



Revision of the European Insolvency Regulation

Proposals by INSOL Europe

Drafting Committee: Robert van Galen (chairman), Marc André, Daniel Fritz,
Vincent Gladel, Frans van Koppen, David Marks QC, Nora Wouters

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*DRAFT AMENDED VERSION OF COUNCIL REGULATION
(EC) No 1346/2000 ON INSOLVENCY PROCEEDINGS AS
AMENDED BY COUNCIL REGULATIONS OF 12 APRIL 2005,
27 APRIL 2006, 20 NOVEMBER 2006, 13 JUNE 2007,
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As provided by

INSOL Europe

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Foreword from President and Secretary General of INSOL Europe

We are delighted to add our support to the enclosed proposals by INSOL Europe for amendment of the European Insolvency Regulation. This work is the product, not only of Robert van Galen and his Drafting Committee, but also of a much wider community of INSOL Europe practitioners and academics who have given the benefit of their pan-European experience and expertise to this considerable endeavour.

In its 30 year history, INSOL Europe has uniquely been to the forefront of research and education in the area of cross-border insolvency and restructuring. Past achievements include the Coco guidelines in 2009 which set the standard for cross border co-operation on insolvency cases. Present projects are focused on development of Europe-wide Best Practice Rules for insolvency practitioners, and development of a post-graduate insolvency and restructuring degree.

Our INSOL Europe Case Register, in English and the relevant national language, is an invaluable storehouse of precedents, monitoring and interpreting the development of the considerable case law which the Regulation has generated.

The Regulation has its difficulties. There has been controversy. It is time for change. We hope that these proposals will stimulate debate both inside and outside the EC. We intend to progress them further at our annual congress in Brussels in October.

We commend these proposals to you, and welcome your feedback.

Jim Luby,
President

Marc Udink,
Secretary General

INSOL Europe
May 2012

Introduction

In Article 46 of the European Insolvency Regulation (“the **Regulation**”), it is expressly provided that no later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the Regulation. In April 2011, it was announced by Mr Carriat, DG Justice of the European Commission that the Commission would make a legislative proposal in 2013¹.

This document contains the proposals by INSOL Europe for suggested amendments to the Regulation. After a summary of the proposed changes it contains a complete text of the Regulation as proposed by INSOL Europe with detailed explanations regarding the suggested amendments.

The document was drafted by the drafting committee listed at the beginning of this document. The committee held two consultation rounds to which the main experts in the field were invited. The document was presented to INSOL Europe’s Council and has been approved by its Board.

INSOL Europe’s proposals have been formulated from a practitioner’s point of view on the basis of a legal analysis of the Regulation: they are aimed at furthering the proper functioning of the Regulation both by amending substantive aspects of the existing Regulation and by improving technical aspects of the rules which find expression within the Regulation.

The most important proposals are reflected in the addition of three new chapters:

It is clear that problems have arisen on account of the fact that the Regulation applies only to single companies. There are no provisions dealing with the insolvencies of groups of companies. Since most large enterprises are organised as groups of companies, the absence of appropriate rules can cause considerable difficulties². These difficulties have led to a number of proposals on how to deal with the insolvency of

¹ See the paper presented in Amsterdam at the conference *The Future of the European Insolvency Regulation* (held on 28 April 2011). Hereinafter this will be referred to as the Amsterdam conference:: all papers presented there can be found at <http://www.eir-reform.eu/presentations>.

² In its open invitation to tender for an external evaluation of the Insolvency Regulation, the European Commission mentions the fact that in the past ten years companies have been increasingly incorporated in international groups as one of the reasons for a review of the Regulation (p. 7). Consequently, the insolvency of groups of companies is mentioned on p. 10 as one of the most important legal issues to be analysed.

multinational enterprise groups³. Chapter V contains provisions which prescribe powers addressing the coordination of insolvency proceedings with regard to groups of companies and Chapter VI sets out rules on a European Rescue Plan for groups of companies which are located in different European jurisdictions.

Chapter VII concerns the recognition of and provision of assistance to insolvency proceedings opened outside the Union. The necessity of incorporating provisions which address the recognition of non-EU proceedings can be illustrated by the Yukos litigation in the Netherlands. As Professor Lennarts argued at the INSOL Venice conference, partly on account of the lack of a codified framework, there is still no certainty about the legal status of the Yukos assets⁴ even after more than four years of litigation. A suitable framework is therefore proposed in order to prevent future problems of this kind.

Another major proposal concerns the opening of main proceedings. The overall experience with the Regulation over the past ten years has shown that there have been important cases in which the centre of main interests of a company was changed in order to create a new venue for the main proceedings. This development has led to criticism and INSOL Europe therefore proposes (i) the inclusion of a definition of the centre of main interests in Article 2 and (ii) the added requirement in Article 3(1) that in some instances the main proceedings must be opened in the Member State in which the former centre of main interests was located.

