.

¹⁴ Article 3.

The Regulation reflects a philosophy of Euro universalism.¹⁵ Main insolvency proceedings are stated to have universal scope and aim at encompassing all the debtor's assets. The idea is that insolvency proceedings with pan-European effects are more likely to produce better returns for creditors etc than a collection of separate national proceedings.¹⁶ So, for example, if main insolvency proceedings are opened in the UK in respect of a company which has assets in both the UK and Poland, the proceedings apply not only to the assets in the UK but also to those in Poland. There is the possibility of opening secondary insolvency proceedings in Poland but these proceedings are territorial and will apply only to the assets in Poland.¹⁷

The rhetoric of universalism does not quite match the reality however. Not only is there the possibility of opening secondary insolvency proceedings but the effect of Articles 8-18 is that other laws may apply to certain assets and transactions rather than the law of the main proceedings. These provisions mirror, while not exactly duplicating, Articles 5-15 of the original Regulation. It is probably not fair to call the European Regulation a territorialist scheme with universalist pretensions, as one US commentator has done¹⁸, though the Articles 8-18 exceptions run pretty deep.

¹⁵ Recital 23 of the preamble and *Schmid v Hertel* (Case C-328/12 [OJ 2014 C85/5](#)); [2014] [1 WLR \(D\) 5633](#). For the universalism/territorialism debate see G. McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32 *OJLS* 325; J.L. Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 *American Bankruptcy Law Journal* 457; L. LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84 *Cornell Law Review* 696; S. Franken, 'Three Principles of Transnational Corporate Bankruptcy Law: A Review' (2005) 11 *European Law Journal* 232.

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¹⁶ See J.L. Westbrook, n 15 above at 465: "the preservation of going concern values and the maximising of liquidation values by integrated sales will likely increase returns to creditors greatly."²²

¹⁷ Article 3(2).

¹⁸ F. Tung, 'Is International Bankruptcy Possible' (2001) 23 *Michigan J Intl L* 31 at 77.

The possibility of opening secondary proceedings with territorial effects represents another significant inroad on the principle of universalism. The motivation behind such proceedings is likely in many cases to be the protection of ‘local’ preferential creditors.¹⁹ It is worth pointing out that all creditors, and not just local preferential creditors, are entitled to claim in the secondary proceedings but there may be little, if anything, left in the pot after the claims of preferential creditors have been satisfied. Recital 21 of the preamble acknowledges that the preferential rights enjoyed by creditors are in some cases completely different. It also makes the aspirational point that, at the next review of the Regulation, it will be necessary to identify further measures to improve the preferential rights of employees at European level. It is difficult to know what to make of this assertion. Preferential rights of employees are a controversial topic. In some countries preferential claims may trump security rights but in many, if not most, countries they only outrank the general body of creditors.²⁰ In any event, the satisfaction of employee claims through preferential status is very uneven. It depends on there being sufficient assets within the debtor’s coffers to meet the claims. Protecting employee claims through a social insurance fund offers more uniform and potentially complete protection. Establishing such a fund however, requires a substantial bureaucratic commitment and there are also ‘moral hazard’ and financing issues i.e. whether the fund should be financed through ex ante or ex post contributions from employers.²¹

¹⁹ See also [Case C-649/13-Nortel Networks SA v Rogeau](#) [Case C-649/13 OJ 2015 C270/4](#) [ECLI:EU:C:2015:384 \(11th June 2015\)](#) at [36].

²⁰See J.M. Garrido, ‘No Two Snowflakes are the Same: The Distributional Question in International Bankruptcies’ (2011) 46 *Texas International Law Journal* 459, 460–461 stating that “there are no two priority systems that are identical, and that harmonization or unification of the law in this area is extremely unlikely to happen.”

²¹ See generally J. Armour, ‘The Law and Economics Debate about Secured Lending: Lessons for European

What is noteworthy about the recast Regulation is the emphasis placed on rescue and sustaining business activity. The preamble in recital 10 talks about promoting the rescue of economically viable but distressed businesses and giving entrepreneurs a second chance. Two points are pertinent at this stage. The first (obvious) one is that success in business may only come after many efforts and it is more accurate to talk of further chances rather than just a ‘second chance’. The second point is that it is commendable that the preamble has stressed business rescue rather than corporate rescue.²²

In the original European Commission proposal for a revised Regulation there was an implicit assumption that for every business the going concern value exceeds the liquidation value and this surplus value is best captured if the business is restructured in some way rather than auctioned off to the highest bidder.²³ This assumption is understandable in that Chapter 11 of the US Bankruptcy Code has been hailed as the model to which European restructuring laws should aspire²⁴ and the statutory goal of Chapter 11 is

Lawmaking?’ (2008) 5 *European Company and Financial Law Review* 3; ‘Should We Redistribute in Insolvency?’ in J. Getzler and J. Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford: OUP, 2006) and also EU Directive (2008/94/EC) on the protection of employee claims in the event of employer insolvency.

²² For different conceptions of corporate rescue, see V. Finch, ‘Corporate Rescue: A Game of Three Halves’ (2012) 32 *Legal Studies* 302; V. Finch, ‘Corporate Rescue in a World of Debt’ [2008] *Journal of Business Law* 756.

²³ For particular [examples? Or is this] In particular see H. Eidenmuller, n 9 above.

²⁴ See M. Brouwer, ‘Reorganization in US and European Bankruptcy Law’ (2006) 22 *European Journal of Law and Economics* 5; A. Tilley, ‘European Restructuring: Clarifying Trans-Atlantic Misconceptions’ [2005] *Journal of Private Equity* 99; C. Pochet, ‘Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules’ (2002) 6 *Journal of Management and Governance* 343.

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the preparation and confirmation of a restructuring plan.²⁵ In recent years, however there has been an effective move to a new 'Chapter 11' with the provisions being used as a vehicle for going concern sales of the debtor's business rather than on traditional restructurings.²⁶ Moreover, the American Bankruptcy Institute (ABI), one of the important actors in insolvency law reform in the US, has recently produced a report that suggests a reorientation of Chapter 11 away from the restructuring of business debtors and towards the maximization of asset values for the benefit of all creditors and stakeholders.²⁷ In the recast Regulation, while a restructuring focus is still evident to some extent, the emphasis is now on the business rather than on the legal entity per se.

The focus on restructuring in the recast Regulation needs however, to be understood in its proper context. In the original Regulation the focus was almost exclusively on liquidation. This was considered to be the paradigmatic insolvency procedure. For instance, secondary proceedings commenced after main insolvency proceedings had been opened, could only be liquidation proceedings and secondary proceedings initiated before main insolvency proceedings had been opened had to be converted into liquidation proceedings at the request of the liquidator in the main proceedings.²⁸ Moreover, the person who took control of a debtor's affairs after main insolvency proceedings had been opened, was referred to throughout the Regulation as a liquidator even though that person might be charged with the

²⁵ *Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434.

²⁶ See, for example, K. Ayotte and D. Skeel, 'Bankruptcy or Bailouts' (2010) 35 *Journal of Corporate Law* 469, 477 ('[R]oughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan'.)

²⁷ For the ABI report see reform—see www.commission.abi.org/

²⁸ See Articles 3(3), 3(4) and 37 of Regulation 1346/2000.

task of preparing a restructuring plan. The recast Regulation opts for more neutral terminology and uses the expression insolvency practitioner (IP) throughout rather than liquidator.²⁹ There is also no requirement that secondary proceedings should be liquidation proceedings. But it may be that the pendulum has now swung too far in the opposite direction. Putting ailing businesses on a life support machine through restructuring may weaken the overall health of the economy. It forces viable businesses to compete in crowded markets with competitors that may be slimmed down and have their debts reduced but are still ultimately inefficient. At the end of the day, liquidation may be the swiftest and most effective method of allocating assets to their most efficient use.

