Part II

INTERNATIONAL BANKRUPTCY LAW

A. The European Union Insolvency Regulation: An Overview With Trans-Atlantic Elaborations

By Bob Wessels[1]

1. Introduction

After over forty years of preparation, the European Union Regulation on Insolvency Proceedings has entered into force on May 31, 2002. The Regulation, with 47 articles, contains the framework for cross border insolvency within the European Union.[2] Its general goals are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor's assets and to avoid forum shopping. The Insolvency Regulation, therefore, provides rules for the international jurisdiction of a court in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States and the powers of the 'liquidator' in the other Member States. The Regulation also deals with important choice of law (or: private international law) provisions. The Regulation is directly applicable in the Member States[3] for all insolvency proceedings opened after 31 May 2002.

This article highlights the key provisions of the Regulation.[4] Then I

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[2]Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160, 30/06/2000 p. 0001-0013.

[3]Denmark excluded, because it opted out, which is in accordance with its position under the Treaty of Amsterdam.

[4]In this article I will nearly only refer to legal literature available in English. For introductions to the EU Insolvency Regulation see Wessels, European Union Regulation on Insolvency Proceedings, American Bankruptcy Institute Journal, November 2001, p. 24/25, 31; Fletcher, The Law of Insolvency, 3rd ed. (2002), p. 829; Wessels, European Union Regulation on Insolvency Proceedings. A Synopsis. Paper presented at Second Annual International Insolvency Conference, Fordham University School of Law, New York City (International Insolvency Institute CD-ROM, June 10-11, 2001; information: http://infoiiiglobal.org. See furthermore: Gabriel Moss, Ian F. Fletcher, Stuart Isaacs QC, The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide, Oxford University Press (2002), and Bob Wessels, European Union Regulations on Insolvency

will discuss four topics. First I will deal with the general aim of an EU Regulation, which is to be a Community law measure, having general application, unconditionally binding for all Member States and the room this measure still leaves for individual countries to legislate practical provisions. Where I have seen authors, including a few U.S. oriented ones, discuss the principle character of the Insolvency Regulation, I will participate briefly in that discussion. The third issue I will address is the very first experiences with the concept of the debtor's 'center of main interest,' which is the basis for a court's authority (international jurisdiction) to open a main proceeding. This seems especially interesting as the draft-chapter 15 ('Ancillary and Other Cross-border Cases') of the U.S. Bankruptcy Code, in section 1502(4) has taken this definition from the Insolvency Regulation. Finally, I will briefly make some observations on the challenges for the future of international (global) insolvency law.[5]

What is an insolvency proceeding according to the EU Insolvency Regulation?[6]

Art. 1(1) defines a framework for the applicability of the Regulation, requiring four cumulative conditions, which all have to be fulfilled:

> (i) Proceedings must be "collective," which means that all creditors concerned may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded;
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> (ii) The proceedings must be based on "the debtors insolvency" and not on other grounds. The insolvency-test itself is rooted in the legislation of the State of the opening of the proceeding;
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> (iii) The proceedings must entail the total or partial divestment of the debtor. A partial divestment, regarding the debtor's assets or his power of administration, is sufficient. The legal nature that such divestment may take, which is dependent of the national legislation applicable, has no bearing on the application of the Regulation to the proceedings in question; and
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> (iv) The proceedings should entail the appointment of a "liquidator." This requirement is a logical consequence of the previous condition. In general in any insolvency procedure, in order to achieve a divestment, a transfer of powers to another person, the liquidator, takes place. This transfer covers powers of administration or disposal over all or a part of the debtor's assets, and the limitation of the powers of the debtor, through the intervention and control of the debtor's actions.

Proceedings. An Introductory Analysis (forthcoming; to be published by American Bankruptcy Institute, ABI).

[5]For the place of the Insolvency Regulation in a broader domain of European company and commercial law, see Omar, The wider European framework for insolvency, Insolvency Law & Practice 2001, p. 135.

[6]The word 'insolvency' is generally used to describe the phenomenon North Americans call bankruptcy.

For the Insolvency Regulation to be applied, it is however not sufficient that the proceedings in question meet the four conditions mentioned above. Under art. 2(a) and (c), 'insolvency proceedings' covered by the Regulation must also have been expressly entered by the State concerned, in the lists of proceedings in the Regulation's Annexes A and B. Only those proceedings expressly entered in these lists will be considered insolvency proceeding as covered by the Regulation and therefore will be able to benefit from its provisions.

The term 'liquidator' used in the Regulation reflects a very broad concept. Under Art. 2(b) it includes any person or body whose function is to administer or realise the assets or supervise the management of the debtor's business. Even a court itself may fulfil this role. The persons or bodies considered to be liquidators by the Regulation are set in the list in Annex C to the Regulation. Like the other lists the eye meets exotic words for 'liquidator,' like 'Le mediateur de dettes' (Belgium), 'Sachverwalter' (Germany), 'Commissario' (Italy), 'De bewindvoerder in de schuldsanering natuurlijke personen' (The Netherlands), 'Gestor judicial' (Portugal), 'Pesanhoitaja' (Finland), or 'God man' (Sweden).

The general aim of the EU Insolvency Regulation is to be a Community law measure, having general application, binding for all, whether the debtor is a natural person or a legal person, a trader, a merchant, or an individual.[7] The legal status of the Regulation differs from the EU Insolvency Convention (or: Treaty) concluded in 1995, that never got into effect due to causes unrelated to its content. The present EU Insolvency Regulation is however nearly literally the same as the Convention, therefore literature referring to the Convention still is valuable.[8]

In all, in its scope the Regulation applies to 52 types of insolvency

[7]Financial institutions are excluded from the applicability of the Insolvency Regulation. 'Insurance undertakings' will be defined according to the description, laid down in Directive 2001/17 of the European Parliament and the Council of 19th March 2001 on the reorganisation and winding-up of insurance undertaking (OJ L 110, 20/04/2001), and 'credit institution' will be covered by the definition to be found in Directive 2001/24 of the European Parliament and the Council of 4th April 2001 on the reorganisation and winding-up of credit institutions (OJ L 125, 05/05/2001). Opposite to a Regulation a Directive will go through a legislative implementation process in each individual Member-State. The implementation dates are 20 April 2003 (insurance) and 5 May 2004 (credit institutions) respectively. See Wilkinson and McKim, Implementing the Insurance Insolvency Directive, Global Insolvency & Restructuring Review, July/August 2001, p. 25; Galanti, The New EC Law on Bank Crises, International Insolvency Review 2002, p. 49, and Hupkes, Dealing with Distressed Banks —Some Insights from Switzerland, Journal of International Banking Law 2002, p. 153.

[8]Balz, The European Union Convention on Insolvency Proceedings, 70 Am. Bankr. L.J. 1996, p. 485; Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind, 23 Brooklyn Journal of International Law 1997, p. 25; Fletcher, The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions, 33 Texas International Law Journal 1998, p. 119; Virgos, The 1995 European Community Convention on Insolvency Proceedings: an Insider's View, Forum Internationale, no. 25, March 1998; Felsenfeld, International Insolvency, New York, Juris Publishing 2000 (loose-leaf), 5-4; Morse, Cross-border insolvency in the European Union, Patrick J. Borchers and Joachim Zekoll (eds.), International Conflicts of

proceedings and 58 types of office holders (acting as 'liquidator') in 14 countries, with around 375 inhabitants that — roughly — use some 20 different languages.