Some of the other major proposals concern the rights of secured creditors under Article 5 and new provisions with regard both to the treatment of agreements (Article 31a) as well as to the expenses of the estate (Article 20(3)). The latter two topics are not fully addressed under the present Regulation.

Apart from these main proposals, this report contains several other proposals. These will be described in the Summary below. INSOL Europe believes that its proposals

³ E.g. R. van Galen, *The EIR and Groups of Companies*, 23rd INSOL Europe Congress, Cork, Ireland, October 2003, www.iiiglobal.org/country/european_union/Cork-paper.pdf, reprinted in: *Tijdschrift voor Insolventierecht* 2004/2, 13; G. Moss, *Proposal for Group COMI and its Consequences*, International Insolvency Institute, 10th Annual Conference, Rome, 7-8 June 2010; G. Moss, *Group Insolvency- Choice of Forum and Law: the European Experience under the Influence of English Pragmatism*, in: 32 *Brooklyn Forum of International Law* 2007, p. 1005-1018; G. Moss and C.G. Paulus, *Insolvencies of Corporate Groups under the EC Regulation*, International Insolvency Institute, 10th Annual Conference, 7-8 June 2010. C. Paulus, *Group Insolvencies- Some Thoughts about New Approaches*, in: 42 *Texas International Law Journal* 2007, 819ff.; I. Mevorach, *The road to a suitable and comprehensive global approach to insolvencies within multinational corporate groups*, 2005(<<www.iiiglobal.org>>); B. Wessels, *Insolvency of Groups of Companies: the present debate*, 2010, <http://bobwessels.nl/wordpress/?s=groups+of+companies>. Other proposals will be mentioned in footnote 30.

⁴ L. Lennarts and M. Veder, *The Dutch Domestic Cross-Border Insolvency Framework*, Paper presented at the INSOL Europe Venice Conference 2011, www.insol-europe.org/download/file/_5983. The Dutch Preliminary Bill for an Insolvency Act contained rules for the recognition of insolvency proceedings in non-EU countries and the law applicable to foreign proceedings. However, in January 2011 the Dutch minister of justice made it clear that the present Dutch Bankruptcy Act is not to be revised on the basis of this Preliminary Bill. For a critical examination of these rules, see R. van Galen, *Latest Developments in Proposed Bill for Cross-Border Insolvencies*, <http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=5db8d171-9e01-42f3-9897-8d1d0434db85>.

will benefit the single market and provide a much-needed improvement to the efficient administration of cross border insolvency cases.

Summary

Article 1:

It is suggested that the liquidity test be included in order to promote further harmonisation of the substantive insolvency laws in the different Member States. The suggested amended draft currently contains two joint criteria for this test, i.e. (i) the debtor's inability to pay its debts as they mature and (ii) the situation where it is envisaged that the debtor in the foreseeable future will be unable to pay its debts as they mature. The latter wording is included in order in addition to encompass all preliminary proceedings. Furthermore, in order to provide for proceedings in which the debtor remains in possession of the assets, the requirement that the debtor is partially or totally divested is deleted.

Article 2:

The definition of COMI is included in this Article: in the case of companies and legal persons, COMI means the place of the registered office, except that where the operational head office functions of the company or of a legal person are carried out in another Member State and that other Member State is ascertainable to prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such head functions are carried out. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in a Member State other than the Member State of the registered office does not cause the centre of main interests to be located in this other Member State.

The definition of "liquidator" reflects the possibility that the debtor fulfils the role of liquidator.

As stated above, a chapter on the insolvency of groups of companies is added. In view of this new chapter, the definitions of "group of companies", "parent company", "subsidiary", "ultimate parent company" and "group main proceedings" are included in Article 2.

Furthermore, there is an inclusion of the definition of, inter alia, "non-EU proceedings", "non-EU main proceedings", "non-EU non-main proceedings", "non-EU liquidator" in view of the suggested Chapters VII regarding provisions on insolvency proceedings opened outside the European Union.

Article 3:

Article 3 (1) provides that if the company has moved its COMI less than a year prior to the request for the opening of the insolvency proceedings, only the courts of the Member State where the COMI was located one year prior to the request have jurisdiction to open insolvency if the debtor has left unpaid liabilities caused at the time when its centre of main interests was located in this Member State, unless all creditors of the said liabilities have agreed in writing to the transfer of the centre of main interests out of this Member State.

