

International Jurisdiction in European Insolvencies

by Dr. Burkard Göpfert, LL.M.,¹
GLEISS LUTZ, Munich/Germany

Current case law has again raised the question of international jurisdiction in European cross-border insolvencies. Conflicts of jurisdiction are affecting the smooth handling of insolvencies despite the existence of an integrative European Council Regulation (C.). Before discussing this issue in greater depth, the concept of International Jurisdiction (A.) and the Sources of Law relating to it (B.) will first be explained.

A. Concept of International Jurisdiction

The concept of international jurisdiction has its origin in the terminology of private international law, more precisely international civil procedure law. Private international law determines according to which set of laws a legal dispute with a bearing on several legal systems (a case with a so-called “transnational dimension”) is to be decided. Two types of international jurisdiction need to be distinguished between: direct and indirect international jurisdiction. The rules governing direct international jurisdiction – also referred to as jurisdiction to decide – determine whether the courts of a certain state are permitted to rule on a legal dispute; the local, factual or functional jurisdiction of individual courts within this state are not necessarily determined hereby.² Direct international jurisdiction is a prerequisite for the permissibility of proceedings.³ Whether it is present is to be considered by the court *ex officio* and is to be reconsidered upon appeal, whether the appeal is on the facts or points of law.⁴ Furthermore, decisions issued by foreign courts are only recognized if the respective foreign court had jurisdiction to decide; this is referred to as indirect international jurisdiction or jurisdiction to recognise.⁵

¹ Burkard Göpfert is a partner in the law firm of Gleiss Lutz in Munich, Germany, where he specializes in international collective employment law, including negotiations with works councils and trade unions, codetermination, restructuring and insolvency, and company pension plans. He may be reached at burkard.goepfert@gleisslutz.com..

² *Kropholler*, Internationales Privatrecht, 4th edition 2001, pg.365, 597

³ *Kropholler*, see *supra* footnote 1, pg. 597 f.

⁴ Federal High Court of Justice of May 27, 2003 (ref.: IX ZR 203/02), LMK 2004, pg. 14 f.

⁵ *Kropholler*, see *supra* footnote 1, pg. 365.

B. Sources of Law

In accordance with the *lex fori* principle applicable in international civil procedure law, national courts assess the question of international jurisdiction in accordance with the provisions of procedural law applicable in their own state. From a German perspective, the application of legal provisions of international or supranational origin precedes the application of autonomous German provisions.⁶ Inasmuch, only EC Council Regulation No. 1346/2000 of May 29, 2000 on insolvency proceedings must currently be taken into account in Germany (hereafter “European Insolvency Regulation”).⁷ Articles 3 and 16 of this Regulation provide for both direct and indirect international jurisdiction. Autonomous rules of international jurisdiction therefore only remain relevant in cases where the facts do not fall within the field of application of the European Insolvency Regulation.⁸ Since autonomous German law contains no specific rules governing jurisdiction to decide, in accordance with the principle of double functionality of local jurisdiction⁹, the court with local jurisdiction pursuant to section 3 Insolvency Code (*Insolvenzordnung*) is considered to also have international jurisdiction to decide¹⁰. Section 343 Insolvency Code contains a provision on jurisdiction to recognise.¹¹

C. European Insolvency Regulation

The international insolvency law to be applied to European insolvencies has been set out in the European Insolvency Regulation since May 31, 2002. Although, due to its extensive field of application, the Regulation largely replaces the insolvency laws of the individual EC Member States (I.), and despite the fact that the Council was particularly concerned to harmonize international jurisdiction (II.), undesirable conflicts of jurisdiction arise (III.).

⁶ This ensues from the harmonising purpose of non-autonomous legal provisions. This legal concept is also reflected in Article 3(2) Introductory Act to the Civil Code

⁷ Official Journal of the European Communities of June 30, 2000 No. L 160/1, also published in *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, 11th edition 2002, pg. 704 ff. (No. 260).

⁸ *Liersch*, Deutsches Internationales Insolvenzrecht, NZI 2003, pg. 302, 303.

⁹ *Kropholler*, see *supra* footnote 1, pg. 567 f.

¹⁰ *Ganter*, in: *Kirchhof/Lwowski/Stürner* (Hrsg.), Münchner Kommentar zur Insolvenzordnung, volume 1 2001, section 3 margin note 22 ff.; *Liersch*, see *supra* footnote 8, pg. 304.

¹¹ *Liersch*, see *supra* footnote 8, pg. 306.