2. Jurisdiction and law applicable

The key items of Chapter I ('General Provisions,' art. 1-15) are jurisdiction and applicable law. As far as the jurisdiction is concerned, the Regulation is based on the general principle that "the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings" (art. 3(1)). For a company or legal person, the centre of its main interests is the place of its registered office (art. 3(1), last line). In addition, the court of another Member State shall have only jurisdiction, if "the debtor possesses an establishment within the territory of that other Member State" (art. 3(2)). As said I will deal with these important provisions later.

The Regulation sets out uniform rules on conflict of laws which replace national rules of (what continental Europeans call) private international law. Therefore art. 4 lays down the basic rule on conflict of laws of this Regulation, determining the law applicable to the insolvency proceedings, the product thereof and their effects. Unless otherwise stated by this Regulation, the law of the Member State of the opening of the proceedings (or *lex concursus*) is applicable. This rule on conflict of laws is valid both for the main proceedings and for local proceedings, repeated by art. 28 for the secondary proceedings. The effects of the proceedings meant in art. 3(2) are however restricted to the assets of the debtor situated in the territory of that other Member State (art. 3(2), last line). The law applicable of the State of the opening of the proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. This lex concursus governs all the conditions for the opening, conduct and closure of the insolvency proceedings, the admissibility of claims and the rules on distribution and preferences, etc. These substantive effects are in a broad sense quite typical for insolvency law and are also necessary for the insolvency proceedings to fulfil its aims. Art. 4 provides that the lex concursus shall determine in particular against which debtors insolvency proceedings may be brought on account of their capacity, the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings, the respective powers of the debtor and the liquidator, the conditions under which set-off may be invoked, the rules governing the lodging, verification and admission of claims,[9] and other insolvency related items, like who is to bear the costs and expenses

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Laws for the Third Millennium. Essays in Honor of Friedrich K. Junger, Ardsley: Transnational Publishers Inc. 2001, p. 233.

[9]The Court of Arnhem 15 March 2001 (NIPR 2001, 119) has to decide in the following case. IBP Inc (South Dakota) sold meat and beef to the Dutch company Suned BV, now in

incurred in the insolvency proceedings, and the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Insolvency proceedings to which the law of the opening State normally applies, and their automatic recognition as provided in art. 16, may interfere with the rules under which transactions are carried out in other Member States. Therefore, to 'protect legitimate expectations and the certainty of transactions'[10] in a Member State other than the State in which proceedings are opened, provisions have been made for a number of exceptions to the general rule. The exceptions to the application of the law of the State of the opening (thus exceptions to the applicability of the lex concursus) are referred to in art. 5-15.

Three subjects are excluded from the legal consequences normally attached to the opening of insolvency proceedings: third parties' rights in rem (art. 5), set-off (art. 6), and reservation of title (art. 7). The opening of an insolvency proceeding elsewhere shall not affect these rights in respect to assets of the debtor, situated within the territory of another Member State (than the State in which the proceeding is opened) at the time of the opening of the proceedings.

For six subjects the Regulation refers to another applicable law rather than the lex concursus. See Table 1.

Table 1. Reference to another applicable law (another than the lex concursus)

Subject	*Choice of Law*
contracts relating to immovable property (art. 8)	law of Member State within which property is situated (Lex rei sitae)
rights and obligations of parties to payment or settlement systems or to a financial market (art. 9)	law of Member State applicable to system or market[11]

liquidation ('faillissement'), based on a contract excluding the Vienna CISG. At the request of Suned, the meat and beef was stored (without transferring title), awaiting payment, in Houston. As payments did not follow, even after chasing, IBP was obliged to sell the goods for lower prices to third parties. IBP claims damages (including warehouse charges, missed income deriving from interest) of $466,000. IBP requests verification of its claim to which Nebraska law applies. The liquidator opposes, stating that Dutch law applies to the claim, referring to art. 4(2)(h) Insolvency Regulation, which has not become binding. The Court considers (in a free translation): "Under the presumption that the EU Insolvency Regulation can be seen as a codification of present Dutch international private law, this does not result in applicability of Dutch law. The fact that art. 4(2)(h) Insolvency Regulation states that the rules governing lodging, verification and admission of claims will be determined by the lex concursus, does not mean that on a claim, that has been requested to be verified, also Dutch law will apply."

[10]Recital 24 to the Regulation.

contracts of employment (art. 10)	law of Member State applicable to the employment contract
the debtor's rights in immoveable property, ship or aircraft subject to register (art. 11)	law of Member State under the authority of which the registration is kept
validity of some acts of the debtor concluded after the opening of insolvency proceedings, to protect third-party purchasers (Art. 14)	law of Member State within which the territory of the immovable asset is situated or under the authority of which the register is kept
the effects of insolvency proceedings on lawsuits pending (art. 15)	law of Member State in which lawsuit is pending

Art. 12 (Community patents and trade marks) provides that certain rights may be included only in the main proceedings. Art. 13 (detrimental acts) represents a defence against the application of the (foreign) law of the State of the opening, when that law would lead to unenforceability because a legal act would be detrimental to all the creditors. The lex concursus does not apply where the person who benefited from a detrimental act gives evidence that the said act is subject to the law of a Member State other than that of the State of the opening of the proceedings, and that law does not allow any means of challenging that act in the relevant case. The defence must be pursued by the interested party to claim it. In this respect it acts as a 'veto' against the ". . . dominant force of the lex concursus."[12]

3. Recognition.

Chapter II (art. 16-26) focuses on recognition of insolvency proceedings. The principle of universality of main proceedings opened under art. 3(1) embracing all the debtor's assets and in principle affecting all his creditors, implies recognition of the proceedings and their effects in the other Member States in which those assets or creditors are situated. The Regulation guarantees this universality through the setting up of a system of mandatory and automatic recognition in all

[11]The EU Directive 1998/26 (OJ L 166, 11/06/1998) protects netting in payment and securities settlement systems, insulates collateral given to operators of these systems or the Central Banks in the performance of their functions from the effect of bankruptcy. The implementation date was 1 January 1999. Another carve out is the Proposal for a Directive on Financial Collateral Arrangements has been issued (OJ L 168, 27/06/2002). It will apply to collateral arrangements between parties, providing an uniform conflict of laws treatment of book entry securities used as collateral in a cross-border context, and protects these arrangements from the effect of insolvency. The implementation date is 27 December 2003.

[12]Fletcher, The Law of Insolvency, 3rd ed. (2002), page 844.

Member States. This means that in any Member State the same legal effects are produced as under the law of the State of the opening of proceedings. The recognition is immediate in this sense that it takes place by virtue of the Regulation (ipso iure or 'ex lege Regulatorae') without any need to resort to preliminary proceedings, to be fully effective, and without further formalities, like a publication in another country. In order to determine the effects in another State of the judgment opening the proceedings referred to in art. 3(1) the law of the State of the opening shall be applicable. This lex concursus of one Member State therefore is 'exported' to another Member State and shall apply to all the effects both procedural and substantive. The substantive effects are included by virtue of the general applicability under art. 4, which the Regulation attributes to the law of the State of the opening. Therefore they are subject to the same exceptions (see art. 5-15) as are provided for by the Regulation in respect of that law. The recognition of main proceedings under art. 3(1) shall, in accordance with art. 3(2), be limited by the opening of territorial proceedings. In respect of the assets and legal situations which come within the jurisdiction of territorial proceedings, the main proceedings cannot produce their 'automatic' effects, see art. 16(2).

