

**THE EUROPEAN UNION INSOLVENCY REGULATION:
IT'S FIRST YEAR IN DUTCH COURT CASES.**

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1. Introduction

The European Union Regulation on Insolvency Proceedings 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 States³ for all insolvency proceedings opened after 31 May 2002.

This article highlights some key provisions of the Regulation⁴ and touches some of the first experiences with its application in the Dutch courts. I will finalised with some remarks with regard to the future of Dutch position in the field of international insolvency law.

Art. 1(1) of the EU Insolvency Regulation (InsReg) 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;
- (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;
- (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

¹ See for a more extended version, comparing key issues of the Regulation with Chapter 15 (draft) of the US Bankruptcy Code: B. Wessels, The European Union Insolvency Regulation. An Overview with Trans-Atlantic Elaborations, in: Norton Annual Survey of Bankruptcy Law (forthcoming).

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 For introductions to the EU Insolvency Regulation see Wessels, European Union Regulation on Insolvency Proceedings, in: American Bankruptcy Institute Journal, November 2001, p. 24/25, 31; Fletcher, The Law of Insolvency, 3rd ed. (2002), p. 829ff.; 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: info@iiiglobal.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 Proceedings. An Introductory Analysis (forthcoming; to be published by American Bankruptcy Institute, ABI).

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

(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.

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 médiateur de dettes’ (Belgium), ‘Sachverwalter’ (Germany), ‘Commissario’ (Italy), ‘De bewindvoerder in de schuldsanering natuurlijke personen’ (The Netherlands), ‘Gestor judicial’ (Portugal), ‘Pesänhoitaja’ (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.⁵ 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.⁶

5 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, in: *Global Insolvency & Restructuring Review*, July/August 2001, p. 25ff; Galanti, The New EC Law on Bank Crises, in: *International Insolvency Review* 2002, p. 49ff, and Hüpkes, Dealing with Distressed Banks – Some Insights from Switzerland, in: *Journal of International Banking Law* 2002, p. 153ff.

6 Balz, The European Union Convention on Insolvency Proceedings, in: 70 *Am. Bankr. L.J.* 1996, p. 485ff; Fletcher, The European Union Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind, in: 23 *Brooklyn Journal of International Law* 1997, p. 25 ff.; Fletcher, The European Union Convention on Insolvency Proceedings: Choice-of-Law Provisions, in: 33 *Texas International Law Journal* 1998, p. 119ff.; Virgós, The 1995 European Community Convention on Insolvency Proceedings: an Insider’s View, in: *Forum Internationale*, no. 25, March 1998; Felsenfeld, *International Insolvency*, New York, Juris Publishing 2000 (loose-leaf), 54ff.; Morse, Cross-border insolvency in the European Union, in: Patrick J. Borchers and Joachim Zekoll (eds.), *International Conflicts of Laws for the Third Millennium. Essays in Honor of Friedrich K. Jünger*, Ardsley: Transnational Publishers Inc. 2001, p. 233ff.

In all, in its scope the Regulation applies to 52 types of insolvency 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 place of its registered office shall be presumed to be the centre of its main interests, in the absence of proof of the contrary (art. 3(1), last line).

Court of Appeal The Hague 8 April 2003 (unpublished).

MBI Beton BV, a creditor, has requested the liquidation (‘faillissement’) of the UK company Interrexx Enterprises Ltd, with a claimed seat in Cardiff, UK. The court in Rotterdam has opened the proceeding; the Court of Appeal dealt with the request of Interrexx to reverse the Rotterdam judgement. Interrexx claims that its centre of main interest as mentioned in art. 3 EU Insolvency Regulation is not in the Netherlands, but in the UK.

The Court:

‘Interrexx indicates that its statutory seat is Cardiff. In the request for liquidation, a Company Report of The Netherlands British Chamber of Commerce is attached, mentioning Folkestone as registered office. The liquidator of Interrexx has explained to the Court that Companies House in Cardiff serves as central register for corporations in the UK and therefore Cardiff can not act as the center of main interests. In the Company Report Interrexx is mentioned as an extra-territorial organisation, and its statutory director and the company secretary, both holding all the shares, live or lived in the Netherlands. Furthermore the liquidator has indicated that Interrexx probably does not exist anymore, and therefore has no statutory seat, since a search in the digital database of Companies House resulted in the information that the company has closed down per 3 July (or 7 March) 2001. Now the appeal has been initiated by X, the director of Interrexx in the Netherlands with full authority and living in the Netherlands, Interrexx has not succeeded in proving that its center of main interest is in the UK.’