I. Scope of application

1. Factual scope of application

The factual scope of application of the Regulation is set out in Article 1 Insolvency Regulation. Pursuant to this Article, the Regulation applies to all collective insolvency proceedings that entail the total or partial divestment of the assets of a debtor and the appointment of a liquidator. The insolvency proceedings to which the EC Regulation applies are listed in Annex A to the Regulation.¹²

Pursuant to Article 1(2) European Insolvency Regulation, insolvency proceedings against the assets of certain financial services companies are excluded from the scope of the Regulation. According to Recital 9, this exclusion is due to the fact that these companies are subject to special arrangements and, to some extent, national supervisory authorities have wide-ranging powers of intervention. There is a plan to enact regulations specific to this area.¹³

2. Personal and territorial scope of application

Personal and territorial scope of application is established if the centre of the debtor's main interests is situated in an EC Member State, with the exception of Denmark.¹⁴ This follows from Article 3 Sec. 1 and Article 16 European Insolvency Regulation together with Recital 14.¹⁵

In addition, the facts at issue must be transnational; the Regulation does not apply to proceedings of a purely national character. This ensues from Recitals 2 and 3. The legal basis of the European Insolvency Regulation, namely Article 65 EC Treaty, also does not provide for the regulation of purely domestic insolvency proceedings.

In establishing whether the facts are transnational, a simple foreign reference is adequate, that is, such a reference to a third party state.¹⁶ The range of possible foreign references required for application of the Regulation should not be too narrowly defined in order to enable the

¹² See Article 2 a and b Insolvency Regulation as well as Recital 10, 2nd sentence.

¹³ *Huber*, Internationales Insolvenzrecht in Europa, ZZP 114 (2001), pg. 133, 136 with further references.

¹⁴ Recital 33.

¹⁵ *Huber*, see *supra* footnote 13, pg. 135.

most effective application of the Regulation possible and to promote the legal harmonisation sought. In any event, foreign references should include those listed in the European Insolvency Regulation itself, such as the location of assets or the creditor's foreign domicile.¹⁷

Even if, pursuant to above criteria, personal and territorial scope is established in principle, the following limitation needs to be observed: insolvency proceedings instituted in accordance with the Regulation do not take effect with respect to other non-EC Member States. For example, proceedings against both movables and immovables located within non-EC Member States are governed by the international insolvency laws of the respective non-EC Member State.¹⁸

3. Temporal scope of application

With respect to timing, the application of the European Insolvency Regulation is established if insolvency proceedings were instituted after the Regulation was enacted on May 31, 2002.¹⁹ The time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not, is deemed to be the time of opening of proceedings.²⁰

II. Area of regulation

The EC Regulation aims at enabling a smooth and comprehensive handling of European insolvency cases. To avoid debtors obtaining a more favourable legal position by transferring assets and, thus, legal disputes from one Member State to another (so-called “forum shopping”) the Regulation generally pursues the Principle of Universality.²¹ However, given the considerable differences between the national legal systems in some areas, the Regulation contains some restrictions in favour of the Principle of Territoriality.²²

¹⁶ In dispute up to now, see *Huber*, see *supra* footnote 13, pg. 138 f.; now High Court of Justice Chancery Division Companies Court (England) of February 7, 2003 (ref. 0042/2003, In Re BRAC Rent-A-Car International Inc. (2003) EWHC (Ch) 128), ZIP 2003, pg. 813 ff., EwIR 2003, pg. 367 with annotation *Sabel/Schlegel*.

¹⁷ *Huber*, see *supra* footnote 13, pg. 136.

¹⁸ *Huber*, see *supra* footnote 13, pg. 138.

¹⁹ Articles 43 and 47 European Insolvency Regulation.

²⁰ Article 2(f) European Insolvency Regulation

²¹ Recitals 4 and 12.

²² Recital 11.

1. Principle of universality

According to the EC Regulation, only one set of insolvency proceedings - the main insolvency proceedings, handling all assets of the debtor and irrespective of their allocation between EC Member States - is to be conducted. The concept of universality is implemented through the provision for universal jurisdiction to decide, through the automatic recognition of all decisions by the competent court, and through the uniform provisions of the insolvency statute.