The only ground for opposing recognition is that the judgment, handed down in a Member State, would be 'manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual' (art. 26).[13]

The territorial proceedings protect local interests and for that purpose the national law of that Member State applies. However, the main proceedings may influence the conduct of territorial proceedings as a result of co-ordination and sub-co-ordination rules which derive from the Regulation and to which territorial proceedings are subject. I will get back to this item later.

Territorial proceedings can have their effects only on the assets situated in the State of the opening as referred to in art. 3(2). Recognition cannot imply, therefore, the extension of the effects of those proceedings

[13]The recognition of judgments relating to the conduct and closure of the insolvency proceedings and of judgments adopted in the framework of those proceedings is dealt with generally in art. 25. This provision also regulates the enforcement of all judgments, as regards all its consequences except the opening itself. Under art. 25(1) judgments relating to insolvency proceedings (their conduct and closure) present no specific problem of qualification. Like the judgment re opening of proceedings they also shall be recognised with no further formalities. The simplified system of 'exequatur' provided for in the Brussels Regulation 2002 (Council Regulation No. 44/2001 of 22 December 2000, OJ 2001 L 12/1, as of March 1, 2000 replacing the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters) is used for judgments adopted in the framework of insolvency proceedings. Grounds for rejection of the exequatur are however not taken from the Brussels Regulation 2002, but from art. 26 Insolvency Regulation (public policy exception). Art. 25 provides a fine-tuning with definitions given by the European Court of Justice of 22 February 1979 (Case 133/78) (Gourdain v. Nadler) and aims to avoid gaps between the Insolvency Regulation and the 2002 Brussels Regulation.

to property situated in other Member States. The effects which they produce over the assets located in the territory of the State of the opening, can however not be challenged in other Member States (see art. 17(2), first sentence). This is the case, for example, where the liquidator in those proceedings has to demand the return of assets belonging to the estate in the secondary proceedings which were transferred abroad — after the opening of proceedings — without his authorisation. Moreover the opening of the territorial proceedings limits the universal effects of the main proceedings which may no longer include the assets situated in the State where those territorial proceedings are opened. The main proceedings must observe that limitation.

4. The liquidator

One of the most important effects of insolvency proceedings opened in a Member State is the recognition of the appointment of the office holder ('liquidator') and of his power in all other Member States. By virtue of this recognition the appointed liquidator will be able to exercise his powers — conferred upon him by the law of the State of the opening — in all other Member States (as said, except for Denmark). The nature, obligations and scope of the liquidator's powers will be determined by the law of the State of the opening and of the proceedings in respect of which he was appointed. He may transfer assets out of the State in which they are situated (art. 18(1)). In this regard the liquidator must respect however art. 5 (Third parties right in rem) and art. 7 (Reservation of title) since the proceedings cannot affect rights in rem of creditors or third parties over assets, situated at the time of the opening in a Member State other than the State of the opening of proceedings. The creditors can prevent such transfer by requesting the opening of secondary proceedings concerning those assets, provided that the conditions laid down in art. 3(2) and (3) are met. The powers of the liquidator in the main proceedings are subject to two general restrictions:

> (i) If in another State a secondary proceeding is opened the liquidator in that secondary proceedings will have exclusive powers over the local assets. Once proceedings have been opened, the direct powers of the liquidator in the main proceedings no longer apply to assets situated in the State of the opening of the territorial proceedings. This does, however, not imply that the main liquidator loses all influence over the debtor's estate situated in the other State. That influence must be exercised through the powers conferred upon the liquidator by the Regulation (under art. 31-37) to co-ordinate the territorial proceedings and the main proceedings. I will return to this issue later;
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> (ii) Art. 18(3) provides for the liquidator's obligation to comply with the law of the State within the territory of which he intends to take action exercising his powers. The liquidator shall exercise his powers without infringing the laws of the State in which he is about to take action.

A proof of the liquidator's appointment may be established by a certified copy of the original decision, issued by either a person authorised by the State in which the decision was taken or by any other certificate issued by the competent court affirming the appointment (art.19, first sentence). In case of doubt or of opposition, it seems reasonable that these powers, based on the law of another Member State, are used by the person who invokes them. As the Insolvency Regulation contains no rules regarding the means of proving the scope of the liquidator's powers, proof may be established by a certificate issued by the Court appointing the liquidator, which shall define his powers, or by any other means of evidence admitted by the law of the State where the liquidator intends to exercise his powers. A translation into the official language(s) of the Member State(s) in which the liquidator intends to act may be required. This translation shall take into account the requirements established in the State regarding translations of official documents (art. 19, second sentence).

5. Distribution

It takes quite some imagination in day-to-day practice to truly understand that the Insolvency Regulation considers its geographical scope (the Community, except Denmark) to be a single economic area. The main proceedings produces effects within this whole area. Where the Regulation allows for the opening of secondary proceedings, the whole area should be taken as a reference for the distribution of dividends, making it compulsory to take into account the sum obtained in each set of proceedings by means of a sort of consolidated account of the dividends obtained on a European scale. Art. 20 is to guarantee the equal treatment of all the creditors of a single debtor. The principle of universality of the main proceedings leads to the provision that a creditor who, after the opening of a main proceeding, obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator. The liquidator may demand either the return of the assets received or the equivalent in money, but the obligation to return is subject to art. 5 and 7 (rights in rem of creditors and third parties in respect of the debtor's assets situated outside the State of the opening of proceedings at that time). The underlying idea is that as long as these articles apply, a creditor who obtains satisfaction of claims guaranteed by rights in rem by realization of the security does not enrich himself to the detriment of the estate and does not breach the principle of collective satisfaction. In order to ensure equal treatment of creditors a creditor who has — in the course of insolvency proceedings exercising his right (art. 32(1)) — obtained a dividend on his claim, shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend, see the 'hotch-pot' rule in art. 20(2). This provision allows the creditor to keep what he received in the first proceedings in which distribution took place, but he can participate in other distribu-

tions until all creditors of the same ranking have obtained equal satisfaction.

The ranking or category of each claim is determined for each of the proceedings by the law of the State of the opening (art. 4(2)(i)). It may very well be that the application of different insolvency laws to the different proceeding leads to different ranking of the same claim lodged in two different proceedings. The only ranking or category which is taken into account in order to apply art. 20(2), is that given to the claim by the law governing proceedings in which distribution is to be effected.

6. The debtor's debtor

As indicated before, the publication of the opening of insolvency proceedings in another Member State is not a precondition for the recognition of those proceedings or for the recognition and exercise of the powers of the liquidator appointed in such proceedings. For business considerations, the main content of the decision opening the proceedings should be published in the other Member States at the request of the liquidator. If there is an establishment in the Member State concerned, there may be a requirement that publication is compulsory, but in neither case, however, should publication be a prior condition for recognition of the foreign proceedings. Art. 21(1) vests the right of the liquidator to request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication-procedures provided for in that State. He may also request that the judgment, opening the proceedings referred to in art. 3(1), be registered in the land register, the trade register and any other public register kept in the other Member States (art. 22(1)). The costs of the publication and registration qualify as costs and expenses incurred in the proceedings, see art. 23.