For individuals (private persons) the Regulation does not contain a rebuttable presumption, as for companies and legal persons.

Court of Assen 5 June 2002, Schuldsanering 2002/6, nr. 164.

This case deals with a private person, who has requested on 30 May 2002 for ‘schuldsaneringsregeling’ for a debts position of over €16 million. The Court considers:

‘2.1. Applicant lives officially in Hungary, and therefore outside of the Netherlands, whilst Hungary is not an EU Member-State.

The address 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 applicant has, just before the hearings, had a treatment in a hospital.

Furthermore, his wife, who is considering a divorce, lives in the matrimonial home in H (northern part of the Netherlands), which is also the last domicile from applicant before the calling to Budapest. Under these circumstances the court concludes that the centre of the debtor's main interest still is in the Netherlands, so that according to art. 3 (1) international jurisdiction is given to a Dutch court.'

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)).

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, and other insolvency related items, like who is to bear the costs and expenses incurred in the insolvency proceedings, and the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. The *lex concursus* also determines the rules governing the lodging, verification and admission of claims.

The Court of Arnhem 15 March 2001, NIPR 2001, 119.

The court has to decide in the following case. IBP Inc (South Dakota) sold to the Dutch company Suned BV, now in liquidation ('faillissement') meat and beef, based on a contract excluding the Vienna CISG. The meat and beef was stored (without transferring title) at the request of Suned, in Houston, awaiting payment. As payments, even after chasing, did not follow, 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 his claim to which Nebraska law applies. The liquidator opposes, stating that to the claim Dutch law applies, referring to art. 4(2)(h) Insolvency Regulation, that 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.'

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’⁷ 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).⁸ Under Article 4, par. 2 (d), insolvency set-off is subject to the competence of the State of the opening of the insolvency proceeding, the *lex concursus*. It must be considered however that some countries restrict or even prohibit set-off in situations of insolvency. If the *lex concursus* does not allow for set-off, Article 6 constitutes an exception to the general rule of the applicability of the law of the State where the proceedings are opened. This Member State shall permit the set-off, according to the conditions established for insolvency set-off by the law applicable to the debtor’s claim. As this creditor is entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor, he will acquire – through the set-off – ‘a kind of guarantee based on legal provisions on which the creditor concerned can rely at the time when the claim arises’.⁹

Court of Rotterdam 12 december 2002, JOR 2003/101.

The German Konkursverwalter Zerrath, acting as office holder in the liquidation of Stober & Morlock Wärmekraft GmbH, claims payments of invoices for delivery of technical equipment of around €109000 from the Dutch company NEM Power Systems BV. NEM calls upon defaults in the deliveries and claims set-off with his counterclaim for damages. The opening of Stober & Morlock’s liquidation was well before 31 May 2003.

The court considers:

‘The question under which conditions a set-off can be demanded is a question of insolvency law and is subject to the *lex concursus*. This is supported in art. 4 section 2 under d) European Insolvency Regulation. The principle of legal certainty however demands to take into account that a Dutch counter-party of the foreign insolvent debt or will not be prepared for the application of conditions laid down in non-Dutch rules and applicable to set-off in as far as it concern a legal act which in itself is not subject to that non-Dutch law and this law contains stiffer conditions to a set-off than the law that governs this legal act (‘*lex causae*’). This means that now the *lex causae* in Dutch law and the *lex concursus* is German law, the conditions under which a set-off is permitted have to be tested against German law as well as Dutch law. Now in this case has to be concluded that art. 53 Dutch Bankruptcy Act allows set-off, the question whether German law would allow set-off can remain unanswered. That in this case the set-off should be judged according to Dutch law is also supported in art. 6 section 1 European Insolvency Regulation.....’

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 than the *lex concursus*.