a. International jurisdiction for the main proceedings

According to Article 3(1) European Insolvency Regulation, the court with jurisdiction to open and conduct the insolvency proceedings is the court where the debtor has his centre of main interests. Recital 13 defines this concept in such a way that the “centre of main interest” is the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties. By virtue of the sense and purpose of the Regulation, the term “interests” can only refer to the economic interests of the debtor.²³ Article 3(1) European Insolvency Regulation therefore assigns direct international jurisdiction to the courts of the Member State where “the legal relationship is situated”²⁴, thereby observing the principle of closest connection material in private international law.²⁵ However, the Regulation does not indicate which point of time - whether the time of filing of the petition or the time of opening of the insolvency proceedings - is relevant in determining the centre of main interests. For this reason, the Federal High Court of Justice (*Bundesgerichtshof*) has already issued a request for a ruling on this to the European Court of Justice.²⁶

With respect to natural persons, the main centre of interests is likely to correspond to the place of domicile, provided that this is also the person’s habitual place of abode.²⁷ With respect to merchants and sole proprietorships, the location of their establishment is decisive. For self-employed professionals, what is relevant is where their professional activities are conducted.²⁸

²³ *Huber*, see *supra* footnote 13, pg. 140 with further references.

²⁴ *Von Savigny*, System des heutigen Römischen Rechts VIII, 1834, pg. 28, 108, 118.

²⁵ *Leible/Staudinger*, Die Europäische Verordnung über Insolvenzverfahren, KTS 2000, pg. 533, 543.

²⁶ BGH, Decision of 27.11.2003 (ref.: IX ZB 418/02), ZIP 2004, pg. 94.

²⁷ *Huber*, see *supra* footnote 13, pg. 140.

²⁸ *Huber*, see *supra* footnote 13, pg. 140.

As regards corporations and legal entities, Article 3(1) 2nd sentence European Insolvency Regulation raises a presumption in favour of the location of the registered office. Despite this presumption the court must assess *ex officio* whether the registered office does indeed correspond to the centre of main interests, i.e. to the effective centre of administration.²⁹ The practical significance of this presumption is therefore limited to it being a rule in cases of doubt only.³⁰

Notwithstanding this rule, the English courts have on several recent occasions determined a subsidiary's centre of main interests by means of the statutory registered office of the parent company.³¹ It should be pointed out in this regard that the main business activities of a subsidiary may not necessarily be carried out at the location of the registered office of their parent company. The mere power of direction that a parent company may exercise over a subsidiary does not necessarily lead to the assumption that the subsidiary's centre of main interests corresponds to the registered office of the parent company, especially since such internal organisational matters are not necessarily evident to the outsider.³²

b. Recognition of judgments in the main proceedings

Both judgments opening insolvency proceedings and the other judgments concerning the course and closure of insolvency proceedings as well as compositions confirmed by the courts are automatically recognised in the other Member States in accordance with Article 16(1) and Article 25(1) of the European Insolvency Regulation. This recognition does not require any formal procedure - it is made *ipso jure*. The judgments do not have to be published, either; the possibilities for giving notice provided for in Articles 21 and 22 of the European Insolvency Regulation merely serve publication purposes.³³

There are only two prerequisites for automatic recognition. Firstly, the judgment has to have full force and effect in the state in which the proceedings were opened. It does not matter whether it is formally *res judicata*.³⁴ Secondly, the judgment to be recognised may not violate

²⁹ Huber, see *supra* footnote 13, pg. 141.

³⁰ Huber, see *supra* footnote 13, pg. 141.

³¹ Braun, Der neue Sport in Europa: Forumshopping in Insolvenzverfahren oder: die moderne Form von "Britannia rules the waves", NZI 2004, pg. V f.

³² Ehrlicke, Die neue Europäische Insolvenzverordnung und grenzüberschreitende Konzerninsolvenzen, EWS 2002, pg. 101, 103.

³³ Huber, see *supra* footnote 13, pg. 146 f.

³⁴ Huber, see *supra* footnote 13, pg. 145.

public order.³⁵ There is, on the other hand, no need to examine whether the court actually had jurisdiction to hand down the judgment, i.e. whether the requirements set forth in Article 3(1) of the European Insolvency Regulation are indeed met; indirect international jurisdiction is irrelevant. Though the wording of Article 16(1) European Insolvency Regulation is not altogether clear on this, it follows from recital 22 that it suffices that the court considered itself to have jurisdiction.³⁶

Once the judgment opening the insolvency proceedings has been automatically recognised, it produces the same effects in the entire geographical area of application of the Regulation as under the law of the state in which the proceedings have been opened - under the so-called “principle of the extension of effect”.³⁷ Accordingly, the insolvency administrator has all the same powers abroad as he has under the law of the state in which the proceedings were opened; he does, however, have to comply with local law when exercising his powers and may not use any coercive measures or adjudge any legal disputes.³⁸