The automatic recognition of insolvency proceedings opened in another Member State, and the lack of any general system of prior publication, aim to guarantee the immediate and full effectiveness of the judgment opening proceedings in all the Member States. Without any doubt a number of persons and businesses may be unaware of the opening of proceedings and may act in good faith in contradiction with these new circumstances. Art. 24 provides a form of protection: where an obligation has been honoured in a Member State for the benefit of a debtor who is subject to insolvency proceedings opened in another Member State, when it should have been honoured for the benefit of the liquidator in those proceedings, the person honouring the obligation (meaning the place where the obligation in fact has been performed by the debtor of the obligation) shall be deemed to have discharged it if he was unaware of the opening of proceedings (art. 24(1)). Where such an obligation is honoured before the publication provided for in art. 21 has been effected, the person honouring the obligation shall be presumed, in the absence of evidence to the contrary, to have been unaware of the

opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of evidence to the contrary, to have been aware of the opening of proceedings (art. 24(2)).

7. Secondary insolvency proceedings

The framework of the Regulation is that the main insolvency proceeding in the opening State where the debtor has his centre of main interests does not preclude the opening of secondary proceedings in other Member States where the debtor has an establishment. Chapter III ('Secondary Insolvency Proceedings,' art. 27-38) deals with this phenomenon more specifically. Secondary proceedings can be said to serve mainly two purposes: (i) they protect creditors, usually local creditors, from the main proceedings, and (ii) at the same time they assist and support the main proceedings. The opening of secondary proceedings may be requested by the liquidator in the main proceedings or by any other person authorised to do so under local law. A creditor for example who thinks that his chances are better in local proceedings than in the main proceedings in an other State, may too request. Where the law of the Member State in which the opening of secondary proceedings is requested requires that the debtor's assets be sufficient to cover in whole or in part the costs and expenses of the proceedings, the court may, when it receives such a request, require the applicant to make an advance payment of costs or to provide appropriate security (art. 30). Although the secondary proceeding is limited by the territory of the Member State, the 'secondary' liquidator has however the right to act outside his territory. He is by virtue of art. 18(2) authorised to recover an asset, moved out of that State after the opening of the secondary proceedings. Furthermore he can act outside his territory in case of fraud against the creditors of those proceedings according to art. 13 in conjunction with art. 4(2)(m). The local liquidator therefore may request the court of a Member State the return of the assets.

By virtue of art. 4(2)(h) the law of the State of the opening of secondary proceedings determines the rules governing the lodging of claims. The Regulation itself contains provisions on persons entitled to lodge claims. The creditor is entitled to lodge in the proceedings of his choice, even in several proceedings (art. 32(1)).[14] Both the liquidator in the main proceedings and each liquidator in secondary proceedings may lodge claims in the other proceedings, thus creating a system of multi-

[14]Any creditor has the right to lodge claims in writing, if his residence is located in a Member State other than the State of the opening of proceedings. This provision is meant also for the tax authorities and social security authorities (art. 39), which lays down a rule of substantive law. This provision derogates from the application of national law pursuant to art. 4(2)(h). Art. 40 contains the liquidator's duty to inform known creditors in the other Member States. The Regulation does not take into consideration creditors from outside the European Community. Felsenfeld (note 8), p. 5-15, presumed that. To those creditors the national law of the State in which the proceedings are opened applies; this domestic law determines whether creditors located outside the EU should be informed.

cross filing. The aim of this provision is to facilitate the exercise of the rights of the creditors. Under art. 32(2) a liquidator shall lodge in other proceedings claims, which have already been lodged in its own proceedings. The Regulation allows a creditor the right to oppose a claim lodged in other proceedings by the liquidator. In proceedings other than those he himself has selected, the creditor may have various reasons for opposing the lodging of his claim. A specific appraisal for each claim would involve a difficult task for the liquidator, and would be a costly and lengthy procedure. The obligation to lodge such claims exists however only if it is in the general interests of all the creditors in this proceedings or of a typical group of creditors. Art. 32(3) empowers any liquidator to participate in other proceedings. The aim of this provision is to better ensure the presence of creditors and the expression of their interests through the liquidator. In order to resolve the frequent absence of creditors, the provision allows the liquidator to attend creditors' meetings.

At the request of the liquidator in the main proceedings, the process of liquidation in secondary proceedings may be stayed in whole or in part, see art. 33(1), first sentence.[15] The court may not refuse the stay, except if ". . . it is manifestly of no interest to the creditors in the main proceedings," see art. 33(1)1, second sentence. The ground for a stay may therefore only be appraised in relation to the interests of the creditors in the main proceedings. The court will be dependent on information provided by the main liquidator as the Regulation does not provide rules for cross-border communication between courts. The court may take into account the interests of all the creditors in the secondary proceedings, as well as certain groups of creditors, imposing on the liquidator in the main proceedings a guarantee which it determines as appropriate before ordering the stay (art. 33(1), first sentence). The stay is limited to a maximum of three months. Once this period is over, it may be extended for another three months maximum each time. The number of successive extensions is not limited, see art. 33(1), last line, but the court shall terminate the stay of the process of liquidation at the request of the liquidator in the main proceedings, at its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings (art. 33(2)).

If the law of the State in which the secondary proceedings are opened allows insolvency proceedings to be closed by means of a rescue plan, a composition, or a comparable measure, all those stipulated by that law, may propose such a measure. In addition, art. 34(1) empowers the

[15]If the court of a Member State, which has jurisdiction pursuant to art. 3(1), appoints a temporary administrator in order to ensure the preservation of the debtor's assets, that temporary administrator shall be empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings, see art. 38.

liquidator in the main proceedings to propose a rescue plan or comparable measures, the creditors may accept a rescheduling of debts or waive some of their rights and the debtor may undertake to meet certain conditions. As this may affect the interests in the main proceedings, such a measure must obtain the consent of the liquidator of in the main proceedings. A closure of a secondary proceedings by a measure referred to in art. 34(1), first sentence, shall not become final without the consent of the liquidator in the main proceedings. Opposing a rescue plan or a composition, and therefore failing the liquidator's agreement, however, closure of a secondary procedure may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed (art. 34(1), second sentence). The financial interests are estimated by evaluating the effects, which the rescue plan or the composition has on the dividend to be paid to the creditors in the main proceedings. If those creditors could not reasonably have expected to receive more, after the transfer of any surplus of the assets remaining in the secondary proceedings (see art. 35), in the absence of a rescue plan or a composition, their financial interests are not thereby affected.

8. Duty to cooperate and to communicate

One of the most important provisions is the one with regard to the duty to cooperate[16] and communicate information, that in cross-border insolvency issues exists between liquidators, but regrettably not between courts. Main insolvency proceedings and secondary proceedings can contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The Regulation is based on the rationale that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings has been given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For this reason art. 31(1) sets forth that, subject to the rules restricting the communication of information (privacy laws in Member States), the liquidator in the main proceedings and the liquidators in the secondary proceedings ". . . shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims

[16]See Paulus, A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective, European Business Law review 2000, p. 435. The duty to cooperate goes a long way back. Article XXXV of the Concordat of October 1, 1668, concerning the establishment in Dordrecht (in the 16th century an important city in Holland) of the Scottish Warehouse ('Schotse Stapel'), including the right to store goods, reads (in a free translation of ancient Dutch): "And if it would happen (which Heaven forbids) that someone from the Scottish Warehouse would go bankrupt or go into insolvency to which one of the town's inhabitants as creditors would suffer, we will next to the Lord Curator assign, from each sides, a 'curator,' which will together administer the estate of the insolvent ad opus ius habentis." These last words would translate as: to the benefit of the entitled parties.

and all measures aimed at terminating the proceedings." In addition to this mutual obligation to communicate information, they are bound by a mutual obligation to cooperate. See art. 31(2), that provides that, subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings ". . . shall be duty bound to cooperate with each other." The liquidator in the secondary proceedings shall give the liquidator in the main proceedings ". . . an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings," see art. 31(3). The liquidator in the main proceedings will therefore be able to propose a restructuring plan or a composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended. I will return to this subject later.