There is no compelling reason why secondary proceedings could or should not be reorganisation proceedings⁵. INSOL Europe therefore suggests that the current provision in 3(3) that secondary proceedings must be winding-up proceedings, be deleted.

Article 5 (1)

The discrepancy of the treatment of security rights depending on whether insolvency proceedings have actually been opened in the Member State where the assets are located has been the cause of much debate. Generally it is felt that the distinction may be understandable for historical reasons, but that such a distinction is no longer justified. INSOL Europe therefore suggests amending Article 5(1) and inserting a provision which is similar to the provisions of Articles 8 and 10.

The amended text reads “The effects of insolvency proceedings on the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets [...] belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings shall be governed solely by the law of the Member State within which the assets are situated”.

Article 9

INSOL Europe suggests that there be inserted references to Multiple Trading Facilities to bring Article 9 into line with the Mifid (Markets in Financial Instruments Directive).

Article 10

A second paragraph is added providing: “The effects of the transfer of an undertaking, business or part of an undertaking or business shall be governed by the law of the Member State where the undertaking, business or part of the business or undertaking was located prior to the transfer”. In view of the cohesive nature of an entity such as an undertaking and a business it is felt desirable that the effects of a transfer are the same for all its employees, regardless of the law of their employment agreement.

⁵ See proposal 4 in Proposal for reform of the EIR, Group for International and European Studies (rapporteur A. Espiniella).

Article 13

INSOL Europe considers it to be undesirable that a legal act can be made ‘avoidance proof’ by selecting the law applicable to the contract. However, it should also be observed that a relocation of the centre of main interests may be detrimental to the other party to an agreement if under the law of the new centre of main interests an avoidance action may be easier to institute.

Therefore, the following amendment of the text is proposed:

“Article 4 (2) (m) shall not apply if the law of the Member State where the centre of main interests of the debtor was situated at the time of the legal act does not allow any means of challenging that legal act in the relevant case”.

Article 15 (and Article 4 (2) (f))

The expression “proceedings brought by individual creditors” in Article 4(2)(f) concerns primarily “individual enforcement actions”. The relation between the collective feature of the insolvency proceedings and individual actions by the creditors is primarily a matter for the *lex concursus*. An exception is made for lawsuits which are pending at the time of the opening of the proceedings in other Member States. INSOL Europe proposes that it be made clear that Article 4 (2) (f) applies to actions or proceedings brought by way of enforcement alone. It furthermore proposes that it be made explicit that the exception for lawsuits pending applies both to court proceedings and to arbitrations.

The present wordings of Article 4 (2) f and Article 15 do not quite match, because Article 4 (2) f provides that the law of the State of the opening of proceedings determines in particular the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending, whereas the current text of Article 15 provides that the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending. These provisions do not correspond, because Article 15 is limited to lawsuits concerning an asset or right or asset of which the debtor has been divested. INSOL Europe suggests deleting this limitation in Article 15, and providing that the ‘lawsuits pending’ rule cover all civil and commercial matters which are subject to Council Regulation (EC) 44/2001 as well as arbitration proceedings.

Article 18

The text of 18 (3) is made more explicit: the following text is proposed: “Although the nature and extent of the liquidator’s powers will be determined by the law of the

Member State of the opening of the proceedings, the manner in which these powers are exercised shall be in compliance with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes”.

Article 20

In Article 20 (3) it is provided that if administrative expenses have been incurred during the course of insolvency proceedings and have been caused by the liquidator or a court, such costs will be borne in proportion to the proceeds which have been realised in each of the insolvency proceedings and which have to contribute to the payment of administrative expenses from those proceedings.

Article 21

The proposed Art 21 (3) adds that the liquidator shall take all necessary steps to ensure publication of the judgment opening insolvency proceedings all other Member States in the event that he considers such publication to be necessary.

Article 27

There has been an extensive debate amongst experts on the question whether the possibility of secondary proceedings is desirable and therefore whether this concept should be maintained⁶. INSOL Europe proposes that the court which has jurisdiction under Article 3(2) should have discretionary powers to appraise and assess the need for secondary proceedings in view of the interests of one or more creditors and an adequate administration of the estate.

Article 31a

In order to determine whether the liquidator of the main proceedings or the liquidator of secondary proceedings can decide on termination, compulsory continuation or performance by the debtor under a contract, INSOL Europe suggests the insertion of a new Article 31a. Paragraph 1 determines which agreements fall under the scope of the territorial proceedings. A close connection is required. Paragraph 2 provides for the influence by the liquidator of the main proceedings on the exercise of powers vested in the liquidator of the territorial proceedings.