The recast Regulation does not say that the restructuring goal should be preserved above all others but the accompanying political rhetoric implies that the preservation of employment may best be achieved through the survival of businesses.³⁰

2. Scope of the recast regulation

One of the main intentions behind the recast Regulation is that it should apply to a greater range of procedures. The original Regulation was limited to collective insolvency proceedings involving the partial or total disinvestment of the debtor and the appointment of a liquidator (Art 1). The language of the recast is much broader. The new Article 1 states that the Regulation applies to public collective proceedings, which are based on a law relating to

²⁹ Article 2(5) Regulation (EU) 2015/848 defines an ‘insolvency practitioner’ (IP) as meaning “any person or body whose function ... is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or in part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii); or (v) supervise the administration of the debtor’s affairs.”²² These persons or bodies are listed in Annex B of the recast Regulation.

³⁰ Press Release n 4 above.

insolvency, and in which for the purpose of rescue, adjustment of debt, reorganisation or liquidation (a) the debtor is totally or partially divested of its assets with an IP appointed or (b) the debtor's assets and affairs are subject to control or supervision by a court or (c) there is a stay of individual enforcement proceedings against the debtor. Where proceedings are commenced where there is only a likelihood of insolvency, their purpose has to be to avoid the debtor's insolvency or the cessation of its business activities.

The question arises whether the Regulation applies to schemes of arrangement under the UK Companies Act.³¹ Schemes may serve as a form of 'debtor-in-possession' restructuring. The scheme procedure enables a company to enter into a compromise or arrangement with any class of creditors, or members. In this way, the capital structure of an ailing company may be rearranged. The restructuring may involve various elements such as an extension of debt repayments, whole or partial debt forgiveness, and converting debt into shares or share warrants.

The procedure has separate 'headcount' and numerical value conditions. A majority in number representing 75% in value of the class of creditors or members affected must accept the scheme. There is also a requirement that the court should sanction a scheme as being fair to the affected class as a whole.³² If the statutory conditions are fulfilled, the scheme becomes binding on members of the relevant class who did give their consent. The procedure enables objections by minority creditors within a class to be overcome. The minority creditors are 'crammed down' to use a standard metaphor. Unlike however, chapter 11 of the

³¹ Schemes are dealt with in Part 26 of the Act and see generally on schemes G. O'Dea, J. Long and A. Smyth, *Schemes of Arrangement Law and Practice* (Oxford: OUP, 2012); J Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge: CUP, 2014).

³² On "fairness" see *Re Telewest Communications* [2004] EWHC 924.

US Bankruptcy code, the procedure does not allow dissenting classes in their entirety to be ‘crammed-down’.

One might argue that, since schemes derive from general company law and not from a law relating to insolvency, they therefore fall outside the scope of the Regulation on this basis.³³ On the other hand, they are a debt restructuring tool par excellence.³⁴ Once considered a blunderbuss³⁵, schemes of arrangement are now better described as something in the nature of a high precision sniper’s tool that allows contentious creditors or members to be eliminated from the corporate equation without necessarily tending to all the corporate ills. They have contributed to the UK becoming the restructuring capital of Europe with financially stretched foreign companies³⁶ flocking to the UK to restructure their debts by means of a scheme of arrangement.

Under the old regime, the European Court of Justice held in *Bank Handlowy*³⁷ that once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. In *Ulf Kazimierz Radziejewski*³⁸ the court also held that the

³³ Recital 16 of the preamble.

³⁴ Schemes are also used in corporate takeovers as a mechanism for the compulsory acquisition of shares.

³⁵ Schemes were depicted in the Joint DTI/Treasury *Review of Company Rescue and Business Reconstructions Mechanisms* (London, TSO, 2000) at para 43 and the 1982 Cork Committee *Report on Insolvency Law and Practice* (1982, Cmnd 8558) Chapter 7 as slow and cumbersome.

³⁶ See *Re Seat Pagine Gialle SpA* [2012] EWHC 3686; *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746; *Re Rodenstock GmbH* [2011] EWHC 1104 and see generally L.C. Ho, ‘Making and enforcing international schemes of arrangement’ (2011) 26 *JIBLR* 434; J Payne, ‘Cross-Border Schemes of Arrangement and Forum Shopping’ (2013) 14 *European Business Organization Law Review* 563.

³⁷ *Bank Handlowy SA v Christianapol* (Case C-116/11, [OJ 2013 C26/4](#), [ECLI:EU:C:2012:739](#)) [2013] BPIR 174 at [33–35]. See also para 49 of the opinion of Advocate General Kokott.

³⁸ Case C-461/11 OJ 2013 C9/20 [ECLI:EU:C:2012:704](#) at [24].

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Regulation applied only to the proceedings listed in the annex. This had the consequence that a Swedish debt relief procedure considered in that case was not subject to the Regulation as it was not included in the Annex.

The same language appears in the recast and since schemes of arrangement have not been listed by the UK in Annex A, they are therefore outside the Regulation. This is stated with admirable clarity in recital 9 of the preamble but not in any substantive provision of the Regulation. Recital 9 provides that the insolvency proceedings to which the Regulation applies are listed exhaustively in Annex A. It goes on to say that when a procedure appears in the Annex, the Regulation applies without any further examination by national courts regardless of whether the definition is in fact satisfied. It adds that where a procedure is not listed, it is not covered by the Regulation.³⁹

The non-appearance of UK schemes in the Regulation will no doubt be presented by lawyers and IPs in the UK as a victory⁴⁰ for they have lobbied quite hard for schemes to be kept outside.⁴¹ This fact means that they are not entitled to the benefits of automatic EU wide

³⁹ The Report from the European Parliament's Committee on Legal Affairs on the proposed new Regulation (A7-0481/2013, 20.12.2013 - the "Lehne 2 report") suggested at p 44 that if the Art 1 conditions are met, then "Member States need to notify". This view did not prevail in political negotiations that led to agreement on the new Regulation.

⁴⁰ But the Spanish equivalent of schemes are listed in Annex A. For critical Spanish commentary on the divergence between the two countries see Ángel Carrasco Perera and Elisa Torralba Mendiola, 'UK schemes of arrangement' are "outside" the scope of the European Regulation on Insolvency Proceedings. What does "outside" actually mean?' – available at <http://www.gomezacebo-pombo.com/media/k2/attachments/uk-schemes-of-arrangement-are-outside-the-scope-of-the-european-regulation-on-insolvency-proceedings-what-does-outside-actually-mean.pdf>

⁴¹ See e.g. the Insolvency Lawyers Association (ILA), City of London Law Society Insolvency Law Committee and Association of Business Recovery Professionals joint response of 25th February 2013 to the UK

recognition but, for certain practitioners, this is outweighed by the fact that the ability of the English courts to sanction schemes is not hampered by the jurisdictional conditions of the Regulation. In particular, there is no need to establish that the COMI of the company is in the UK. The courts can sanction a scheme if a foreign company is deemed to have a ‘sufficient connection’ with the UK, even though its COMI may not be in the UK. The ‘sufficient connection’ test has been established in cases like *Re Drax Holdings Ltd*⁴² and in *Re Rodenstock GmbH*⁴³ where a sufficient connection was deemed to exist by virtue of the fact that the company’s credit facilities contained English choice of law clause and jurisdiction clauses and also by reason of expert evidence that the relevant foreign courts would recognise the scheme. The text of the Regulation finally agreed upon preserves the attractiveness of the UK as a restructuring venue for large companies and the ancillary benefits for UK-based professionals.⁴⁴ It may also contribute to the ‘rescue culture’. Not all countries may have the same advantageous laws which permit corporate restructurings to be accomplished through overcoming ‘hold-outs’ by minority creditors.

Government consultation on the proposed changes to the Insolvency Regulation - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279289/insolvency-lawyers-association-evidence.pdf/.

⁴² [2004] 1 WLR 1049.

⁴³ [2011] EWHC 1104. See also *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746; *Re Seat Pagine Gialle SpA* [2012] EWHC 3686; *Re Magyar Telecom BV* [2013] EWHC 3800; *Re Dtek Finance BV* [2015] EWHC 1164.