For contracts relating to immovable property (art. 8) that is the law of Member State within which property is situated (*lex rei sitae*). For rights and obligations of parties to payment or settlement systems

⁷ Recital 24 to the Regulation.

⁸ See: Bob Wessels, The Secured Creditor in Cross-border Finance Transactions Under the EU Insolvency regulation, *Journal of International Banking Law and Regulation* 2003, Vol. 18, Issue 3, at 135.

⁹ See Recital 26 to the Regulation.

or to a financial market (art. 9) the choice of law is the law of Member State applicable to system or market.¹⁰ Contracts of employment (art. 10) will be governed by the law of Member State applicable to the employment contract. The effect of insolvency proceedings to the debtor's rights in immoveable property, a ship or an aircraft subject to registration it is the law of Member State under the authority of which the register is registration is kept (art. 11). 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*'.¹¹

Netherlands Supreme Court 24 October 1997, NIPR 1998, 114; NJ 1999, 319.

A German business ('BBB') contracted in July 1992 with Mosk, a company in the Netherlands. Mosk will deliver and lease materials. The contract implied a choice for Dutch law. In August 1992 a German Court decided for a 'Sequestration' of BBB and appointed Gustafsen as 'Sequester'. After the sequestration BBB, with co-operation of Gustafsen, told Mosk that the due and enforceable claim of Mosk would be paid by cheque (dated 16 September 1992). Two weeks later BBB went bankrupt and Gustafsen was appointed, now as a trustee ('Konkursverwalter'). With the latter status of trustee Gustafsen claims the repayment of the amount paid by cheque. His argument is that according to German law he can invoke the voidness of the payment, because Mosk knew at that moment of receiving the cheque of BBB's financial problems.

The Dutch Supreme Court considers:

'3.5.3. The opinion of the Supreme Court to be applied to a Paulian action during insolvency, initiated by a foreign liquidator in the Netherlands, is that according to present Dutch private international law the law which is applicable to a liquidation ('faillissement') is the '*lex concursus*', which determines the existence and content of the powers of the liquidator. The principle of legal certainty however demands to take into account that a Dutch counter-party of the foreign insolvent debtor will not be prepared for the application of non-Dutch rules in a case where the legal act (of payment) is not subject to that foreign law and those foreign rules are less strict when granting a claim than the law applicable to the legal act itself ('*lex causae*', which was in this case Dutch law; Wess.). The Paulian claim should therefore – when the *lex causae* differs from the *lex concursus* – not only be tested against the criteria of the latter, but also to those of the *lex causae*, and thus she can be allowed if both the conditions of the *lex concursus* and the *lex causae* are met.

The opinion, accepted in this case, is supported by the international legal development, as particularly is seen in the EU Convention on Insolvency Proceedings in art. 4 (2) (m) and art. 13.....'.

¹⁰ 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.

¹¹ Fletcher, *The Law of Insolvency*, 3rd ed. (2002), at 844.

The validity of some acts of the debtor's debtor concluded after the opening of insolvency proceedings, to protect third-party purchasers (Art. 14) is decided by the law of Member State within the territory of which the immovable asset is situated or under the authority of which the register is kept. Finally, the effects of insolvency proceedings on lawsuits pending the law of Member State in which lawsuit is pending (art. 15).

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 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).¹²

¹² 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.

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 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), 1st 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

An effect of major importance 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;
- (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, 1st 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, 2nd sentence).

5. Distribution

The main proceedings produces effects within the whole Community area, except for Denmark. 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 distributions 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

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

Chapter III ('Secondary Insolvency Proceedings', art. 27-38) deals with this phenomenon of the secondary insolvency proceeding, which can be said to serve mainly two purposes: (i) it protects creditors, usually local creditors, from the main proceedings, and (ii) at the same time it assists and

supports 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)).¹³ 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-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), 1st sentence.¹⁴ 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, 2nd sentence. The ground for a stay may therefore only be appraised in relation to the interests of

¹³ 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 6), 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.

¹⁴ 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.

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), 1st 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 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), 1st 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), 2nd 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

A vital provision is the one with regard to the duty to cooperate¹⁵ 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

¹⁵ See Paulus, A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective, in: European Business Law review 2000, p. 435ff. 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.