Article 33

Article 33 creates a right which is granted to the liquidator in the main proceedings to ask the court which opened the secondary proceedings to stay the process of liquidation in whole or in part. INSOL Europe is of the opinion that it should be

⁶ S. Viimsalu, *The meaning and function of secondary insolvency proceedings*, dissertation, series Dissertationes Iuridicae Universitatis Tartuensium nr. 38, Tartu, 2011 (summary to be found at www.bobwessels.nl) is in favour of maintaining secondary proceedings, but states that several changes are needed in the national laws of the EU Member States and the EIR itself.

explicitly provided that the Article concerns not only the liquidation of assets, but also other activities of the liquidator of and in the secondary proceedings which may undermine the integrity of the enterprise, such as termination of vital contracts. Hence the suggested amendment to the Article.

Article 34

Paragraph 2 is amended: INSOL Europe suggests that the same language be used here as is in Article 17 (2) for clarity's sake. Furthermore, a fourth paragraph is added: *'Nothing in this Article precludes the main proceedings being terminated or otherwise concluded by means of a rescue plan or a composition or a comparable measure, thereby allowing any secondary proceedings to be ended or concluded in the manner addressed in paragraph 1 of this Article'*

Article 37

There is no compelling reason why secondary proceedings cannot be reorganisation proceedings. INSOL Europe proposes that the last sentence of **Article 3(3)**, reading *"These latter proceedings must be winding-up proceedings"* be deleted and that the liquidator of the main proceedings have the same conversion rights with respect to the secondary proceedings as the liquidator of the secondary proceedings. Thus if the liquidator of the secondary proceedings is entitled to request the court to convert winding-up proceedings into reorganisation proceedings or vice versa, the liquidator of the main proceedings should have the same right. Therefore, Article 37 is amended to this end.

Chapter V (Addition of a chapter on insolvency of groups of companies) and Chapter VI (Addition of a chapter on a European Rescue Plan)

The occurrence of several group companies becoming insolvent is a frequent phenomenon which demands rules on coordination of the insolvency proceedings concerned and on encompassing rescue plans. In essence, INSOL Europe's proposal is that if a subsidiary and its ultimate parent company both enter into insolvency proceedings the liquidator of the parent company be given powers similar to those that the liquidator in main proceedings has vis-à-vis secondary proceedings. The starting point should therefore be the application, in a more or less analogous fashion, of the provisions of Articles 27 et seq. of the Regulation, taking into account however the differences between main and secondary with respect to the same debtor on the one hand and insolvency proceedings of multiple group companies on the other.

Since the coordination function should be attributed to one of the main proceedings of one of the group companies, the question arises as to how these proceedings should

be defined. INSOL Europe suggests that the group main proceedings should be the main insolvency proceedings of the ultimate parent with its centre of main interests in the European Union that is in an insolvency proceeding.

The definitions of “group of companies”, “parent company”, “subsidiary”, “ultimate parent company” and “group main proceedings” are included in Article 2.

The centrepiece of the group provisions should be the possibility of proposing a plan covering one or more group companies. In essence it should provide for a restructuring mechanism which on the one hand ensures that each creditor will at least receive value which on the one hand equals a distribution in the case of the winding-up of his debtor, and on the other hand procures that conglomerates are saved and do not fall victim to a lack of coordination in an international context. For a further explanation reference should be made to the commentary on Chapter VI.

The provisions on the European Rescue Plan in Chapter VI do not replace any legislation of the Member States with regard to compositions and rescue plans, but instead introduce an additional instrument for the adoption of cross border rescue plans involving groups of companies. INSOL Europe is of the opinion that such an instrument will considerably further the proper functioning of the internal market, because it will provide a means for restructuring conglomerates which have engaged within the common market on an international level.

INSOL Europe is of the view that, inter alia, the following principles should apply to such a plan:

- The proceedings with regard to the plan should take place in the court which opened the proceedings with respect to the parent company.
- The plan may be proposed by either the parent company or its liquidator.
- The creditors are divided into classes: creditors of different companies should be placed in different classes while creditors with different rankings in respect of the assets of a particular company should also be put in different classes.
- The creditors vote by class, whereby each class determines whether it accepts the plan and acceptance requires a qualified majority of two thirds of the amount of the creditors voting within the concerned class.

The provisions of the European Rescue Plan have been inspired by the U.S. Chapter 11 regime as have been several modern reorganisation plan regimes in Member States. However, there are important differences. eg. the classification of claims is not part of the plan itself, but is decided upon by the court separately and, in the event that individual creditors oppose the plan, cram down possibilities are much more restricted

than under Chapter 11. Furthermore the Chapter 11 regime does principally concern single companies whereas the European Rescue Plan applies only to groups of companies.