The other judgments regarding the course and closure of insolvency proceedings require judicial enforcement if they are to have effect. Enforcement is governed by Articles 31 to 51 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (“CJEU”)^{39,40} which have now been replaced by Articles 38 to 58 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“RJREJ”).^{41,42} The exequatur procedure under the CJEU is simplified compared to national procedures.⁴³ Moreover, within the framework of the European Insolvency Regulation the relatively detailed grounds for refusal to grant a writ of execution under the CJEU are not applicable; only the *ordre public* proviso in Article 25(3) and Article 26 of the European Insolvency Regulation can provide grounds for refusing to grant a writ of execution.⁴⁴ Under the RJREJ

³⁵ Article 26 European Insolvency Regulation. Article 25(3) European Insolvency Regulation applies as a specific provision in relation to the recognition of other decisions as defined by Article 25(1) European Insolvency Regulation.

³⁶ *Huber*, see *supra* footnote 13, pg. 145 f. *Mankowski*, EWiR 2003, pg. 767, 768 takes a different opinion.

³⁷ Article 17(1) European Insolvency Regulation.

³⁸ Articles 18(1) and 18(3) European Insolvency Regulation.

³⁹ *Jayme/Hausmann*, Internationales Privat- und Verfahrensrecht, 10th edition 2000, pg. 279 ff. (No. 150).

⁴⁰ Article 25(1) subpara. 2 European Insolvency Regulation.

⁴¹ Official Journal of the European Communities of 16.01.2001 No. L 12/1, also published in *Jayme/Hausmann*, see *supra* footnote 7, pg. 364 ff. (No. 160).

⁴² Article 68(1) RJREJ. The RJREJ has applied in all EU Member States except Denmark since March 1, 2002, Article 76 RJREJ, Recitals 21 and 22 RJREJ.

⁴³ *Huber*, see *supra* footnote 13, pg. 149.

⁴⁴ Article 25(1) subpara. 2 European Insolvency Regulation expressly excludes reference to Article 34(2) CJEU.

the decision on the writ of execution is no longer linked to special grounds for refusal, anyway.⁴⁵

c. Applicable insolvency law

The principle of universality is manifested, lastly, in the manner in which the law that governs the insolvency is determined: According to Article 4(1) of the European Insolvency Regulation, insolvency proceedings and their effects are governed by the law of the Member State in which the proceedings are opened, the so-called *lex concursus*, the scope of which is broad according to Article 4(2) of the European Insolvency Regulation, which provides that it determines the conditions for the opening of the proceedings, their conduct and their closure. Article 4(2), 2nd sentence, of the European Insolvency Regulation simplifies qualification by providing a list of examples. The parallelity of jurisdiction and applicable law ensures that the proceedings proceed as smoothly as possible. Article 4(1) of the European Insolvency Regulation is to be understood as referring to a provision of substantive law.⁴⁶ Thus, it is the substantive law of the Member State concerned that applies directly; there is no need to refer to the national conflict of laws rules. This avoids all the backward and forward references that stand in the way of the harmonisation of laws and guarantees the parallelity of jurisdiction and governing law.

2. Restrictions

The aforementioned universality principle is sometimes limited in favour of the principle of territoriality. The first sentence of Recital 11 justifies this in the following manner: “This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties.” The Regulation takes account of this in two different ways: It allows particular proceedings alongside the main proceedings and limits the *lex concursus* by imposing special requirements.

⁴⁵ See Article 41 1st sentence RJREJ.

⁴⁶ *Huber*, see *supra* footnote 13, pg. 151.

a. Particular proceedings

Alongside the main proceedings different types of particular proceedings are conceivable: particular proceedings in the strict sense, secondary proceedings, and national particular proceedings.

aa. Secondary proceedings

Where a debtor not only has the centre of his main interests within the meaning of Article 3(1) European Insolvency Regulation in one Member State, but also has assets in other Member States in the form of establishments, particular proceedings in accordance with Article 3(2) European Insolvency Regulation may be opened by the courts of the Member States concerned. If the particular proceedings are opened after the main proceedings have been opened, the term used is secondary proceedings, otherwise particular proceedings in the strict sense.⁴⁷

The term “establishment” is defined in Article 2(h) as being “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”. The economic activity has to be directed at the market, have a certain permanent quality and require at least a minimum of organisation.⁴⁸ The definition of establishment used in the European Insolvency Regulation is a political compromise: Some states are in favour of being able to open secondary proceedings whenever the debtor has assets in their territory, while others want there to be a strict requirement that the debtor have a domestic establishment.⁴⁹

In much the same way as in the main proceedings, the courts seized of the secondary proceedings also have their own *lex concursus*.⁵⁰ The secondary proceedings cannot be called into question by the other Member States, either.⁵¹ The main difference is that the effects of secondary proceedings are limited to the territory of the state of the opening of proceedings.⁵² Secondary proceedings relate solely to the assets located in the state in question, but they do

⁴⁷ Article 3(3) European Insolvency Regulation

⁴⁸ *Huber*, see *supra* footnote 13, pg. 142.