9. The EU Insolvency Regulation, as a Regulation

The general judgement in Europe is that the EU Insolvency Regulation is quite a step forward in providing a recognisable framework that facilitates interaction and alignment of different insolvency systems throughout the European Community. Cross-border insolvencies should become much more predictable with the enacted system of coordinated universalism. Of course, authors and insolvency practice are not blind for its shortcomings. In the light of the ongoing trend of businesses that spread and globalise in regions and continents all over the world a drawback is its limited territorial scope. This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.[17] Other shortcomings should be recognised too: the Regulation does not deal with the position of economic groups, consisting of a number of related companies (holding-subsidiary relations), nor with a concept that in the USA is known as "substantive consolidation." In some cases, one would wonder whether the predictability of the Regulation is sufficient enough. The Regulation contains several vague concepts as 'centre of main interest,' 'establishment,' and 'public policy' and it may give rise to creative engineering of certain transactions by drafting and applying legal arrangements and contracts that limits the risks of being opposed to provisions with regard to detrimental acts or that limits (or, as the case may be, optimises) set-off.[18]

Although a Regulation, as an EU measure, is binding in all its content

[17]Literally the text of Recital 14 to the Regulation.

[18]See Wessels, The Secured Creditor in Cross-Border Finance Transactions Under The EU Insolvency Regulation, International Journal of Banking Law, March 2003. I conclude this article with the following: "Where the rationale of the Regulation indicates that for the proper functioning of the internal EU market it is necessary to avoid '. . . incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)' (Recital 4 to the Regulation), one could wonder whether the EU Insolvency Regulation succeeds in its mission. For lenders the Insolvency Regulation has been or will be a reason to search for the appropriate contractual choice of law provisions with which lenders will be able to a degree of structuring and engineering of financial transaction, e.g. by choosing for a forum that allows set-off to the maximum extend possible and that has limited provisions of

and is directly and unconditionally applicable in Member States most countries still need to amend their domestic insolvency law in the short term to be able to put the Regulation into practical effect. Several questions will have to be dealt with to really fit the Regulation into the domestic legal framework. Just to give an idea of some of the questions EU countries have provided legislation for or are still in the process of discussing. For instance, procedural questions:

> (i) Should the request for opening of an insolvency proceeding expressly ask for 'main' or 'secondary' proceeding?
>
> (ii) Must the court look into its international jurisdiction 'ex officio' and explicitly make mention in the judgement what type of proceeding it opens?
>
> (iii) Does a foreign liquidator have standing to appeal to a judgement of the court of another Member State?
>
> (iv) Will a foreign liquidator in submitting his requests need mandatory administrative support, e.g. by a 'clerk' or a court official?

There will be details re registrations and publications to deal with:

> (v) Method and contents re registration in a national 'Bankruptcy' register, when the debtor has an 'establishment';
>
> (vi) Method and contents re registration in the same register of a foreign main proceeding;
>
> (vii) And: in the registers of which court (when the Member States has no system of central registration)?
>
> (viii) How to handle changes in the legal situation of immovable assets and may result in publications in Public register(s) in another Member State?
>
> (ix) How to adapt of national Trade Register, e.g. with regard to a foreign court with appropriate international jurisdiction, that opens main proceeding abroad against a debtor-entrepreneur in which a foreign liquidator is appointed?
>
> (x) publication of the opening of proceedings or insolvency related judgements in which sources (Official Gazette/Newspaper) and — confusion of tongues — in which languages?

With regard to facilitating the co-ordination of main and secondary proceedings:

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challenging detrimental acts. It will also trigger to look carefully at certain provisions or covenants in contracts with debtors, e.g. the provision that prevents a debtor to change any specifically described 'centre of main interest' (or circumstances that would lead to a change of jurisdiction) without the lender's consent or the provision that it is not allowed to alter the location of certain assets between the time of the creation of the right in rem."

(xi) The liquidator can ask for a stay (art. 33) in secondary proceedings and may ask to terminate this stay: at which court in the other Member State? Is there a possibility of appeal against a (positive or negative) decision? If yes, by whom?

(xii) Same questions with regard to the ending of secondary proceedings (art. 34);

(xiii) Same question re the request of preservation measures: which court in the other Member State? Possibility of appeal? By whom? (art. 38)

(xiv) Does not the aim of the Regulation demands for certain obligations for court staff re information/registration/translation?

(xv) Provisions re power of liquidator to propose rescue plan in case domestic law only provides that a debtor himself can issue said proposal (Art. 34)

This list could easily be doubled. My aim here is to demonstrate that a possible idea that 'Europe' now has a full fledged domain of community insolvency law is far beyond reality. If one is aware of the administrative dimension of day-to-day insolvency practice there can be no doubt about the vast number of practicalities that have to be dealt to really be able to benefit from the Insolvency Regulation. Where 'coordination' is in the genes of both the EU Insolvency Regulation — and the UNCITRAL Model Law on Cross-Border Insolvency it is — to say the least — odd to see that every individual EU Member State here follows its own course,[19] without giving any evidence of even sharing draft work products or of mutual alignment or consultation.[20]

[19]In the UK, the government has passed six statutory instruments to ensure that UK provisions would be in line with the Regulation. They all came into force May 31, 2002. A proposal in Belgium was issued in September 2002. In Germany, a legislative proposal has been issued, also in September 2002. Several of the detailed questions I raised in the text are treated differently in the latter proposals. The German one also contains an separate part ('Internationales Insolvenzrecht' or: International Insolvency Law) with some 25 provisions which aims to provide for a set of rules also applicable outside Europe. The same goes for Spain. See Valenzuela, Reflections on Spanish and European Bankruptcy Reform, International Business Lawyer, November 2002, p.435. In The Netherlands, a legislative proposal with some twenty articles was sent to Parliament in October 2002. The Dutch governmental policy is to provide for very modest provisions that only couples the Regulation with Dutch law. Proposals aiming at regulation of cross-border issues to which the Regulation does not apply have been qualified (by the Standing Committee on Private International Law, February 2002) as not urgent and the Dutch government will now request the advice of (another) Committee, which by the way still has to be set up.

[20]For a probable dispersion per country: Lueke, The New European law on International Insolvencies: a German Perspective, 17 Bankruptcy Developments Journal 2001, p. 369.; Butter, Cross-Border Insolvency under English and German Law, Oxford University Comparative Law Forum 2002, at http://www.ouclf.iuscomp.org; Moss, The Impact of the EU Regulation on UK Insolvency Proceedings, International Insolvency Review 2002, p. 132.; European Cross-Border Insolvency. A Guide To Insolvency Procedures Across The European Union, Jennifer Marshall (general editor), Published by Allen & Overy 2002.

10. The EU Insolvency Regulation, its character

With an eye on the practical consequences the question has been raised whether the Insolvency Regulation isn't too traditional in its approach by trying to align certain proceedings (leaving some details to member States). Given the fact that secondary proceedings (aiming at establishments in another Member State) must be winding-up proceedings, does the Regulation promote a rescue culture enough? Indeed, the model the Regulation uses (the framework of a main proceeding and secondary proceedings with a mandatory liquidation character) has been principally criticised: "More fundamentally, the [Regulation's] orientation seems rooted in principles more facile to liquidation than rehabilitation, raising questions about its utility in the present day 'corporate rescue' culture," see Johnson.[21]

I challenge this view. Take a simple example of a debtor-company, with two different businesses in two different Member States, e.g. 'production' in England and 'storage, distribution, marketing and sales' in France. The idea is that the successful business (e.g. the one in England) will be the victim of the badly functioning enterprise (in France). If in France a main proceeding is opened the proceeding in England has to be a secondary one, and this one must be a liquidation proceeding. So, for no good reason a good business will be liquidated.