⁴⁴ See joint response n 45 above at p 6: “We consider that the benefits derived from the different jurisdictional thresholds for sanctioning Schemes of Arrangement ... are capable of providing a better outcome in terms of value to creditors. Additionally, we believe that Schemes provide the UK with an important commercial advisory opportunity as well as enhancing the reputation of the UK as a leading commercial centre.”

3. Jurisdiction to open insolvency proceedings

(a) main proceedings

Like its predecessor, the recast Regulation confers jurisdiction to open main insolvency proceedings on the State where the debtor has its centre of main interests (COMI) but there has been considerable criticism of the COMI concept as the basis for opening main insolvency proceedings.⁴⁵ This criticism is based on the proposition that COMI is inherently variable and fact sensitive and may give to conflicting judicial interpretations.⁴⁶ If a relevant party considers that the opening of insolvency proceedings in a particular jurisdiction will favour its case but there are doubts about the COMI location, it makes sense to put aside these doubts and file in the 'favoured' jurisdiction. In marginal cases, a court may well be inclined to assert, rather than to decline jurisdiction.⁴⁷ COMI is the centre piece of the Regulation for it determines not only jurisdiction to open main insolvency proceedings but also applicable law in most cases.⁴⁸ Given this importance, the decided cases provide many of examples of purported COMI shifts in anticipation of an insolvency filing – 'forum shopping'.

The COMI concept is in some respects a compromise between the rival 'real seat' and 'incorporation' theories of jurisdiction in respect of companies. Under the 'real seat' theory,

⁴⁵ See generally M. Szydło, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 *European Business Organization Law Review* 253; W.G. Ringe, 'Forum Shopping under the EU Insolvency Regulation' (2008) 9 *European Business Organization Law Review* 579; G. McCormack, 'Jurisdictional competition and forum shopping in insolvency proceedings' (2009) 68 CLJ 169.

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⁴⁶ L. LoPucki in 'The Case for Cooperative Territoriality in International Bankruptcy' (2000) 98 *Michigan Law Review* 2216, 2217 (describes the COMI concept as intentionally vague and practically meaningless).

⁴⁷ *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594.

⁴⁸ Article 7.

the law applying to the internal affairs of a company is the law of the country where it has its so-called 'real seat' i.e. its effective central administration, whereas the incorporation doctrine refers to the law of the state of incorporation.⁴⁹ Common law countries apply the incorporation theory but the majority of civil law countries apply the 'real seat' theory. COMI appears closely akin to the concept of 'real seat'⁵⁰ but there is a nod in the direction of the incorporation theory by a presumption that, in the case of company, COMI is the same as the place of the registered office. This presumption however may be rebutted. The recast Regulation could have introduced greater certainty by making the 'COMI equals registered office' presumption rebuttable only in extreme circumstances or else by replacing COMI with a place of incorporation or place of the registered office test.⁵¹ However, the COMI concept is also found in the UNCITRAL Model Law on Cross-Border Insolvency⁵² and importing a new test into the Insolvency Regulation would introduce an unwelcome degree of international divergence. Moreover, even within the EU there may be so-called 'letterbox' companies with little or no connection with their place of incorporation and having

⁴⁹ See S. Rammeloo, *Corporations in Private International Law* (Oxford: OUP, 2001) 11-16 and for the meaning of 'real seat' see *A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts* (2002) at pp 32-33, available at <http://ec.europa.eu/internal-market/company/docs/modern/consulten.pdf>

⁵⁰ See the comment of L. Enriques and M. Gelter, 'Regulatory competition in European company law and creditor protection' (2006) 7 *European Business Organization Law Review* 417 at 442 that COMI "is not entirely unlike real seat theory"²².

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⁵¹ See generally J Armour, 'Who Should Make Corporate Law? EC Legislation versus Regulatory Competition' (2005) 58 *Current Legal Problems* 369; H. Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6 *European Business Organization Law Review* 423.

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⁵² Article 16 and see *Re Stanford International Bank Ltd* [2011] Ch 33.

insolvency proceedings in the country of incorporation seems very much at variance with the factual realities on the ground.

Instead the recast Regulation sticks with COMI as the basis for opening main insolvency proceedings but adds a number of provisions by way of clarification and to combat improper forum shopping. In this respect, the recast implicitly builds on a distinction that has been increasingly drawn in the case law and commentaries between ‘good’ and ‘bad’ forum shopping.⁵³ This seems a useful taxonomy. Maximising asset values for the benefit of creditors and other stakeholders through taking advantage of more favourable laws or procedural conditions in a particular jurisdiction is an example of ‘good’ forum shopping whereas debtors making assets more difficult to trace or shielding themselves from potential liabilities is ‘bad’ forum shopping.

Forum shopping by individual debtors is often seen as problematic and the practice of German and Irish debtors moving to the UK has attracted particular attention where the evidence for the move seems scanty, incomplete or to be supported by fabricated documentation.⁵⁴ A case in point is *Irish Bank Resolution Corp v Quinn*⁵⁵ where a debtor - reputedly at one stage Ireland’s richest man – attempted to shift COMI from the Republic of

⁵³ See the opinion of Advocate General Colomer in *Staubitz-Schreiber* Case C-1/04 [2006] ECR I-701 at paras 71, 72 and to be contrasted with the more general comments of Lord Simon in *The Atlantic Star* [1974] AC 436 at 471 that “‘Forum-shopping’ is a dirty word”. The proposal for a new Regulation COM (2012) 744 at para 3.1.2. refers to reducing “the cases of forum shopping through abusive and non-genuine relocation of the COMI” implying that some forum shopping is non-abusive.

⁵⁴ See generally A. Walters and A. Smith, ‘Bankruptcy tourism under the EC Regulation on Insolvency Proceedings: A view from England and Wales’ (2010) 19 *International Insolvency Review* 181.

⁵⁵ [2012] NI Ch 1, [2012] BPIR 322. See also *Sparkasse Hilden Ratingen Velbert v Benk* [2012] EWHC 2432 (Ch).

Ireland to Northern Ireland so to avail of the one year bankruptcy discharge period in Northern Ireland compared with up to 12 years in the Republic. In that case however, the court held that the evidence of the move was insufficient. On the other hand, it must be remembered that genuine relocation involves the exercise of one of the fundamental freedoms guaranteed by the EU Treaties; namely, freedom of movement and is unobjectionable even if it is done to avail of shorter bankruptcy discharge periods in a particular country. For instance, in *Shierson v Vlieland-Boddy*⁵⁶ it was remarked that a debtor must be free to relocate his home and business and that it was a necessary incident of the debtor's freedom that he might choose to do so for a self-serving purpose and at a time when insolvency threatens. The court added however, that it must be a change based on substance and not on illusion.

Under Article 4 of the [Recast Regulation](#) there is now a duty on a court, or other person or body competent to open insolvency proceedings, to examine ex officio whether or not it has jurisdiction in the particular case. The court should also specify whether the proceedings opened are main or secondary proceedings. It may be however, that in practice all the requirement amounts to an additional “box-ticking” exercise. But an attempt is made to give teeth to the provision by investing any creditor with the right to challenge the decision to open main proceedings on grounds of lack of international jurisdiction.⁵⁷

The preamble to the recast Regulation adds bit of detail generally on COMI determinations. It suggests that in cases of doubt, self-serving assertions about COMI by the debtor should not be taken at face value in the absence of supporting evidence.⁵⁸ It also suggests the COMI

⁵⁶ [2005] BCC 949.

⁵⁷ Article 5(1).