⁴⁹ *Huber*, see *supra* footnote 13, pg. 142.

⁵⁰ Article 28 European Insolvency Regulation.

⁵¹ Article 17(2) 1st sentence European Insolvency Regulation.

⁵² Article 3(2) 2nd sentence, Article 17(2) 2nd sentence, Article 27 3rd sentence European Insolvency Regulation, Recital 11 6th sentence, Recital 12 4th sentence.

displace the main proceedings in this respect.⁵³ Secondary proceedings can produce effects relative to assets located abroad, but only if the assets were transferred abroad after the secondary proceedings were opened.⁵⁴

bb. Particular proceedings in the strict sense

For particular proceedings in the strict sense, i.e. ones which are opened before the opening of the main proceedings, the above remarks concerning secondary proceedings apply in principle. However, strict requirements are to be met if the opening of proceedings of this kind is to be admissible: Either main proceedings cannot be opened under the law in force abroad, or the insolvency petition is filed by a domestic creditor or a creditor of the domestic establishment.⁵⁵ The idea being that particular proceedings in the strict sense should be kept to a minimum.⁵⁶ If main proceedings are opened after the particular proceedings have been opened, then the latter automatically become secondary proceedings.⁵⁷

cc. National particular proceedings

In the following two constellations, purely national particular proceedings can be opened alongside the main proceedings.

Where the debtor has an establishment in a third state or in Denmark, then these proceedings are to be conducted solely in accordance with the law in force in said state. From the German perspective, the recognition of proceedings of this kind is determined by reference to section 343 of the Insolvency Code.⁵⁸

Lastly, another possible scenario is where the assets located in a state do not constitute an establishment within the meaning of Article 3(2) of the European Insolvency Regulation. If the debtor has the centre of his main interests as defined in Article 3(1) of the European Insolvency Regulation in a third state or in Denmark, then section 354 et seq. of the

⁵³ Any assets remaining in the secondary proceedings after all claims allowed under those proceedings are met must be transferred to the main proceedings, Article 35 European Insolvency Regulation.

⁵⁴ Article 18(2) European Insolvency Regulation.

⁵⁵ Article 3(4) European Insolvency Regulation. In contrast, the court which opens secondary proceedings need no longer even examine the debtor's insolvency, Article 27 1st sentence European Insolvency Regulation. This was, after all, done upon the opening of the main proceedings.

⁵⁶ Recital 17 2nd sentence.

⁵⁷ Recital 17 3rd sentence.

⁵⁸ cf. *Paulus*, Änderungen des deutschen Insolvenzrechts durch die Europäische Insolvenzverordnung, ZIP 2002, pg. 729, 732.

Insolvency Code would allow national particular proceedings to be conducted in Germany. If, on the other hand, the centre of the debtor's main interests is in an EC Member State other than Denmark and if main proceedings have already been, or are expected to be, opened there, then national particular proceedings are not permitted.⁵⁹

b. Special requirements

The European Insolvency Regulation allows of several exceptions to the application of the *lex concursus*, e.g. as regards rights in rem of third parties (Articles 5 and 7, European Insolvency Regulation), set-off (Article 6, European Insolvency Regulation), various kinds of current contracts (Articles 9 and 10, European Insolvency Regulation), and certain kinds of rights subject to registration (Article 11, European Insolvency Regulation).⁶⁰

III. Jurisdictional Conflicts

Although the European Insolvency Regulation applies in the whole of Europe and although it does not provide for alternative legal venues and thus allows of no options as regards direct international jurisdiction, jurisdictional conflicts do occur. Before setting forth the different kinds of jurisdictional conflicts, we will first explain the term.

1. Term

The term “positive jurisdictional conflict” describes the situation where two courts claim jurisdiction for the same matter, while a “negative jurisdictional conflict” is when no court at all declares itself competent. Within the ambit of the European Insolvency Regulation another constellation is conceivable: While the main insolvency proceedings and particular proceedings are not identical litigations, there may be overlaps between them, and thus jurisdictional conflicts, owing to their being very closely linked with each other. The European Insolvency Regulation itself does not contain any provisions dealing explicitly with jurisdictional conflicts.