From the long history of the Regulation it emerges that the European Commission has given this issue much thought, but the Commission was not in favour of a proposal, brought forward by the European Parliament, to make a creditor's filing for a secondary proceeding dependent on the approval of the (foreign) liquidator, appointed in the main proceeding elsewhere.[22] The Regulation's answer lies at another level: coordination. See Recital 20 to the Regulation: "Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency

[21]Johnson, The European Union Convention on Insolvency Proceedings: A Critique on the Convention's Corporate Rescue Paradigm, International Insolvency Review 1996, p. 80. Apparently with consent quoted by Felsenfeld (note 8), p. 5-8. The idea mentioned has been put forward by authors from Germany, The Netherlands and Luxembourg too.

[22]Clearly stated in Recital 18 to the Regulation: "(18) Following the opening of the main insolvency proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary insolvency proceedings."

proceedings to be suspended."

It may be the case that the secondary proceeding only can have a liquidation character (art. 27, second sentence), but this limitation fuels from the clear desire ". . . to achieve a system of international cooperation that is simple and easy to understand," see Virgos.[23] At the same time, during the preparation of (what now is) the Regulation, the predominating thought was that ". . . the rules of mandatory coordination and the influence rights given to the main trustee would provide enough means to protect the rescue efforts in the main forum. This line of reasoning explains the rule adopted: secondary proceedings are possible, provided they are of the winding-up type, but they are subject to the. . . main-secondary scheme of coordination."[24] In an earlier part of this article I discussed several of these measures for coordination. For ease of reference I list here the rights (and duties) of the liquidator in the main proceeding, from which they can be deducted.

Rights and duties of a liquidator in the main proceedings

The liquidator in the main proceedings may:

1. exercise right ex art. 20 (creditor in other Member State shall return what he has obtained).
2. request publication in another Member State of opening judgment (art. 21)
3. request registration of judgment in public registers kept in another Member State (art. 22)
4. request opening of secondary proceedings in other Member States (art. 29)
5. participate in secondary proceedings (art. 32(3))
6. request stay the process of liquidation of secondary proceedings (art. 33(1)) and may request measures as mentioned in art. 34(1) (see art. 34(3))
7. request termination of this stay (art. 33(2))
8. propose a rescue plan, when allowed (art. 34(1))
9. disagree with finalizing liquidation in secondary proceedings (art. 34(2))
10. claim the remaining assets (art. 35)
11. exercise rights of 5-10 to proceedings opened before the main proceeding
12. request that these previous proceedings will be converted in

[23]See Virgos (note 8), p. 11. Professor Virgos was, in the mid 90s, one of the authors of an extended Explanatory Report to the Convention, that never got an official status only due to the lack of official approval by the Ministers of Justice of the Member States.

[24]See Virgos (note 8), p. 11.

winding up proceedings (art. 37).

Duties of the liquidator in the main proceedings:

1. to communicate information (art. 31(1)) (ditto for liquidators in 'secondary' proceedings)
2. to cooperate (art. 31(2)) (ditto for liquidators in 'secondary' proceedings)
3. to lodge all claims lodged in the main proceedings (art. 32(2))
4. to immediately inform all known creditors (art. 40(1)) by individual notice (art. 40(2))

The mutual duty between liquidators to communicate and to cooperate symbolises, in the words of the German Professor Paulus ". . . the bridging of the still existing deficit of uniform law."[25] The performance of the obligations to communicate and to cooperate is necessary in order to voice with regard to all claims the principle of equal treatment of pari-passu ranked creditors. In a dozen or so separate provisions the Insolvency Regulation gives shape to the idea of 'unity of estate,' with regard to which he who has the most dominant role (the main liquidator) in principle directs the completion of the insolvency process, under the supervision of a national court. In this process the main liquidator has with regard to the secondary proceedings a set of controlling (procedural and substantive) powers which he can exert. It is for this reason I use the description of 'coordinated universalism.' While the secondary proceedings do not qualify as 'ancillary' in its support to a main proceeding Westbrook, however, uses the description of 'modified territorialism,' which in my opinion does not reflect the Regulation's model.[26] The symbol of territoriality (secondary proceeding) should not be overestimated as it only may exists when an 'establishment' can be located. Without an establishment all assets in Lisbon, Helsinki or Bordeaux are part of the estate of the debtor in a main proceeding opened in Berlin, Stockholm or Naples. The procedural powers of the main liquidator, the mutual interwoven interests of creditors (filing of claims; alignment in dividends), the parallel national insolvency proceedings and the mutual obligations to communicate and to cooperate do form ". . . parts of an overall integrated system of cross-border insolvency, which operates through the application of the . . . main/secondary scheme of coordination" and ". . . fixed rules on participation and distribution" as well as "coordination among trustees" demonstrate

[25]Paulus, Die europaische Insolvenzverordnung und der deutsche Insolvenzverwalter (The European Insolvency Regulation and the German Liquidator'), NZI 2001, p. 505 e.v. (". . .Uberbrucking des. . . noch bestehenden Defizits einheitlichen Rechts").

[26]Westbrook, Universal Participation in Transnational Bankruptcies, Ross Cranston (ed.), Making Commercial Law. Essays in Honour of Roy Goode, Oxford: Clarendon Press 1997, p. 419, at p. 422. Even stronger expressed by Tung, Is International Bankruptcy Possible?, 23 Michigan Journal of International Law 2001, p. 1, at p. 47 (". . . essentially a territorial system with universalist pretensions").

that the Regulation ". . . honors the economic unit of the debtor . . .," see Virgos.[27]

I recognize, as expressed with my displeasure with the national divergence in the (to be) enacted domestic provisions earlier, that 'coordinated universalism' is the theoretical concept behind the Insolvency Regulation, which I consider is not fully matured. In addition to a coordinated process of giving practical effect to the Regulation in each of the Member States at an EU level other practical measures should be given careful consideration. The co-appointment by the court that opens a secondary proceeding of the (foreign) main liquidator (next to the appointment of the national 'secondary' liquidator) could be one of these measures. Another one that comes to mind is the facilitation of the building of a technological platform that enables to file all claims from all proceedings, that is 'owned' by the main liquidator and that will be made accessible for the secondary liquidators. In more complex cases this would probably advance an orderly process and would lead to savings in expenditures. With this collected and consolidated information I am confident that the 'hotch-pot' rule (art. 20 lid 2) will facilitate commonly difficult calculations. As a third suggestion I would propose again to create communication and coordination provisions between courts in Member States and to give serious consideration to the American Law Institute (ALI) Principles on Court-to-Court Communications.[28]

11. The EU Insolvency Regulation, its guidance to future U.S. international bankruptcy law

The rules of jurisdiction set out in the Regulation establish only the international jurisdiction. Art. 3 designates the Member State of which the courts may open insolvency proceedings. The territorial jurisdiction of a specific court (attribution) within that Member State itself must be established by the national law of the Member State concerned. The essential design of the Regulation is, as explained, to establish a hierarchical scheme of primary (main) and subsidiary (secondary) jurisdictional competence in relation to a debtor. The court where the 'centre of the debtor's main interests' is situated, so within the territory of a Member State, will have the primacy to open the proceedings. The principle of subordination between main and secondary proceedings is set forth by art. 3(2)-(4): where the centre of the debtor's main interests is situated within the territory of a Member State, the courts of another Member

[27]Virgos (note 8), p. 34.