⁵⁸ Recital 32.

presumption may be rebutted if the principal reason for a debtor to move his habitual residence was to file for insolvency proceeding in a new jurisdiction and such a filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.⁵⁹

The recast preamble also lays emphasis on giving publicity to the COMI. Recital 28 states that in the COMI determination, special considerations should be given to the creditors and their perception as to where a debtor conducts the administration of his interests. It goes on to state that in cases of alleged COMI shifting, this may require informing creditors of the new location from which the debtor is carrying out his activities. This recital stresses a point that that has been made in some of the case law on the original Regulation. In *Irish Bank Resolution Corp v Quinn* for instance, it was stated that a debtor may not hide his COMI. The court said that the COMI should be ascertainable by a reasonably diligent creditor. 60

What is completely new in the recast Regulation is the introduction of so-called ‘look back’ periods though these provisions do no more than state that a presumption that would have otherwise applied to determine COMI will not apply.⁶¹ In the case of individuals exercising an independent business or professional activity, COMI is presumed to be the individual’s principal place of business except where the principal place of business has moved to another State within 3 months prior to the request for the opening of insolvency proceedings. In the

⁵⁹ Recital 30.

⁶⁰[2012] NI Ch 1, [2012] BPIR 322 at para 28. This para was approved in *Lombard North Central Plc v Blower* [2014] EWHC 2267. On mobile Irish debtors attempting to shift COMI to the UK see also *O’Donnell v Bank of Ireland* [2012] EWHC 3749. On a German debtor attempting likewise see *Schrade v Sparkasse Ludencheid* [2014] EWHC 1049.

⁶¹ Article 3(1) but Cf Art 2(10) on the definition of ‘establishment’, which applies a genuine look back rule.

case of any other individual, COMI is presumed to be the place of the individual's habitual residence save where the habitual residence has moved within 6 months prior to the request for the opening of insolvency proceedings. The implication is that where the previous principal place of business or habitual residence has moved during the look back period then there is no presumption one way or the other about COMI which should be determined on the totality of the evidence.

For companies, the COMI/registered office presumption only applies if the registered office has not been moved to another State within 3 months prior to the request for the opening of insolvency proceedings. COMI shifting can easily occur however, without moving the registered office and it may be that the new provision will have little effect in practice.

The new recitals in the preamble also codify the case law of the European Court on COMI, particularly statements from the *Interedil* decision.⁶² It is stated that the COMI/ registered office presumption may be rebutted where—“a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests⁶³ is located in another State.”⁶³

(b) secondary proceedings

Secondary proceedings may be opened in States where the debtor has an establishment and the effects of the proceedings are limited to assets of the debtor within that State. The fact that secondary proceedings may be opened qualifies the universality of the main insolvency proceedings. The applicable law in respect of the secondary proceedings is the law of the State where the proceedings are opened including local priority rules in respect of the

⁶² Case C-396/09 [OJ 2009 C312/21](#); [\[2011\] ECR I-9915](#) [\[2011\] DPIR 1639](#).

⁶³ Recital 30.

distribution of assets.⁶⁴ Under a genuinely universalist system the task of an IP in secondary proceedings would be merely the collection of assets and entrusting them to the liquidator [IP?] in the main proceedings who would then distribute them in accordance with the law applicable to the main proceedings. Secondary proceedings protect local preferential creditors whose claims would be treated as non-preferential under the law that applies to the main proceedings.

Under the original Regulation, secondary proceedings had to be liquidation proceedings. This limitation was part of the horse-trading that led to the Regulation gaining the necessary measure of political acceptance. –“By opening a local liquidation proceeding, Member States can pull an emergency brake if they feel that unlimited recognition of foreign rehabilitation proceedings is unfair to their (or to their local creditors’) interests.”⁶⁵ Nevertheless, the limitation acted as an impediment to the ‘rescue culture’ because it made a coordinated sale or rescue of the assets of a company as a whole difficult, if not impossible, to achieve. The limitation has now been removed.

The Credit Institutions Directive⁶⁶ implements a more universalist regime with no room for secondary proceedings in respect of bank insolvencies. From the published documents of the

⁶⁴ Articles 7(i) and 35.

⁶⁵ See M Balz, ‘The European Union Convention on Insolvency Proceedings’ (1996) [70](#) *American Bankruptcy Law Journal* 485, 520.

⁶⁶ Directive 2001/24/EC on the reorganisation and winding-up of credit institutions, OJ 2001 L125/15 and for judicial consideration of the directive see Case E-28/13 *LBI v Merrill Lynch* (17th October 2014); Case C-85/12 *LBI Hf v Kepler Capital Markets SA* [2013] All ER (D) 301; *Tchenguiz v Grant Thornton* [2015] EWHC 1864; *Joint Administrators of Heritable Bank plc v Winding Up Board of Landsbanki Islands HF* [2013] 1 WLR 725; *Re Kaupthing Singer & Friedlander Ltd (In administration)* [2012] EWHC 2235; *Landsbanki Islands HF v Mills* [2010] CSOH 100.

Commission however, there does not appear to have been serious consideration given to the prospect of scrapping secondary proceedings in the context of the Insolvency Regulation.

Indeed, in one respect, the ~~‘recast’~~ increases the likelihood that there will be secondary proceedings.

Secondary proceedings may be opened where the debtor has an ‘establishment’⁶⁷ and Article 2(10) defines ‘establishment’ as meaning any place of operations where the debtor carries out, or has carried out in the 3 month period before the request to open main insolvency proceedings, a non-transitory economic activity with human means and assets.⁶⁸

Therefore, even if the debtor does not have an ‘establishment’ in a particular State when application is made to open secondary proceedings, these secondary proceedings may still be opened if the necessary establishment existed at the time of the opening of the main proceedings or 3 months beforehand. The fact that the necessary time frame is calculated by reference to the main proceedings means that a different result would be reached in *Re Olympic Airlines SA*.⁶⁹

In this case, the debtor airline had gone into main liquidation proceedings in Greece before the application to commence secondary proceedings in England and during that time the affairs of the company were being wound down. Under the ‘old’ Regulation whether secondary proceedings could be opened depended on whether there was an establishment in England at the time of the application to open the secondary proceedings. The Supreme Court held that the definition of ‘establishment’ required more economic activity than the mere

⁶⁷ Article 3(2).

⁶⁸ Article 2(10).

⁶⁹ *Trustees of the Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27.

process of winding up and therefore no secondary proceedings could be opened. There had to be activities which by their nature involved business dealings with third parties - external, market-facing activities.⁷⁰ The recast Regulation requires these market-facing activities at the time the main proceedings were opened in Greece. This test is clearly satisfied since the airline was trading at the time.

The main thrust of the recast Regulation is however to reduce the circumstances in which secondary proceedings may be opened. It does this by generalising and ‘Europeanising’ some of the practices developed by the English Courts in cases like *Re Collins and Aikman*⁷¹ and *Re Nortel Networks*⁷². In *Re Collins and Aikman* the court developed the notion of ‘synthetic’ secondary proceedings holding that the UK Insolvency Act was sufficiently flexible so that UK IPs could observe promises made to creditors in other EU States that local priorities would be respected in return for not opening secondary proceedings in these States. Local creditors effectively got the benefits of secondary proceedings without the trouble of having to open them. These secondary proceedings were ‘synthetic’ or ‘virtual’ rather than actual.

In *Re Nortel Networks SA* a mechanism was created so that the IP in the main proceeding had a ‘voice’ on any decision to open secondary proceedings. IPs of certain UK based companies in the Nortel group were granted an order requesting other EU courts to give notice of applications to open secondary insolvency proceedings in respect of Nortel companies and

⁷⁰ Para 13. Heavy reliance was placed on the Virgos-Schmit report which stated (at para 71): ‘Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.’

⁷¹ *Re Collins and Aikman Europe SA* [2006] EWHC 1343.

⁷² [2009] EWHC 206.

allowing them to make submissions on such applications. The IPs wished to avoid secondary proceedings on the basis that this was likely to hinder a global restructuring and reduce the overall realisations for the benefit of creditors.

Under the recast Regulation, the court seised of a request to open secondary proceedings may turn down the request if the IP in the main proceedings gives an undertaking that adequately protects the general interests of local creditors.⁷³ The European Commission pointed out that such a practice was not possible under the law of many States⁷⁴ but the new provision, while welcome in principle, comes with a lot of complexity in its detailed design. For instance, the undertaking has to be approved by the known local creditors. Rules on qualified majority and voting that apply in the State where the secondary proceedings could have been opened apply for the approval of the undertaking.