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 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: the Dutch approach.

In general in the Netherlands the EU Insolvency Regulation is considered as 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.¹⁶ 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.¹⁷

¹⁶ Literally the text of Recital 14 to the Regulation.

¹⁷ See Wessels, *The Secured Creditor in Cross-Border Finance Transactions Under The EU Insolvency Regulation*, in: *International Journal of Banking Law* March 2003 at 135, where I conclude with the following: ‘Where the rationale of the Regulation indicates that for the proper functioning of the internal EU market it is

Although a Regulation, as an EU measure, is binding in all its content 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 with regards to insolvency proceedings, registration and publication will have to be dealt with to really fit the Regulation into the domestic legal framework.¹⁸ A draft proposal for the administration in the Dutch Bankruptcy Act of some twenty provisions in October 2002 has led to criticism and a redrafted version of March 2003 will be discussed in Parliament.¹⁹ 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 has to be set up April 2003. The Dutch proposals are based on the idea that in other EC countries also a reluctant approach had been chosen for.

One might question however this approach taking into consideration the developments in the period the Dutch draft was issued.

In Germany, in September 2002, a legislative proposal has been issued. Several of the detailed questions I raised in the text are treated differently in the latter proposals. The German proposal also has taken the opportunity to reconsider its field of international insolvency law with regard to insolvency proceedings fully with an separate part with some 25 provisions which aims to provide for a set of rules also applicable outside Europe.²⁰

In Belgium a special Code with regard to international private law is near to be finalised, which code also will deal with insolvency proceedings. In the draft a special part is focusing on 'Collective insolvency Proceedings', which contains a paragraph on the 'extension of the applicability of the EC Insolvency Regulation'.²¹ The approach seems to be to adopt the EC community-resolutions to the non-community cross-border insolvency issues too. In that approach leaves the possibility to insert parts of the UNCITRAL Model Law, as suggested by Torremans.²²

It seems that in Spain too this approach has been taken. A draft proposal of July 23, 2002 (Núm. 101-1) has been issued and is expected to enter into force in July 2003. The key elements are the transfer of

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 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'.

18 See Bob Wessels European Union Regulation on Insolvency Proceedings. A Synopsis, Paper presented to Second Annual Conference of the International Insolvency Institute, Fordham University law School, New York City, June 10, 2002 (available through: info@iiglobal.org).

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.

20 See the presentation of Eberhard Braun, III Third Annual International Insolvency Conference, New York, June 9-10, 2003.

21 See the Proposal submitted July 1, 2002, by Senators Leduc, Mahoux, Monfils, VanLerberghe, Nagy en Lozie, nr. 2- 1225/1 – 2001/2002.

22 Torremans, Cross Border Insolvencies in EU, English and Belgian Law, Kluwer law International, The Hague / London / New York (2002) at 218.

a major part of the EU Insolvency Regulation into the Draft, quite some implementation of the Model Law and the introduction of the principle of reciprocity. As I understand, given where the present status quo of (international) insolvency in Spain, the draft is a major step forward.²³

The very limited Dutch approach does not seem to be followed by Dutch courts. As I demonstrated, even before the entering into force of the EU Insolvency Regulation, several courts have found a source of inspiration by its provisions. Although the cases decided nearly all concern cross border issues between the Netherlands and Germany the considerations the courts formulates provide a broad enough bases to conclude that a geographical limitation (to 'Europe') is not in the court's mind. Already five years before anyone could dream of the EU Insolvency Regulation a court anticipated on its contents.

Court of Haarlem 17 September 1996, NIPR 1996, 438

The court considers:

4.1. To be decided is the question whether the detrimental act during insolvency proceedings ('faillissementspauliana') is excluded from art. 1 (2) of the Brussels Civil Jurisdiction Convention.

4.2. In answering this question the court will, as both parties did, also take into account the mutual relation between the Brussels Convention and the Convention on Insolvency Proceedings. This Convention is not entered into force yet, and even not yet signed by the United Kingdom, but this does not rule out that it can have an interpretative meaning in answering the question with regard to art. 1 (2) Brussels Convention.