[28]See Wessels, 'Internationaal insolventierecht als motor van grensoverschrijdende cowrdinatie en samenwerking tussen rechters en curatoren' (International Insolvency Law as Engine for Cross-Border Coordination and Cooperation Between Judges and Liquidators, Tijdschrift voor Insolventierecht (Dutch Insolvency Law Journal) 2002, p. 21. For (references to) the ALI Principles, see Westbrook, Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation, 76 American Bankruptcy Law Journal 2002, p. 1. With good reason, Westbrook (p. 37) writes: "The EU Regulation is silent on the subject of communication between courts."

State have a jurisdiction to open insolvency proceedings only if the debtor possesses an 'establishment' in the territory of that other State.[29] In cases where the debtor's centre of main interests is located in a Member State, the courts of other Member States have no power to open a main insolvency. Opening is allowed of a secondary proceeding, if the debtor has an "establishment," which is defined as ". . . any place of operations where the debtor carries out a non-transitory economic activity with human means and goods" (art. 2(h)).

These words should sound familiar.

In the pending Chapter 15 U.S. Bankruptcy Code, section 1502 provides several definitions, amongst others 'establishment' in section 1502(2) and 'foreign main proceeding' in section 1502(4). With minor language varieties these definitions derive from art. 2 UNCITRAL Model Law on Cross-Border Insolvency. The definition in section 1502(2) of 'establishment' takes the wording of the Model Law, but omits the last words 'with human means and goods or services,' because adding these unusual words would possibly lead to unintended results, according to Westbrook.[30] The Model Law, in its turn, took its inspiration from the (now) EU Insolvency Regulation.[31]

In section 1502(4) the definition of 'foreign main proceeding' includes a reference to 'the center of its main interest.' Although a more usual wording was suggested by several North-American commentators, the decision to follow Model Law language — like in several other places — was taken, because it was felt '. . . more important to have a uniform worldwide phrase (at least in English) for such a central point,' see Westbrook.[32] Here again word-tracing brings us to Europe. The Guide to Enactment (nr. 72), is surprisingly short in its elucidation of 'the center of main interest,' which wording is so central to determine the proper jurisdiction. The Guide just refers for the expression 'centre of main interests,' used in art. 2(b), to the wording as used in the (now) EU Insolvency Regulation.[33]

Here Europe may shed some light of future US Bankruptcy law.

The Regulation does not define the concept of 'main interests' as meant in art. 3(1) Insolvency Regulation, but it appears that only eco-

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[29]See art. 3(2), and art. 2(h).

[30]See Westbrook (note 27), p. 19.

[31]The definition of the term 'establishment' in art. 2 Model Law has been inspired by art. 2(h) of the EU Insolvency Regulation, see Guide to Enactment (1997), nr. 75. Compared to the latter definition in art. 2 Model Law the final two words 'or services' are added. Under the EU Regulation the mere presence of an asset or only a bank account or the passive ownership of a holiday home is not enough to create this 'establishment.'

[32]Westbrook (note 27), p. 19.

[33]Felsenfeld (note 8), p. 5-37, notes that the term 'centre of main interests' is undefined, but is considered ". . . to embody a meaning sufficiently well established around the world not to require a definition." An overly prescriptive and also static definition would only limit a courts' ability ". . . to react to evolving business practice," according to Fletcher (note 11), p. 857.

nomic interests are to be taken into consideration. The "centre of main interests" should correspond ". . . to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[34] The Regulation assumes[35] that the registered office of a company is the centre of main interests, in the absence of proof to the contrary. The idea is that most commonly such a place corresponds to the actual head office. Actually this might not be so, because in some countries it is quite common for the registered office to be somewhere else than the actual operational headquarters of the company. One might argue that if the 'actual head office' was elsewhere this would be required sufficient to rebut the presumption. In two recent cases, both decided after 31 May 2002, this approach has been taken.

A creditor of *Enron Directo Sociedad Limitada*, a Spanish incorporated company forming a part of the troubled Enron group, wished for the opening of 'administration' (a UK proceeding) as the main proceeding. The court in London[36] accepted evidence that, although the registered office was in Spain, the head office was in England, as all of the principal executive, strategic and administrative decisions in relation to the financials and activities of the company were conducted in London. The court therefore decided it had jurisdiction to make an administration order as a main proceeding for *Enron Directo* had the centre of main interest in England.

In cases of personal insolvency to which the Regulation applies, the Regulation does not contain a presumption that can be rebutted.[37] For the Dutch court in Assen[38] a debtor has requested on 30 May 2002 for "*schuldsaneringsregeling*" (a consumer fresh start proceeding) for a debts position of over G 16 million (sic). The Court considers that the applicant officially lives in Hungary, and therefore outside of the Netherlands, whilst Hungary is not an EU Member-State. The address the applicant has given is a post address of an office from an enterprise that he established. In fact, applicant has given the information that he stays the major part of the year in several hotels in Hungary and for the rest of his time in the Netherlands. In the Netherlands, the applicant has, just before the hearings, had a treatment in a hospital. Furthermore, his wife lives in the matrimonial home in H, in the northern part of the Netherlands, which is also the last domicile from the applicant before the calling to Budapest. Under these circumstances, the court concludes that the centre of the debtor's main interest is still in the Netherlands, so that according to art. 3(1) EU Insolvency Regula-

[34]Recital 13 to the Regulation.

[35]See art. 3(1), 2nd sentence.

[36]June 4, 2002 (unreported).

[37]Natural persons can be subject of the Regulation. The same approach is taken in art. 1 Model Law. In draft-section 1501(c) amongst others certain small debtors are excluded from the chapter 15 application.

[38]June 5, 2002 (unreported).

tion, international jurisdiction is given to the Dutch court.

It is evident that it is too early to draw any conclusions, but my first observation is that the way the Regulation arranges the concept, "the center of main interest" provides as a fact intensive standard quite some space manoeuvre, which in its core is contrary to the desire to provide predictability.[39]

12. EU Insolvency Regulation, the future

When the centre of the debtor's interests is located outside the territory of a Member State, the Regulation consequently does not apply, e.g. in Norway, Switzerland, Turkey, CIS, or the USA. A debtor that posses only an establishment does not fall into the scope of the Insolvency Regulation. A subsidiary outside the EU may nevertheless have its centre of main interest inside the EU. When the presumption of art. 3(1) can be rebutted, the Regulation will apply to a debtor incorporated outside the EU Member States having its centre of main interest in the Community. The Regulation does formally not apply either in a case where the debtor, with his centre of main interest outside the EU, has two or more establishments in the Member States. I write formally, because there is no reason to apply e.g. the Regulation's cooperation provisions to the latter proceedings.

As indicated, the EU Insolvency Regulation in principle only has intra-Community effects. When the centre of a debtor's main interests is in a Member State and the Regulation is applicable, its provisions are restricted to relations with other EU Member States. This is recognised by the Chairman of the ad hoc Working party, that prepared in the early 90s the (now) Regulation), Dr Manfred Balz, who stated several times: "It is fair to say that the [Regulation] is universal within the EEC, but territorial as to third Countries." The EU Insolvency Regulation indeed may be seen as a cheese cover over a main part of Europe.