Chapter VII (Incorporation of UNCITRAL Model Law provisions into the European Insolvency Regulation)

As to the recognition of insolvency proceedings opened outside the European Union, the UNCITRAL Model Law provides a system which is supported by the global community which created it. Contrary to the Regulation, it is not based on a similar principle to that of the community trust and therefore the effect of foreign proceedings within the receiving state is much less pronounced and there are more elaborate reviews than under the Regulation. For example, there is no automatic recognition of the powers of the foreign liquidator, but there is instead a two tier review system. First the court of the receiving state reviews whether the foreign insolvency proceedings meet the standards of recognition and whether the centre of main interests or establishment as the case may be, is indeed located in the country where the proceedings have been opened. However if recognition of the foreign proceedings is obtained, this does not entail the consequence that the foreign liquidator can exercise all his powers in the receiving state. If for example he desires to sell assets of the debtor which are located in the receiving state, he will need to obtain relief from the courts of the receiving state and those courts will investigate whether the interests of the creditors and other interested parties such as the debtor are adequately protected.

INSOL Europe is of the opinion that it is desirable that these provisions be incorporated within the Regulation. A unified approach to insolvency proceedings opened outside the European Union will enhance the proper functioning of the internal market and support a unified external trade policy.

An appendix is added to this report containing a proposal for harmonised rules on detrimental acts.

DRAFT AMENDED VERSION OF THE REGULATION WITH COMMENTS

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67(1) thereof,

Having regard to the initiative of the Federal Republic of Germany and the Republic of Finland,

Having regard to the opinion of the European Parliament⁷,

Having regard to the opinion of the Economic and Social Committee⁸,

Whereas:

- (1) The European Union has set out the aim of establishing an area of freedom, security and justice.
- (2) The proper functioning of the internal market requires that cross border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.
- (3) The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor's assets.
- (4) It is necessary for the proper functioning of the internal market 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).

⁷ Opinion delivered on 2 March 2000.

⁸ Opinion delivered on 26 January 2000.

- (5) These objectives cannot be achieved to a sufficient degree at national level and action at Community level is therefore justified.
- (6) In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings, judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings and rules on recognition of insolvency proceedings opened outside the European Union. In addition, this Regulation should contain provisions regarding the recognition of such judgments, the applicable law, insolvencies concerning groups of companies and cross border rescue plans concerning multiple legal entities which also satisfy that principle.
- (7) Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters⁹.
- (8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.
- (9) This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. The insolvency proceedings to which this Regulation applies are listed in the Annexes. Insolvency proceedings concerning insurance undertakings and credit institutions should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention.
- (10) Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression ‘court’ in this Regulation should be given a broad meaning and include a person or body empowered by national law to open insolvency proceedings. In order for this Regulation to apply, proceedings (comprising acts and formalities set down in law) should not only have to comply with the provisions of this Regulation, but they should also be officially recognised and legally effective in the Member State in which the

⁹ OJ L 2001/12, 16/01/2001, p. 1-23.

insolvency proceedings are opened and should be collective insolvency proceedings.

- (11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different. This Regulation should take account of this in two different ways. On the one hand, provision should be made for special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening should also be allowed alongside main insolvency proceedings with universal scope.
- (12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.
- (13) 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. In the event that the centre of main interests has been moved shortly before the filing for insolvency proceedings creditors which have obtained claims against the debtor prior to such shift of the centre of main interests should be protected against effects of the shift which may be detrimental to them.
- (14) The rules of jurisdiction set out in this Regulation establish only international jurisdiction, that is to say, they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned.

- (15) The court having jurisdiction to open the main insolvency proceedings should be enabled to order provisional and protective measures from the time of the request to open proceedings. Preservation measures both prior to and after the commencement of the insolvency proceedings are very important to guarantee the effectiveness of the insolvency proceedings. In that connection this Regulation should afford different possibilities. On the one hand, the court competent for the main insolvency proceedings should be able also to order provisional protective measures covering assets situated in the territory of other Member States. On the other hand, a liquidator temporarily appointed prior to the opening of the main insolvency proceedings should be able, in the Member States in which an establishment belonging to the debtor is to be found, to apply for the preservation measures which are possible under the law of those States.
- (16) If the centre of main interests is located within the Community, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment prior to the opening of the main insolvency proceedings, should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main insolvency proceedings are intended to be limited to what is absolutely necessary.
- (17) 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 requires that such opening is justified by the interests of one or more creditors or an adequate administration of the estate. 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.
- (18) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings and other parties which are entitled to do so pursuant to national law may request the opening of secondary proceedings if the opening of such proceedings is justified.