⁵⁹ *Paulus*, see *supra* footnote 58, pg. 732.

⁶⁰ For more detail *Huber*, see *supra* footnote 13, pg. 162 ff.; *Ehricke/Ries*, Die neue Europäische Insolvenzordnung, JuS 2003, pg. 313, 315 ff.

2. Conflicts as regards jurisdiction for primary and secondary insolvency proceedings

Conflicts as regards jurisdiction for primary and secondary insolvency proceedings revolves around the term “establishment” within the meaning of Article 3(2), 1st sentence, European Insolvency Regulation and the “centre of main interests” within the meaning of Article 3(1), 1st sentence, European Insolvency Regulation. The question whether a debtor’s assets located in some other state than that of the opening of the main proceedings are to be regarded as an establishment and thus as capable of being the subject-matter of secondary insolvency proceedings, or whether these assets are to be classified as “other assets” and thus come under the main proceedings, can lead to jurisdictional conflicts.⁶¹ Conflicts may also occur where it is unclear whether a debtor has several centres of main interests, so that several main proceedings have to be conducted instead of one main proceedings and the corresponding secondary proceedings.

This last point is relevant in connection with corporate groups. Here, the question is whether a legally independent subsidiary can be classified as an establishment. If so, then secondary insolvency proceedings would have to be conducted in this respect. If it is not an establishment, then separate main proceedings would have to be conducted. While the definition contained in the Regulation is broad and does, on the face of it, include independent subsidiaries, too,⁶² the fact that the Community legislator did not intend to regulate group insolvency suggests that subsidiaries should not be qualified as establishments.⁶³ Moreover, it follows from the other provisions of the European Insolvency Regulation that dependence is an unwritten criterion for establishments. For example, Article 27 provides that the debtor’s insolvency does not have to be examined before opening secondary proceedings because it is assumed that this has already been examined before opening the main proceedings; the Regulation therefore proceeds on the basis of an estate belonging to one debtor.⁶⁴ Article 32(1) European Insolvency Regulation provides that creditors can lodge their claims in the main proceedings and in any secondary proceedings. This presupposes that the debtor is the same person, however, because the creditors would not have the right to lodge claims against someone else for want of any relationship with them under the law of obligations.⁶⁵

⁶¹ For more detail *Paulus*, Das inländische Parallelverfahren nach der Europäischen Insolvenzverordnung, EWS 2002, pg. 497, 503.

⁶² On such an extension of the European Insolvency Regulation to group insolvencies: *Paulus*, see *supra* footnote 61, pg. 500 f.; *idem*, see *supra* footnote 58, pg. 730.

⁶³ *Huber*, see *supra* footnote 13, pg. 143.

⁶⁴ *Ehricke*, see *supra* footnote 32, pg. 105.

⁶⁵ *Ehricke*, see *supra* footnote 32, pg. 105.

Furthermore, qualifying independent subsidiaries as establishments would lead to a violation of the principle of equal treatment of all creditors because it would lead to a merging of the estates of dominating and dependent undertakings, so that - given Article 35 European Insolvency Regulation - creditors who have no relationship with the debtor undertaking under the law of obligations would be able to take part in the distribution of the estate.⁶⁶ Lastly, it would not seem apposite to classify subsidiaries on the basis of an apparent legal situation along the lines of the qualified *de facto* group.⁶⁷ While some subsidiaries may outwardly appear to be nothing more than an extension of the parent company, this appearance is generally negated, if only because the subsidiary carries a designation of its legal form in its name. Moreover, proceeding in this manner would lead to extreme legal uncertainty.⁶⁸

3. Negative jurisdictional conflict at the level of jurisdiction for primary insolvency proceedings

The European Insolvency Regulation just touches on the problem of negative jurisdictional conflict in passing. It is indeed unlikely that the courts of all the Member States would deny jurisdiction - after all, generally speaking substantial business interests are at stake.

German insolvency law nevertheless provides for this eventuality as a precaution. Under Article 102(3), 2nd paragraph, of the Introductory Act to the German Insolvency Code, German courts may not deny jurisdiction for the opening of the main proceedings if some other European court has denied jurisdiction on the grounds that the German courts have jurisdiction.