The court seised with a request to open secondary proceedings is also required to hear the IP in the main proceedings before making its decision.⁷⁵ Moreover, the new provision stipulates that where a temporary stay of individual enforcement proceedings has been granted to allow for negotiations between the debtor and creditors, the court may stay the opening of secondary proceedings for up to 3 months as long as suitable measures are in place to protect the interests of local creditors.⁷⁶

⁷³Articles 38(2) and 36.

⁷⁴ See Proposal for a new Regulation COM (2012) 744 at para 3.1.3.

⁷⁵ Article 38.

⁷⁶ Article 38(3). The courts involved in the main and secondary proceedings now have an express duty to cooperate with one another – Article 42. Under the original Regulation, while there was no express duty of cooperation between courts but there were suggestions that such a duty should be implied in certain circumstances – see *Bank Handlowy SA v Christianapol* (Case C-116/11 [OJ 2013 C26/4 ECLI:EU:C:2012:739](#)) [2013] BPIR 174 referring to para 62 referring to the principle of sincere cooperation laid down in Art 4(3) of the Treaty on

(c) insolvency related actions

Article 6 of the recast Regulation extends the jurisdiction of the court that opened insolvency proceedings to insolvency related actions. Essentially there is a codification of the decision in *Seagon v Deko*⁷⁷ and a clear statement that courts opening insolvency proceedings also have jurisdiction in respect of actions that derive directly from the insolvency proceedings and are closely linked with them.⁷⁸

There is however, no guidance on what constitutes an insolvency linked action other than avoidance actions being highlighted as an example of the term. It seems reasonably clear from the case law however, that actions based on specific provisions of insolvency law that establish liability of company officers, or insolvency related adjustments of general legal norms, are within the concept but not actions based on general provisions of civil or commercial law even if the actions are brought by IPs. The European Court applied this type of analysis in Case C-295/13 *H v HK*⁷⁹ holding that the concept of insolvency-related actions included actions brought by an IP under provisions of German law that required the director of a debtor company to reimburse payments made on behalf of the company after it became

European Union. IPs now also have an express duty to cooperate and communicate with courts in other Member State involved in the proceedings – Article 43.

⁷⁷ Case C-339/07 [2009] ECR I-767. See on the decision L. Carballo Pineiro, ‘Vis attractiva concursus in the European Union: its development by the European Court of Justice’ *InDret* 3/2010 at pp 1-23 and more generally A. Dutta, ‘Jurisdiction for insolvency-related proceedings caught between European legislation’

[2008] *Loyds Maritime and Commercial Law Quarterly* 88 and G. McCormack, ‘Reconciling European Conflicts and Insolvency Law’ (2014) 15 *European Business Organization Law Review* 309.

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⁷⁸ The Regulation has been held to apply where the defendant in an insolvency-related action is resident outside the EU - see *Schmid v Hertel* (Case C-328/12 [OJ 2014 C85/5](#)); [2014] [1 WLR \(D\) 5633](#).

⁷⁹ [2014] All ER (D) 50.

insolvent. The court said that the provisions clearly derogated from the common rules of civil and commercial law because of the insolvency of the debtor company. It did not matter for this purpose that insolvency proceedings had not formally been opened.

The European Commission in its initial proposals acknowledged that the “delimitation between the Brussels I Regulation and the [Insolvency] Regulation is one of the most controversial issues relating to cross-border insolvencies.”⁸⁰ The Brussels I Regulation⁸¹ applies in civil and commercial matters but according to Art 1(2)(b) 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’. An IP in seeking to enhance the value of an insolvency estate therefore faces the task of navigating between two complex sets of jurisdictional rules.

The recast Insolvency Regulation alleviates this task somewhat by permitting the IP to bring insolvency related actions in the defendant’s country of domicile as well as in the insolvency forum.⁸² This facility allows an IP to couple an insolvency-related action with, for example, an action based on the duties of directors under company law.⁸³ The provision has much merit for an IP is saved the job of potentially having to bring proceedings against the same

⁸⁰ See Report from the Commission on the application of Council Regulation (EC) No 1346/2000 COM (2012) 743 final at p 10.

⁸¹ Council Regulation 44/2001 replacing the earlier similar, but not identical, Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968). A recast form of the Brussels I Regulation came into force in January 2015 – Regulation 1215/2012/E and see generally A. Dickinson, ‘The Revision of the Brussels I Regulation’ (2010) 12 *Yearbook of Private International Law* 248.

⁸² See Proposal for a Regulation COM (2012) 744 final at p 7.

⁸³ See the Hess/Oberhammer/Pfeiffer external evaluation of the Regulation - JUST/2011/JCIV/PR/0049/A4 - at pp 22 and 219-220.

defendant in two different countries e.g. an avoidance action⁸⁴ in the State where the insolvency proceedings are opened and an action to recover assets based on general commercial law in the State where the defendant is domiciled.⁸⁵ Transaction costs are minimised if the actions are combined and heard together in the same State and the Recast permits this.

In recital 7 of the preamble, the Recast adds that ‘regulatory loopholes’ between the Insolvency Regulation and the Brussels 1 Regulation should be avoided. This is a noble sentiment but while the European jurisprudence however has stressed the need for a harmonious interpretation of the two instruments, it is not entirely clear what is meant by ‘regulatory loopholes’. The case law is certainly not conclusive. In *Nickel & Goeldner Spedition GmbH v ‘Kintra’ UAB*⁸⁶ the CJEU said that the two Regulations ‘must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum’.⁸⁷ In *F-Tex SIA*⁸⁸ however, the court was asked directly whether the court hearing the insolvency proceedings had the exclusive jurisdiction to adjudicate upon insolvency related actions but it declined the opportunity to answer, stating that this was not necessary for a decision in the case at hand.

⁸⁴ *Seagon v Deko* Case C-339/07 [2009] ECR I-767.

⁸⁵ *Byers v Yacht Bull Corp* [2010] EWHC 133.

⁸⁶ Case C-157/13 [OJ 2014 C395/11 ECLI:EU:C:2014:2145](#), 4 September 2014. See also ~~Case C-649/13 *Nortel Networks SA v Rogeau* (Case C-649/13 OJ 2015 C270/4 ECLI:EU:C:2015:384 at [26] 11th June 2015) at para 26.~~

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⁸⁷ Paragraph 21.

⁸⁸ ~~Case C-213/10 *F-Tex SIA v Lietuvos-Anglijos UAB* Case C-213/10 OJ 2012 C165/3 ECLI:EU:C:2012:215 [2013] Bus LR 232.~~

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~~Whatever~~ ~~Whatever~~ [???] about possible overlaps, the recast preamble concedes the possibility of gaps stating in recital 7 the mere fact that a national procedure is not listed in annex A does not imply that the procedure is covered by the Brussels 1 Regulation. The UK scheme of arrangement may be an example of such a procedure but has been not yet been an appellate court decision that reviews all the relevant authorities.⁸⁹ Instead there has been a number of first instance decisions, some uncontested, where the matter has been addressed at varying length. Schemes do not appear a neat fit under either Regulation. In *Re DAP Holdings NV*⁹⁰ it was suggested that applications to sanction schemes of arrangement fell outside the Brussels 1 Regulation but the contrary conclusion was reached in *Re Rodenstock GmbH*⁹¹. Here the judge did concede that the Brussels 1 Regulation seems ill-equipped to deal with proceedings for the sanctioning of schemes of arrangement since, in a sense, nobody was being sued. He said that they “are not, at least in form, proceedings aimed at specific defendants at all. They may nonetheless be adversarial proceedings, in the sense that affected members and creditors of the scheme company may appear and oppose the grant of sanction and, for that purpose, serve evidence and make submissions just like any ordinary defendant.”⁹²

Comment [DG1]:

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⁸⁹ For general discussion see J. Payne n 36 above; L.C. Ho n 36 above and see also J. Kuipers, ‘Schemes of arrangement and voluntary collective redress: a gap in the Brussels 1 Regulation’ (2012) 8 *Journal of Private International Law* 225.