- (19) 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 proceedings to be suspended.
- (20) This Regulation should furthermore provide for the opening of territorial insolvency proceedings in the event that the centre of main interests of the debtor is located outside the Community and for the recognition of such territorial proceedings in the other Member States. The opening of such territorial proceedings should not only be possible if the debtor has an establishment in the Member State where the proceedings are opened, but also if the debtor only has assets in that Member State, provided the national law of that Member State allows the opening of insolvency proceedings in that case.
- (21) Every creditor should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims.
- (22) This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also 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.

- (23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.
- (24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.
- (25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs*. The same applies to rules applying to enforcement of security rights in rem and the opposability of the rights in rem in the insolvency proceedings. Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there.
- (26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.
- (27) There is also a need for special protection in the case of payment systems and

financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems¹⁰. For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

- (28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees' claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.
- (29) 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. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.
- (30) It may be the case that some of the persons concerned are not in fact aware that proceedings have been opened and act in good faith in a way that conflicts with the new situation. In order to protect such persons who make a payment to the debtor because they are unaware that foreign proceedings have been opened when they should in fact have made the payment to the foreign liquidator, it should be provided that such a payment is to have a debt-discharging effect.
- (31) An effective administration of insolvent conglomerates in the Community requires that insolvency proceedings relating to different legal entities belonging to the same group can be coordinated under the supervision of one court. Where the assets of two or more companies belonging to one group

¹⁰ OJ L 166, 11.6.1998, p. 45.

cannot be disentangled there should be provisions to merge the insolvency proceedings with respect to such companies. The Regulation should provide for a cross border European Rescue Plan which can encompass two or more companies belonging to a group located in several Member States.

- (32) In the interest of enhancement of the proper functioning of the internal market and support of the unified external trade policy the Regulation should contain uniform rules on the recognition of and assistance to insolvency proceedings which have been opened outside the European Union. These rules should differ from the rules applying to the recognition of insolvency proceedings opened by Member States, because the concept of community trust does not apply here. Since the UNCITRAL Model Law on cross border insolvency provides for such rules and since this law reflects an internationally accepted structure for such recognition which has been enacted in important jurisdictions this Regulation should implement these rules.
- (33) This Regulation should include Annexes relating to the organisation of insolvency proceedings. As these Annexes relate exclusively to the legislation of Member States, there are specific and substantiated reasons for the Council to reserve the right to amend these Annexes in order to take account of any amendments to the domestic law of the Member States.
- (34) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.
- (35) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

Commentary to the preamble:

The preamble has been adapted in order to reflect the suggested changes to the Regulation. The suggested changes to the preamble are not separately commented on here. The changes concern paragraphs 6, 7, 10, 13, the former paragraph 14 is deleted, 16, 17, 18, 20, 21, 25, 31 and 32.

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

*Article 1*¹¹

Scope

1. *This Regulation concerns collective rescue, reorganisation and insolvency proceedings, conducted under the supervision of a court, where it is assumed or proven to the satisfaction of the court that the debtor is unable to pay its debts as they mature or that it is envisaged that the debtor in the foreseeable future will be unable to pay its debts as they mature. The Member States will propose the inclusion of such proceedings in Annex A to this Regulation pursuant to Article 90 of this Regulation.*
2. *This Regulation shall not apply to such insurance undertakings, credit institutions and, investment undertakings to the extent that they are the subject of separate regimes created by Regulations or provided for by Directives of the European Community.*

Commentary to the suggested amendments to Article 1

Current version of Article 1:

Scope

1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.
2. This Regulation shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

¹¹ For literature on Article 1 see Virgos/Garcimartin, 2004, pp. 26-29.

Commentary to the amended provisions

- 1.1 Currently the definition of “insolvency proceedings” in Article 2(a) refers both to “the collective proceedings referred to in Article 1(1)” and to the listing in Annex A. INSOL Europe proposes to change the provision in the sense that it refers to Annex A only. Thus in the INSOL Europe proposal the scope of the provision of **Article 1(1)** has no direct effect on the meaning of “insolvency proceedings” in the Regulation, but only serves as a guideline to determine whether proceedings should be listed within Annex A under the rules of Article 90 of the proposal (currently Article 45).