4.3. In interpreting the Insolvency Convention the Court will seek guidance by the youngest edition of the draft-elucidation to the Convention (Report Virgos/Schmit).

4.4. The Report Virgós/Schmit lays down under par. 77-78 (elucidation to art. 3) and 194-195 (elucidation to art. 25), that the purpose is to maintain the criteria as laid down by the Court of Justice EC in Gourdain/Nadler (NJ 1979, 564). The codification in art. 25 (1), second sentence, of the Insolvency Convention leads to the result that court rulings, to which the Brussels Convention does not apply, will be recognised in other States. By operating this way a seamless line will result between the Brussels Convention and the Insolvency Convention.

4.5. In par. 196 the Report Virgos/Schmit says that 'Paulian actions' have to be seen as claims relating direct to the insolvency proceedings and are closely linked with these, and therefore they do not fall under the scope of the Brussels Convention, but under that of the Insolvency Convention.

4.6. A direct appliance to the Paulian action from what has been considered under 4.5. of the Gourdain/Nadler-ruling would, by the way, lead to the same result. To that it is of specific interest that de Paulian action only can be put forward exclusively by the liquidator and can not be transferred to a third party. Although general Dutch Civil Law (art. 3:45 CC) provides a Paulian action to every individual creditor, but that one can not be applied in this case where the debtor is in liquidation ('faillissement').

4.7.'

The general approach in Dutch court decisions since 1997 is to apply general principles that underlay the Regulation, as they are considered to be reflecting the present status of Dutch international private law with regard to cross-border insolvency proceedings.

²³ During the LL.M International Business Law, from February – April 2003 a course 'International Insolvency Law' has been followed by the students Blanca Manzano Lopez (from Spain) and Juliana Reyes (from Columbia). They presented a paper 'The Reform of the Spanish Insolvency Law: Proposal No 101 -1 of 23 July 2002' that will be published separately on the website of : www.iiiglobal.org.

Court of Middelburg 16 februari 2001, NIPR 2001, 215.

‘4.3. In Dutch insolvency law since a long time the principle of territoriality has been applied. In the ruling of the Supreme Court of the Netherlands of 24 October 1997 a first sign of change seems to be at hand. When deciding that case the EU Insolvency Convention was not ratified yet. At present the EU Insolvency regulation of 29 may 2000 will enter into force 31 may 2002.Because the Regulation will enter into force next year and the Regulation is a provisional final result of a development, started a long time ago, towards a regulation of the insolvency law in a European context, it is allowed,, to anticipate on this Regulation. The consequence is thatS (the Dutch creditor, Wess.) can file his claim in the French proceedings.

It is quite easy to demonstrate with these examples from only five countries that a possible idea that ‘Europe’ now has a full fledged domain of community insolvency law is far beyond reality.²⁴ It is remarkable to see that every individual EU Member State here follows its own course, without giving any evidence of even sharing draft work products or of mutual alignment or consultation.²⁵ Where ‘coordination’ is in the genes of both the EU Insolvency Regulation – and the UNCITRAL Model Law on Cross-Border Insolvency uncoordinated ‘everyman his own dog’-approach is – to say the least – odd.

24 In due course ‘Europe’ will be enlarged with some ten especially Eastern-European countries. In Poland a fully renewed Bankruptcy Act (date: 28 February 2003), containing 546 articles will enter into force October 1, 2003. A Chapter deals with cross-border insolvency proceedings also with regard to countries outside the (present) Europe. This chapter is heavily based on the UNCITRAL Model Law (with my thanks to Paul Meijknecht).

25 For a probable dispersion per country: Lueke, The new European law on international insolvencies: a German perspective, in: 17 Bankruptcy Developments Journal 2001, p. 369ff.; Bütter, Cross-Border Insolvency under English and German Law, Oxford University Comparative Law Forum 2002, at <www.ouclf.iuscomp.org>; Moss, The Impact of the EU Regulation on UK insolvency proceedings, in: International Insolvency Review 2002, p. 132ff.; Bos, De Europese Insolventieverordening in het Nederlandse recht (EU Insolvency Regulation in Dutch Law), NIPR 2003, at 1.