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⁹⁰ [2006] BCC 48 at para 14. For a more cautious approach see Warren J in *Re Sovereign Marine and General Insurance Co Ltd* [2007] 1 BCLC 228 at [62].

⁹¹ [2011] EWHC 1104 at [43-62].

⁹² [2011] EWHC 1104 at [60]. See also *Re Magyar Telecom BV* [2013] EWHC 3800 where David Richards J decided that an order sanctioning a scheme between an insolvent company and its creditors was subject to the

Brussels 1 Regulation ~~Judgments Regulation~~ [if this is the Brussels 1 Regulation, could we use that instead? Or

Snowden J commented recently, with a degree of understatement, that “[t]his point is of some difficulty”.⁹³

4. *Applicable law and ‘carve outs’*

As well as determining the jurisdiction to open insolvency proceedings, the Insolvency Regulation contains rules on conflict of laws. The law applicable to the insolvency proceedings is, in general, the law of the State where the proceedings are opened irrespective of whether these insolvency proceedings are main or secondary proceedings. There are however, a number of exceptions to this general rule. The recast Regulation keeps the same basic framework. It effects a number of changes by way of clarification, but retaining the original structure.

For some commentators, this is a missed opportunity.⁹⁴ For instance, it is stated in both the original and recast that the opening of insolvency proceedings shall not affect rights in rem of creditors over assets located in a State other than the State of the opening of proceedings.⁹⁵

The provision has recently been considered by the CJEU in *Lutz v Bäuerle* ~~Case C-557/13~~.⁹⁶

The court said that a creditor, to assert its right in rem effectively, must be able to exercise the

~~clarify which one this is if it's a new Regulation?~~, at least if the company was not subject to insolvency proceedings under the Insolvency Regulation.

⁹³ See *Re Van Ganswinkel Groep BV* [2015] EWHC 2151 at [45].

⁹⁴ See the papers by Jennifer Marshall and Michael Veder on the www.eir-reform.eu website.

⁹⁵ Arts 5 and 8 respectively.

⁹⁶ ~~Case C-557/13 OJ 2015 C198/7, ECLI:EU:C:2015:227~~ [2015] I L Pr 21. See also ~~Case C-649/13-Nortel Networks SA v Rogeau~~ ~~Case C-649/13 OJ 2015 C270/4 ECLI:EU:C:2015:384 (11th June 2015)~~ where the CJEU held that two courts might have concurrent jurisdiction to rule on the location of assets and more generally P. Smart, ‘Rights In Rem, Article 5 and the EC’ (2006) 15 International Insolvency Review 18; M Balz, n 65 above at 509-510.

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right after the opening of insolvency proceedings and the particular conditions under the law of the State where the assets are located would apply rather than the law of the State of the opening of proceedings.

Nevertheless, it could be argued that the provision is both ambiguous and undesirable on policy grounds. While the term ‘right of rem’ basically encompasses security rights i.e. rights over property to ensure the payment of money or the performance of some other obligation, there is no precise definition. The key expression “shall not affect” in the relevant provision is also unclear and, in particular, whether it would prohibit temporary moratoria on security enforcement; debt write-downs and security realisations by an IP rather than the secured creditor.

But the main objection against the protection for rights in rem is a policy one. The Virgos Schmit report⁹⁷ suggests that there is a ‘hard and fast’ rule⁹⁸ that a right in rem holder can exercise its rights over the assets in question irrespective of any exceptions or limitations that might exist under the law of the State that opens the insolvency proceedings. The holder of rights in rem over foreign located assets is unaffected by the opening of insolvency proceedings in another State. It is only if insolvency proceedings are opened in the State where the assets are located that consequences arise. Arguably, the provision overprotects a secured creditor with foreign-located assets because it gives a stronger level of protection against the debtor’s insolvency than that demanded by the law of the State where the assets are located.⁹⁹ The secured creditors gets a ‘Euro bonus’ – a benefit in European cross-border

⁹⁷ See paras 97-104.

⁹⁸ For use of this expression see A.J. Berends, ‘The EU Insolvency Regulation: Some Capita Selecta’ [2010] Netherlands International Law Review 423, 429 and for discussion of rival approaches see 430-434.

⁹⁹ See para 5.7 of the proposals prepared by Insol Europe, Revision of the European Insolvency Regulation (2012) - drafting committee chaired by Robert van Galen.

insolvencies that is not available in domestic insolvencies.¹⁰⁰ Unless secondary insolvency proceedings are opened in a particular State, a secured creditor is allowed to enforce against collateral in that State even though the country's domestic law would not allow enforcement. The protection of 'rights in rem' holders is left unchanged in the recast Regulation but new rules are laid down to assist in determining the location of assets.¹⁰¹ These changes introduce a welcome measure of clarification. For example, it is now clear that bank deposits are deemed to be located in the State indicated in the account's international bank account number (IBAN).¹⁰² Under the original regime, it was stated in Article 2(g) that a claim was situated in the State where the third party required to meet the claim had its COMI i.e. implying that for bank accounts, the deposit, was deemed to be located where the bank holding the account had its COMI, rather than the place of the branch where the deposit was made. But one of the authors of the influential Virgos-Schmit has argued¹⁰³ that in "the case of current accounts and deposits in banking institutions, for these purposes each branch must be considered as an autonomous entity (ie as if it were a distinct debtor) in accordance with the special structure of these institutions; consequently the claim will be considered situated in the State where the office serving the customer account

¹⁰⁰ See M Virgos and F Garcimartin, *The European Insolvency Regulation: Law and Practice* (The Hague: Kluwer, 2004) 103-104: "Article 5 functions more as a rule of substantive law than as a simple conflict rule and when, compared with the national laws concerned, it may afford a stronger level of protection against the insolvency of the debtor than that which these national laws demand".

¹⁰¹ Article 2(9).

¹⁰² Article 2(9)(iii).

¹⁰³ See M Virgos and F Garcimartin n 100 above 168. The Virgos-Schmit report at para 69 does not express a definite view on the point.

is located.¹⁰² There is however, no independent doctrine of European law that each bank branch has to be regarded as an autonomous entity for legal purposes.

The ~~R~~ecast makes another small, but welcome, change with respect to pending proceedings. Under the original regime, the effects of insolvency proceedings on a pending lawsuit concerning an asset or right that forms part of the debtor's insolvency estate was governed solely by the law of the Member State in which that lawsuit is pending. In the ~~R~~ecast, the reference to pending lawsuits is widened to include arbitration proceedings.¹⁰⁴ This change makes explicit what was held to be implicit in the provision by the English courts in *Syska v Vivendi Universal SA*.¹⁰⁵ The court suggested that it would border on the irrational to protect the legitimate expectations of those who had commenced an action against an insolvency party but not those who had initiated a reference to arbitration. The ~~r~~ecast takes expressly on board this policy sentiment.

The most substantive changes made by the recast Regulation on applicable law are in relation to immovable property and contracts of employment giving IPs greater powers to modify contracts. Taking contracts of employment as an example, Article 10 of the original regulation provided that the effects of insolvency proceedings on employment contracts and relationships should be governed by the law applicable to the contract of employment. This law would determine, for example, whether insolvency proceedings operated to terminate or to continue the contract but other important employment law related matters were left to the law of the insolvency forum, including the preferential status of employee claims.

In the recast Regulation, Article 13 retains the basic proposition that the effect of insolvency proceedings on contracts of employment is governed by the law that applies to the contract.

¹⁰⁴ Article 18 and see Commission report - COM (2012) 743 - at p 13.

¹⁰⁵ [2008] 2 Lloyd's Rep 636.