One should bear in mind, however, that the Regulation provides for EU-related directly applicable community law, but that it does not interfere with certain international concepts in the domestic insolvency law of Member States itself. Member States may provide for a wider applicability of those issues than the Regulation addresses. Two examples:

> (i) The opening of insolvency proceedings in a Member State towards a debtor, who's centre of main interest is outside EU, but where the specific national legislation offers sufficient

[39]The Regulation does not provide any express rule to resolve cases where the courts of two States concurrently claim jurisdiction in accordance with art. 3(1). The principle of mutual trust forms the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision, see Recital 22 to the Regulation.

ground for the jurisdiction of the court in that Member State[40] , or

(ii) The duty to inform immediately "known creditors who have their habitual residences, domiciles or registered offices in the other Member States" (art. 40(1)), but where the respective national legislation contains wider provisions, e.g. to inform all ('known') creditors, wherever they are located. Member States may therefore, in their own domestic law, presently have wider provisions with international dimensions.[41]

Individual Member States may furthermore wish to fill in certain gaps, e.g. with regard to recognition of insolvency proceedings and its effects, opened in Member States, but fallen outside the scope of the EU Insolvency Regulations, because the debtor is located outside the territory of the EU or a proceeding is not listed in Annex A to the Regulation. That same wish may be more broadly felt, e.g. to provide for domestic legislation on the effects of insolvency proceedings opened outside the EU with regard to a debtor with a centre of main interest outside the EU,[42] to provide for the possibility of opening secondary proceedings — with territorial limitation — when the debtor has no establishment (but may have just some assets), or to provide for certain rules on 'group' or 'consolidated' insolvency.

To fill in gaps in certain insolvency cases with international aspects, other options come to mind too. On an individual bases a Member State's court may follow the method of application of the EU Insolvency Regulation on non-EU insolvencies by analogy, e.g. with respect to cross-border cases involving Denmark. The Member State may wish to codify a rule of this nature, whether or not based on reciprocity, as it then may wish to enact legislation containing (additional) provisions with regard to cooperation and coordination between 'liquidators' and/or court-to-court communication.

Given the historic step taken by the EU, a next step seems logical, e.g. with regard to the coordination of the insolvency proceedings of 'establishments' in Member States from a debtor with his centre of main interest outside the EU. EU initiatives may even be more robust.

As cross-border insolvency is settled now on a European level a global equivalent seems desirable, giving evil-minded debtors no opportunity regarding the circumstances and providing some predictability and certainty in cross-border cases, that now hardly are regulated. This should be a global equivalent to which the EU Insolvency regulation

[40]This approach could have been chosen by the aforementioned Dutch court case (see note 37).

[41]Dutch Bankruptcy Act has a wider rule, as it allows also creditor's located abroad a longer period to lodge their claim in the verification process.

[42]As I understand, quite recently Germany took this approach, based on the principle of extending the effects of the Regulation beyond EU borders (see note 19).

aligns. It was only five years ago that a world standard was developed that recognises the need for cooperation between courts and liquidators ('foreign representatives') and for the recognition of foreign insolvency judgments, the UNCITRAL Model Law on Cross-Border Insolvency. This Model Law aims to urge and inspire in a way to adapt the national insolvency law, consequently it must be stated explicitly that the UNCITRAL Model Law shall be implemented voluntary by each country. What, in brief, is the score for this Model Law?

Several countries have enacted legislation that — with different density — inserts the Model Law into domestic law: Eritrea, Japan, South-Africa, Mexico and within Yugoslavia, Montenegro. In some countries, legislative proposals have been suggested or are debated within the countries' legislative forum (the country's parliament, etc.) also based on (the intention of or the details of) the Model Law: Ecuador, Germany, Italy, Korea, Poland, Spain, UK, and especially USA , that in its draft-chapter 15 stays very close to structure and wording of the Model Law).[43] Furthermore, it is certainly meaningful that several large institutions have recommended the adoption of the Model Law, e.g. Asian Development Bank, IMF, and Worldbank.[44] The Model Law also has the support of the American Law Institute.[45] Given the complexity of the issues and the diversities in countries' insolvency laws, the

[43]See http://www.uncitral.org/English/status/index.htm and (also for further references) Westbrook (note 28). The information with regard to Italy and Poland I deduced from: Getting The Deal Through, Insolvency & Restructuring 2003 in 36 jurisdictions worldwide, London: Law Business research Ltd 2002, in association with Freshfields Bruckhaus Deringer. See for Spain: Valenzuela (note 19).

[44]The IMF 1999 report, "Orderly & Effective Insolvency Procedures. Key Issues," composed by Legal Department, International Monetary Fund, encourages the taking of appropriate steps to solve cross-border insolvency issues. The report (p. 82) concludes: "The adoption by countries of the Model Law on Cross-Border Insolvency prepared by UNCITRAL would provide an effective means of achieving these objectives." In the RETA report 5795 (RETA: Regional Technical Assistance for Insolvency Law Reform), delivered by the Office of the General Counsel of Asian Development Bank, with the title: 'Law and Policy Reform at the Asian Development Bank' (2000 Edition, Vol. I), a project has been launched to structurally reform in several countries the system of insolvency law (amongst other areas of law). It is suggested that the insolvency reform is guided by sixteen so called "Good Practice Standards for Insolvency Law." ADB's Good Practice Standard 16 reads: "An insolvency law regime should include provisions relating to recognition, relief and cooperation in cases of cross-border insolvency, preferably by the adoption of the UNCITRAL model law on cross-border insolvency." A project is underway that reaches for a regional coordination to materialize aforementioned 'good practice' for Indonesia, Philippines, Thailand, and Korea. In April 2001, Worldbank approved 35 "Principles and Guidelines for Effective Insolvency and Creditor Rights Systems," which it will use in its program of country assessment. Principle 24, with the heading 'International Considerations' goes as follows: "Insolvency proceedings may have international aspects, and insolvency laws should provide for rules of jurisdiction, recognition of foreign judgements, cooperation and assistance among courts in different countries, and choice of law." In its explanation, it reads (under nr. 180): "The most effective and expeditious way to achieve these objectives is enacting the UNCITRAL Model Law on Cross Border Insolvency."

[45]See ALI's 'Principles of Cooperation in Transnational Insolvency Cases Among the Members of the North American Free Trade Agreement' (Spring, 2001). Recommendation 1 (heading: 'Model Law') reads: 'Each of the NAFTA countries should adopt the Model Law on Cross-Border Insolvency.'

development over a period of less than a decade is quite remarkable. International insolvency for decades has been a Cinderella. Now a group of countries are in the process of renewing their legislation, and respected global institutions have put 'international insolvency' in the top of their global political agenda.

It seems that the solutions the Model Law presents are the best option under the present circumstances. Where art. 3 Model Law respects international obligations of enacting States, and therefore also the EU Insolvency Regulation, adoption of the Model Law (with country-tailored adaptations) would provide for a workable regime for the Member-States' relations with those countries to whom the Insolvency Regulation presently does not apply. It seems still early enough to initiate a coordinated approach at EU level for all Member States to consider jointly the adoption of the Model Law and, given the fact that in the US seems close to adopting chapter 15, to further coordination by e.g. devising a legislative measure that would create a transatlantic bridge between EU and USA (or NAFTA countries) to align solutions to cross-border insolvency issues and, thus, take a next step towards the building of a global integrated circuit.