In the current version Article 1(1) defines insolvency proceedings on the basis of the following four criteria¹²:

- (a) The proceedings must be “**collective**”, *i.e.* all the creditors concerned may seek settlement only through the insolvency proceedings, as individual actions will be precluded; this however does not necessarily preclude certain groups of creditors such as preferred, secured or post-opening creditors from having individual rights of recourse.
 - (b) The proceedings must be based on the debtor’s “**insolvency**” and not on any other grounds.
 - (c) The proceedings must entail the partial or total **divestment** of the debtor’s assets, that is to say the transfer to another person, the liquidator, of the powers of administration and of disposal over all or part of debtor’s assets, or the limitation of these powers by means of the intervention over and control of the liquidator’s actions.
 - (d) The proceedings should entail the appointment of a **liquidator**.
- 1.2 As to criterion (a) INSOL Europe proposes to extend this criterion to rescue and reorganisation proceedings as provided for in the Directives on credit institutions and insurance companies.
- 1.3 As to criterion (b) the Virgos-Schmit report observed in nr. 49 that there is no test of insolvency other than that demonstrated by the national legislation of the State in which proceedings are opened. The two tests currently in place pertain either to liquidity or to a consideration of the balance sheet as indicated in the April 2010 report on the Harmonisation of Insolvency Law at EU Level, which report was prepared by INSOL Europe for the Legal and Parliamentary Affairs Committee of the Directorate General for Internal Policies of the

¹² Virgos, Miguel and Schmit, Etienne. (1996) *Report on the Convention on Insolvency Proceedings*. [EU Council of the EU Document] http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf; nr 48- 60; hereafter referred to as the Virgos-Schmit Report.

European Parliament¹³. In that report INSOL Europe advised that in view of the increased mobility of companies and the interdependence between the main and the secondary proceedings, there is a need to define the criteria to be applied for the opening of all insolvency proceedings¹⁴. Furthermore Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters addresses jurisdiction in civil and commercial matters and the recognition and enforcement of judgments rendered in other Member States. However Article 1(2) sub-paragraph (b) of this Regulation excludes bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. Ideally there should not be a gap between Regulation 44/2001 and the Insolvency Regulation, so that court proceedings and judgments opened in Member States and rendered by courts in Member States which are excepted under Article 1(2) (b) of Regulation 44/2001, fall under the scope of the Insolvency Regulation (unless excepted under Article 1(2) of the Insolvency Regulation) and that court proceedings and judgments which do not fall under the scope of the Insolvency Regulation are covered by Regulation 44/2001. Since however the exception under Article 1(2) sub-paragraph (b) is to be interpreted autonomously¹⁵, this constitutes a further reason for harmonizing the criteria under Article 1 and in particular the “insolvency” criterion. Alternatively Article 1(2) sub-paragraph (b) of Regulation 44/2001 could be amended in such a way that it excepts proceedings and judgments which fall under the scope of the Regulation and the instruments referred to in Article 1(2) thereof.

- 1.4 The liquidity test seems to be the most commonly used test in the Member States and is also the preferred single test promoted by the UNCITRAL Legislative Guide on Insolvency Law¹⁶. It is suggested that the liquidity test be included in the Insolvency Regulation in order to promote further harmonisation of substantive insolvency laws in the different Member States. The suggested amended draft currently contains two joint criteria, i.e. (i) the inability to pay debts as they mature and (ii) envisaging that the debtor in the foreseeable future will be unable to pay its debts as they mature. The latter wording is included in order in addition to encompass all preliminary proceedings.
- 1.5 Certain preliminary insolvency proceedings are not included in Annexes A or B, either because the individual Member State failed to include these

¹³ <http://corporatelawandgovernance.blogspot.com/2010/07/europe-harmonisation-of-insolvency-law.html>.

¹⁴ Page 9-10 of the report.

¹⁵ ECCJ 22 February 1979, 133/78 Gourdain/Nadler.

¹⁶ http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf, nrs 25-29.

proceedings in the annexes to the Regulation by using the revision mechanism laid down in Article 90 (as is the case with the Germany preliminary proceeding), or because the criteria set out in the Regulation were not appropriate so as to encompass these proceedings (for example the French Conciliation). Although the initial stages of insolvency proceedings were explicitly excluded from the system of international cooperation when the Insolvency Regulation was drafted, there is now no longer an overriding reason as to why these should not be included in the list.

- 1.6 Criteria (c) and (d) have been deleted in order to include proceedings in which the debtor remains in possession of its assets. In such proceedings the powers and duties of the liquidator as provided for in the Regulation will be vested in the debtor or, where the debtor is not an individual, its management will be so vested and the definition of “liquidator” in Article 2 is amended accordingly. The requirement that the insolvency proceedings are subject to the supervision of a court remains in place.
- 1.7 In Nr 39 of the Virgos/Schmit report it was considered that Article 1(1) lays down the conditions which enable proceedings to be added to the lists in the Annexes, and that only when the proceedings are included in the appropriate list will the Insolvency Regulation (in the report still a Convention) apply. The wording of Article 1 has been amended in order to make this arrangement more explicit.
- 1.8 **Article 1(2)** currently provides that the Regulation does not cover insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or collective investment undertakings. This exception was made because these entities were or were intended to be the subject of specific Community regulations or directives. Such directives were adopted with respect to credit institutions and insurance companies, but not with respect to collective investment undertakings. Consequently the latter category is not included in any community instrument on the recognition of insolvency proceedings. Such recognition therefore still depends on domestic law. In order to avoid any gaps between the Regulation and the special regimes, Article 1(2) is amended and refers directly to the special legislation of the Community. The consequence of this is that investment undertakings will fall under the scope of the Regulation until a separate regime has been created for them by European legislation. If new special regimes are created with respect to other categories of debtors they will be automatically carved out under Article 1(2).