But courts or competent authorities of Member states where insolvency proceedings have been opened may also approve the termination or modification of the contracts. It seems that behind the new contractual termination regime is the European Commission view that “different labour law standards may hinder an insolvency administrator to take the same actions with regard to employees located in several Member States and that this situation may complicate the restructuring of a company.”¹⁰⁶

5. *Insolvency Registers and greater transparency*

(a) *Insolvency Registers*

The Regulation proposes the establishment of an ambitious new regime to enhance the publicity of insolvency proceedings. Member States are required to publish certain information concerning insolvency proceedings in a ‘free’ and publicly accessible electronic register though access to the register may be made dependent upon establishing a ‘legitimate interest’ to the competent authority.¹⁰⁷ What constitutes a ‘legitimate interest’ is obviously prone to different interpretations in different States and it is not clear whether an autonomous Europe-wide interpretation is envisaged. The information to be published includes information concerning the court opening the insolvency proceedings, the date of opening and of closing proceedings, the type of proceedings, the debtor and IP appointed, and the deadline for lodging claims. This kind of information will assist creditors and others in their information-gathering exercises, but there is no requirement to publish details of claims that have been lodged or accepted. States however, are not precluded from requiring additional information to be included on the registers, and may also charge searchers a

¹⁰⁶ See Commission report - COM (2012) 743 - at p 12. The report goes on to say that “this situation is inherent in the policy choice underlying Article ..[13] which the evaluation study does not call into question.”²²

¹⁰⁷ Articles 24-27.

reasonable fee for accessing these optional extras.¹⁰⁸ Because of privacy concerns, States are not required to make available on the national register information concerning individuals not exercising an independent business or professional activity but may do so.¹⁰⁹

The European Commission is charged with the responsibility of establishing a decentralised system for the interconnection of national insolvency registers and the European e-Justice Portal is intended to serve as the central public electronic access point to information from the system. The ambition of the project means that a longer period has been given to get the system up and running. In general, the changes made by the recast Regulation come into effect 2 years from the date that they are published in the Official Journal. Member States however, have 36 months to establish insolvency registers and 48 months to provide confirmation that the registers will form part of an interconnected EU Portal.¹¹⁰

(b) Greater transparency

Foreign creditors are often disadvantaged by the opening of insolvency proceedings. These proceedings may be taking place in a faraway country according to an unfamiliar procedure and language. Foreign creditors may not be aware of the time limits for lodging claims nor of the proofs that have to be submitted. A translation of the claim into one of the official language of the relevant State may also be required as well as the services of a foreign lawyer or other professional. These costs may make it uneconomical to submit a claim. The European Commission has said: “Due to high costs, creditors may choose to forgo a debt,

¹⁰⁸ Articles 24(3) and 27(2).

¹⁰⁹ Article 24(4) and see also Article 27(3).

¹¹⁰ Articles 24, 25, 87 and 92.

especially when it involves a small amount of money. This problem mainly affects small and medium-sized businesses as well as private individuals.²²⁷ ¹¹¹

The recast Regulation tries to facilitate the lodging of claims by foreign creditors.¹¹² Firstly, it is provided that representation by a lawyer or another legal professional is not mandatory for the lodging of claims.¹¹³ Secondly, it provides for the introduction of two standard notice and claim forms for all proceedings irrespective of where proceedings are commenced. One is the notice to be sent to creditors and the other is for the lodging of claims. These standard forms are made available in all EU official languages and so saving on translation costs. Thirdly, each State has to indicate whether it accepts ~~at least one EU~~ official EU language other than its own that it accepts for the lodging of claims. Fourthly, irrespective of shorter periods under national law, foreign creditors are given at least 30 days following publication of the notice of opening of proceedings in the insolvency register to lodge their claims. Finally, foreign creditors have to be informed if their claim is contested and afforded the opportunity of providing supplementary evidence to verify their claim.

6. *Groups of companies*

In the original Insolvency Regulation the focus was much very on the particular individual company of a group of companies and not on its possible status as a member of a group of companies.¹¹⁴ In one sense, this focus was understandable for the Regulation is more a conflict-of-laws instrument than a substantive law instrument. Provisions, for example, for

¹¹¹ See Commission report – COM (2012) 743 - at pp 16-17.

¹¹² Articles 53-55.

¹¹³ Article 53.

¹¹⁴ See generally I Mevorach, ‘The “Home Country” of a Multinational Enterprise Group Facing Insolvency’ (2008) 57 ICLQ 427; ‘Centralising Insolvencies of Pan-European Corporate Groups: a Creditor’s Dream or Nightmare?’ [2006] Journal of Business Law 468.

the pooling of assets of related companies would trench on the fundamental principle of substantive company law, reaffirmed by the UK Supreme Court,¹¹⁵ that a company is a legal entity, separate and distinct from its controlling shareholders.¹¹⁶ Nevertheless, the Regulation might have contained procedurally oriented provisions enabling the same IP to be appointed to different companies within the same corporate group and for proceedings involving related group companies to be administered from the same State.

The jurisprudence from the European court has also been generally unsympathetic to the notion of procedural consolidation of insolvency proceedings. In the *Eurofood* case¹¹⁷ it was held that “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 the Regulation.”¹¹⁸ In other words, the presumption applied that the COMI was the place of the registered office of the subsidiary. Moreover, in *Mediasucre*,¹¹⁸ the court rejected the proposition that a single COMI could automatically be inferred from the intermixing of the property of two companies. The court said that this could be organised from two management and supervision centres in two different Member States.

The case law in some EU States has however embraced the concept of procedural consolidation more warmly. A French Court has said that the “analysis of the case law of

¹¹⁵ *Prest v Petrodel Resources Ltd* [2012] 2 AC 415; *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 237.

¹¹⁶ See however, *Re BCCI (No 2)* [1992] BCC 715 where it was held that pursuant to s 167 of the Insolvency Act 1986 the court could approve a ‘pooling’ agreement if the assets of insolvent companies were so confused that it was impossible to define the assets of each company.

¹¹⁷ Case C-341/04 [2006] ECR I-03813.

¹¹⁸ Case C-191/10; [2012] All ER (EC) 239.

the various Member States shows that courts adopt a pragmatic approach tending to allow streamlining of strongly integrated groups of companies.²²² ¹¹⁹ In cases like *Re Daisytek-ISA Ltd*¹²⁰ this approach was effectively adopted in the UK with the court holding that all the members of a group of companies had a common UK COMI despite the fact that the companies had been incorporated in different countries.

The recast Regulation does not preclude the possibility of procedural consolidation in appropriate cases. The European Commission in its initial proposals reaffirms the “existing practice in relation to highly integrated groups of companies to determine that the centre of main interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction.”²²³ ¹²¹

But the main thrust of the recast Regulation in relation to groups is to extend the principles of cooperation that apply in the context of main and secondary proceedings to insolvency proceedings that involve different companies within the same group. IPs and courts are obliged to cooperate and the cooperation may take different forms depending on the circumstances of the case. IPs should exchange relevant information and cooperation by way of protocols is explicitly mentioned.¹²² This reference acknowledges the practical importance of these instruments as well as further promotes their use. Courts can cooperate by the exchange of information; by coordinating the administration and supervision of the assets and

¹¹⁹ *Re MPOTEC GmbH* [2006] BCC 681 at 687.

¹²⁰ [2003] BCC 562.

¹²¹ See explanatory memorandum attached to the Commission proposals COM (2012) 744 final, para 3.1.5.

¹²² Article 41(1) (main and secondary proceedings) and Article 56(1) (groups).

affairs of the group companies as well as coordinating the conduct of hearings and the approval of protocols.¹²³

The Recast gives an IP standing in relation to insolvency proceedings affecting another member of the same group with rights to be heard and to request a stay provided that a restructuring plan for some or all of the insolvent group members has been proposed and presents a reasonable chance of success.¹²⁴ In the original Commission proposals it was suggested that the IP with the biggest interest in a successful group restructuring could submit a coordinated restructuring plan even if the plan did not meet with the approval of the IPs of other group members.¹²⁵ But this gave rise to the possibility of procedural chaos with different IPs putting forward different restructuring plans. This possibility appears to have been eliminated in the text that finally emerged. It is provided that IPs should “consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan.”¹²⁶ Nevertheless, working relationships between IPs will have to be good to ensure that the potentially valuable procedural tools provided by the Recast do not become instruments for conflict and increased transaction costs.