4. Positive jurisdictional conflict at the level of jurisdiction for primary insolvency proceedings

More interesting from a commercial perspective, the issue of positive jurisdictional conflict - i.e. when the courts of more than one state claim jurisdiction for the main proceedings for the insolvency of one and the same debtor - has recently gained topicality as a result of the “ISA” case, also known as the “Daisytek” case.⁶⁹ Because the European Insolvency Regulation offers no choice of jurisdiction, but simply provides that the courts of the state where the

⁶⁶ *Ehricke*, see *supra* footnote 32, pg. 107.

⁶⁷ cf. however *Paulus*, see *supra* footnote 61, pg. 500 f.

⁶⁸ *Ehricke*, see *supra* footnote 32, pg. 106.

⁶⁹ High Court of Justice Leeds, ZIP 2003, pg. 1362 f.; AG Düsseldorf, ZIP 2003, pg. 1363.

debtor has the centre of its main interests have international jurisdiction for the main proceedings, the problem of positive jurisdictional conflict should not actually occur at all. Problems in interpreting the term “centre of main interests” have caused jurisdictional conflict, however.

a. “ISA” case

A positive jurisdictional conflict occurred in the following - simplified - case: Three German GmbHs domiciled in Neuss are linked as follows. Two of them are (the only) subsidiaries of the third, a holding company. The shares in the holding GmbH are owned by an English company. The managing director of both of the subsidiaries is a Ms. Y, who manages the Holding GmbH together with Mr. X. Once it is clear that insolvency is inevitable, Mr. X files a petition with the High Court of Justice in Leeds for administration for all three companies under section 8 et seq. of the Insolvency Act 1986, pointing to the cross-border dimensions and claiming that the centre of operations of all three companies is in England. The English judge issues the administration orders as applied for. A few days later Ms. Y files insolvency petitions for all three companies with the court having jurisdiction in Germany, namely Düsseldorf Local Court, which opens insolvency proceedings. Consequently, primary insolvency proceedings were opened in both Germany and England.

b. Solution of jurisdictional conflict of the basis of the European Insolvency Regulation

Because the European Insolvency Regulation only provides for one, exclusive jurisdiction for the main proceedings, the problem of positive jurisdictional conflict is only touched upon in passing. Recital 22 states as follows: “... Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. ... This is also the basis on which any dispute should be resolved where the courts of two Member States claim competence to open the main insolvency proceedings. The decision of the first court to open insolvency proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision.” If one considers this Recital in the context of the provisions of the European Insolvency Regulation relating to the recognition of foreign judgments, the conclusion is the following:

The jurisdiction accepted by the court of a Member State for opening main proceedings is to be accepted by all courts subsequently seized of the matter. These courts may not question the jurisdiction of the first court and then issue a decision themselves. The aforementioned Recital specifically forbids any scrutinising of jurisdiction; Article 17(1) of the European Insolvency Regulation waives formalities with regard to the jurisdiction of the court seized.⁷⁰ Proceedings opened later must therefore be converted into secondary proceedings, provided the assets located in the state concerned can be qualified as an establishment within the meaning of Article 3(2) European Insolvency Regulation. Which proceeding was opened first is determined by reference to the effective date of the decision issued in the respective states of the opening of proceedings.⁷¹

If at all, recognition can only be refused if the court that opened the proceedings first failed to perceive the European dimension of its decision and obviously only intended to open purely national proceedings.⁷² Lastly, there is also the *ordre public* clause in Article 26 of the European Insolvency Regulation, which can serve as grounds for refusing recognition. According to the principles of private international law, which is based on mutual consideration and an assumption of the equivalence of legal systems, clauses of this kind are to be narrowly construed.⁷³ All the more so in this particular case, given that to apply the clause loosely would be to endanger the very purpose of the Regulation, namely to harmonise insolvency laws. Consequently, recognition can only be refused if the concrete results of recognition are clearly incompatible with material fundamental principles of the state concerned. Consequences that the Regulation actually seeks to bring about naturally cannot come under the *ordre public* clause. Consequently, if the state of the court seized feels that jurisdiction was wrongly claimed by the courts of another state, this cannot be used as grounds for refusing to recognise the decision via Article 26 of the European Insolvency Regulation.⁷⁴

⁷⁰ Huber, see *supra* footnote 13, pg. 143 ff.; Paulus, *Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung*, ZIP 2003, pg. 1725, 1727. Mankowski, see *supra* footnote 36, pg. 768 takes a different view.

⁷¹ Huber, see *supra* footnote 13, pg. 145.

⁷² Paulus, see *supra* footnote 70, pg. 1727.