The same hope and prayer extends with added force to the second aspect of the provisions for groups of companies.¹²⁷ These provisions were added to the original Commission proposals

¹²³ Article 57. Co-operation however, must be appropriate to facilitate the effective administration of the proceedings; not be incompatible with the rules applicable to the respective courts nor entail any conflict of interest.

¹²⁴ Article 60(1).

¹²⁵ COM (2012) 744 para 3.1.5.

¹²⁶ Article 56(2(c)).

¹²⁷ See Chapter V Section 2 of the Regulation,

by the European Parliament¹²⁸ and involve the possibility of opening group co-ordination proceedings that would sit alongside the separate insolvency proceedings opened in respect of individual companies within the group. The co-ordination proceedings would allow for the appointment of a co-ordinator who would partially act as a sort of “super-mediator” between the different IPs.¹²⁹ The coordinator also has the task of proposing a “group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach” to resolving the insolvency of group members. The plan may contain proposals for the settlement of intra-group disputes or, more ambitiously, to re-establish the economic performance and financial soundness of the group or any part of it.

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The amicable settlement of intra-group disputes and disputes between IPs is undoubtedly beneficial and so too is restoring the financial soundness of a group of companies but it is questionable whether the new provisions will contribute in particular to the achievement of the latter end. They may in fact lead to further costs and delay.

Firstly, group co-ordination proceedings may be commenced in any State that is administering an insolvency in respect of a group member but where there are different co-ordination proceedings instituted in different States, other courts are required to decline jurisdiction in favour of the courts of the State that is first seised of the matter.¹³¹ This rule is however subject to Article 66 which allows for an agreement between at least two-thirds of

¹²⁸ See the Report from the European Parliament’s Committee on Legal Affairs on the proposed new Regulation (A7-0481/2013, 20.12.2013 - the “Lehne 2 report”) at pp 39-43 and 47-48.

¹²⁹ Article 72(2)(b).

¹³⁰ Article 72(1)(b)(ii).

¹³¹ Articles 61(1) and 62.

IPs conferring exclusive jurisdiction on a particular court. Such exclusive jurisdiction agreements must be recognised and enforced.

Secondly, the IPs of individual companies within the group are not obliged to join the group proceedings. They may simply opt-out at the commencement stage.¹³² Thirdly, the group co-ordination plan is not binding on individual IPs, even on those who had opted-in, though the latter have a duty to consider the plan recommendations and to explain deviations from the plan to the coordinator.¹³³ Fourthly, to ensure proper implementation of the plan, there is a stay for up to 6 months on separate insolvency proceedings affecting a group member¹³⁴ and it has been suggested this stay may act as a real deterrent for supporting any group restructuring proposal. “Individual group companies could choose not to opt in, simply to avoid the stay applying, as the stay is expressed not to apply to those companies who have not agreed to support the group coordination proceedings.”¹³⁵ Finally, the costs regime in respect of group coordination proceedings may give rise to difficulties. These costs are to be met by participating companies but are only to be paid for at the end of the proceedings.¹³⁶ This leads to the possibility that individual companies or IPs may dispute or delay payment when they have effectively opted out of the coordination proceedings after having opted in at the commencement stage.

¹³² Articles 64 and 65.

¹³³ Article 70.

¹³⁴ Article 72(2)(e).

¹³⁵ See Clifford Chance briefing note, *Final Text for the Amended EU Regulation on Insolvency Proceedings* (December 2014) at p 3.

¹³⁶ On costs see Article 77.

Group coordination proceedings are noble in intention.¹³⁷ Nobody is obliged to participate and a would-be participant can even effectively opt out at a later stage. Moreover, before opening such proceedings a court needs to be satisfied that the proceedings are appropriate and that none of the creditors of the participating companies are financially disadvantaged. The voluntary nature of the regime however may mean however that they are unlikely to be much used in practice but they may have a use in the ‘big ticket’ cases where there is a high degree of coordination among IPs at the outset.

7. Conclusion

The recast Insolvency Regulation is to be seen in the context of the Europe 2020 strategy that aims to improve economic performance throughout the EU including a more competitive business environment which encourages speed of resolution of distressed businesses. The European Commission has said that as “Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment. It is a high political priority to take measures to create sustainable growth and prosperity.”¹³⁸

The Commission has highlighted the importance of insolvency rules in supporting economic activity and recasting the Insolvency Regulation is part of a three-pronged strategy in this regard. The second part is a non-binding Recommendation on a new European approach to

¹³⁷ For discussion of the cross-border insolvency of multinational enterprise groups at UNCITRAL level – see the Working Paper A/CN.9/WG.V/WP.128 available at www.uncitral.org/.

¹³⁸ Communication, *A new European approach to business failure and insolvency* COM (2012) 742 at p 2 citing ‘President’ Barroso's letter to EP President in the framework of the State of Union address on 12 September 2012.

business failure and insolvency and the third is the formulation of proposals for possible measures of substantive insolvency law harmonisation.¹³⁹

The recast Regulation, or at least the rhetoric surrounding it, puts the emphasis very much on business restructuring rather than on liquidation. The assumption appears to be that business restructuring is value enhancing whereas liquidation is value destructive. While plausible in many scenarios, the assumption cannot be accepted as a universal truth. Often assets may be put to their most productive use through the liquidation process rather than left to linger in ‘zombie’ businesses that have little hope of long-term economic health but serve to suck resources away from more productive sectors. Be that as it may, the Recast is not unduly prescriptive. It extends recognition to a greater range of ‘pre-insolvency’ procedures promoting the rescue of economically viable but distressed businesses but ultimately it is up to individual Member states to decide what should be included. There is no scope for second-guessing the decision of individual States about what to include; either by the Commission or by other States. This will no doubt be presented as a victory by UK practitioners for it means that schemes of arrangement can be kept outside the Regulation. Therefore, UK law firms and restructuring professionals can continue to promote the virtues of the scheme as a restructuring vehicle for financially distressed European companies irrespective of the jurisdictional constraints of the Insolvency Regulation.

This ‘voluntaristic nature’ is even more evident in the second major innovation; namely, the new mechanism for coordination proceedings involving members of a group of companies. Individual members within a group of companies are not obliged to take part in the

¹³⁹ See Commission Recommendation of 12th March 2014 - C(2014) 1500 final. In addition, a plan, *Entrepreneurship 2020 Action Plan: Reigniting the entrepreneurial spirit in Europe* COM (2012) 795 was released on 9th January 2013.

coordination proceedings and may opt out subsequently if the proposals emanating from the group coordinator are not to their liking. In the circumstances, it is questionable whether the new mechanism will be widely used in practice.

The recast Regulation retains the same basic structure as the original including the concepts of main and secondary insolvency proceedings with the secondary proceedings applying to local assets and qualifying the universality of the main proceedings. The Recast makes a number of changes to improve the practical operation of the Regulation and the coordination between main and secondary proceedings. While worthwhile, these changes are essentially modest and there is no tampering with political ‘hot potatoes’ such as the rights of secured creditors under the applicable law provisions. The Recast does not strike off in a different direction or upset the balance of political and economic interests at the heart of the Insolvency Regulation. This is perhaps one of the reasons why, unlike in other areas of EU policy making, the UK was able to opt into the proposal for a recast Regulation with relatively little fuss.¹⁴⁰ Despite the occasionally grand and sweeping rhetoric, the reality on the ground seems to be that European law is built incrementally by a series of small steps. The recast Insolvency Regulation is one such step.

¹⁴⁰ See written ministerial statement of 15th April 2013 - available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130415/wmstext/130415m0001.htm>.