⁷³ Leible/Staudinger, see *supra* footnote 25, pg. 567.

⁷⁴ Huber, see *supra* footnote 13, pg. 146; Leible/Staudinger, see *supra* footnote 25, pg. 568, for a different view von der Fecht, *Probleme des Insolvenzeröffnungsverfahrens*, in: *Betteray/Delhaes*, *Festschrift für Friedrich Wilhelm Metzeler*, pg. 119, 127.

c. Legal remedies available to resolve the jurisdictional conflict

Given that the matter at stake is the application of an EU Regulation, the remedy that first springs to mind is to refer the matter to the European Court of Justice.

One possibility would be to initiate proceedings for a preliminary ruling under Article 234(1)(b) EC. Courts that consider the centre of the debtor's main interests to be in their own state, after the main proceedings have already been opened in another state, could refer to the ECJ the question of whether the Regulation is to be construed as meaning that a strict priority principle does indeed apply, or whether there can be exceptions to the rule. It has to be said, however, that to initiate proceedings of this kind would be of little help in practice given the length of time they normally take. Moreover, contrary to Article 234(2) EC, in the context of judicial collaboration only courts of last instance may refer matters to the ECJ for a preliminary ruling - Article 68(1) EC.

Where the courts of a state repeatedly claim jurisdiction for main proceedings in obvious contravention of Article 3(1) European Insolvency Regulation, and where no measures are implemented to prevent this in the state concerned, this state is violating its obligation of loyalty to the Community on the basis of Article 10, first paragraph, EC. For this reason proceedings could be initiated against the state concerned for violation of the Treaty - Article 226 EC.⁷⁵ Given the material hurdles to be scaled and the timeframe involved, this would seem even less suitable than the avenue of seeking a preliminary ruling by the ECJ.

If at all, the only promising avenue would appear to be that of having recourse to national legal remedies.⁷⁶ If, for example, a German insolvency court were to disregard Article 3(1) European Insolvency Regulation and wrongly assume that it had direct international jurisdiction, the decision would be incorrect for, in actual fact, it should have issued a procedural judgment and refused the petition for the opening of insolvency proceedings want of jurisdiction. Under German insolvency law the debtor and - if main proceedings had already been opened abroad - the administrator in these proceedings could lodge an immediate appeal against this decision under section 34(2) and section 6 et seq. German Insolvency Code and Article 102, section 3(1), 3rd sentence, of the Introductory Act to the German Insolvency Code. Under German law at least, therefore, it is ultimately up to the

⁷⁵ cf. *Becker*, *Insolvenz in der Europäischen Union. Zur Verordnung des Rates über Insolvenzverfahren*, ZEuP, 2002, pg. 287, 304.

courts of the state that previously wrongly claimed jurisdiction to decide on the issue of international jurisdiction.

d. Preventing jurisdictional conflicts

One can but hope that jurisdictional conflicts of this kind will decrease as the mutual trust referred to in Recital 22 increases. To promote mutual trust liquidators can avail themselves of their rights under Article 21(1) European Insolvency Regulation. At the liquidator's request, the material contents of the judgment opening insolvency proceedings are to be published in all other Member States in accordance with the publication procedures provided for in the state concerned. A request of this kind is naturally only necessary to the extent that publication is not made anyway *ex officio* in the individual states in which the debtor has an establishment - Article 21(2) European Insolvency Regulation.⁷⁷

It would be a welcome development if the Member States were to issue of their own accord legislation facilitating an effective implementation of the European Insolvency Regulation. Under German law, for example, a court that assumes jurisdiction has to provide the grounds for its claiming jurisdiction.⁷⁸ At the same time, the law provides that German courts have to refuse to open or continue main insolvency proceedings if primary proceedings have already been opened abroad.⁷⁹ Provisions of this kind are not transposed from the European Insolvency Regulation, however; the Regulation applies directly in all Member States, anyway - Article 249, 2nd paragraph, 1st sentence, EC. Rather, provisions of this kind are to be understood as an expression of loyalty to the Community in accordance with Article 10, 1st paragraph, EC. Ultimately, therefore, it all comes down to the goodwill of the individual Member States in this respect.

⁷⁶ cf. Paulus, see *supra* footnote 58, pg. 1729.

⁷⁷ In Germany, Article 102 sec. 5(2) Introductory Act to the Insolvency Code.

⁷⁸ Article 102 sec. 2 Introductory Act to the Insolvency Code.

⁷⁹ Article 102 sec. 3(1), sec. 4 Introductory Act to the Insolvency Code.