Definitions

For the purposes of this Regulation:

- (a) *“centre of main interests” shall mean in the case of companies and legal persons, the place of the registered office, except that, (i) where the operational head office functions of the company or legal person are carried out in another Member State and that other Member State is ascertainable to actual and prospective creditors as the place where such operational head office functions are carried out, it shall mean and refer to the Member State where such operational head functions are carried out and (ii) where the company or legal person is a mere holding company or mere holding legal person, within a group with head office functions in another Member State, the centre of main interests as defined in the previous sentence is located in such other Member State. The mere fact that the economic choices and decisions of a company are or can be controlled by a parent company in another Member State than the Member State of the registered office does not cause the centre of main interests to be located in this other Member State. In the case of individuals, the centre of main interests shall mean the place of habitual residence, except that in case of professionals it shall be the professional’s principal office or principal location from which his profession is conducted;*
- (b) *“insolvency proceedings” shall mean such proceedings as are listed in Annex A;*
- (c) *“liquidator” shall mean any person or body whose function is to administer or liquidate assets or to facilitate the reorganization of the debtor’s business or assets, including the debtor or its management in case of self administration. Except in the case of self administration those persons and bodies are listed in Annex B;*
- (e) *“court” shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings;*
- (f) *“judgment” in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator;*
- (g) *“the time of the opening of proceedings” shall mean the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not;*

¹⁷ For literature on Article 2 see Virgos/Garcimartin, 2004, pp. 28-30.

- (h) *“the Member State in which assets are situated” shall mean, in the case of:*
- *tangible property, the Member State within the territory of which the property is situated,*
 - *property and rights ownership of or entitlement to which must be entered in a public register; the Member State under the authority of which the register is kept,*
 - *claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests,*
 - *bank accounts, the Member State within the territory of which the relevant branch in which the account is held, is located;*
- (i) *“establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;*
- (j) *“group of companies” shall mean a number of companies consisting of parent and subsidiary companies;*
- (k) *“group company” shall mean a parent company or subsidiary with respect to which insolvency proceedings have been opened;*
- (l) *“parent company”: with respect to a company (the other company) the parent company is (i) the company which has a majority of the shareholders’ or members’ voting rights in the other company, if no company meets such definition it is (ii) the company that has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other company and is at the same time a shareholder in or member of that other company and if no company meets the definitions under (i) and (ii) it is (iii) the company that has the right to exercise a dominant influence over another company of which it is a shareholder or member, pursuant to a contract entered into with that other company or to a provision in its memorandum or Articles of association. The parent company of a parent company of another company is deemed the parent company of the other company as well;*
- (m) *“subsidiary” shall mean a company which is owned or controlled in the manner set out in (l) by a parent company;*
- (n) *“ultimate parent company” shall mean a parent company which has its centre of main interests in the European Union and which is subject to insolvency*

proceedings under Article 3(1) of this Regulation and which itself does not have a parent company as defined under (l) which has its centre of main interests in the European Union;

- (o) *“group main proceedings” shall mean the insolvency proceedings referred to and more particularly set out and described in Article 43;*
- (p) *“non-EU proceedings” shall mean a collective judicial or administrative proceeding in a non-Member State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a court from a non-Member State, for the purpose of reorganization or liquidation;*
- (q) *“non-EU main proceedings” means non-EU proceedings taking place in the State where the debtor has the centre of its main interests;*
- (r) *“non-EU non-main proceedings” means non-EU proceedings, other than non-EU main proceedings, taking place in a State outside the EU where the debtor has an establishment within the meaning of subparagraph (f) of this Article;*
- (s) *“non-EU liquidator” means a person or body, including one appointed on an interim basis, authorized in non-EU proceedings to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the non-EU proceedings;*
- (s) *“court from a non-Member State” means a judicial or other authority competent to control or supervise non-EU proceedings.*

Commentary to the suggested amendments to Article 2

- 2.1 It is suggested that there be included a definition of “centre of main interests”, that the definitions of “insolvency proceedings”, and “liquidator”, be amended, that there be deleted the definition of “winding-up proceedings”, that the definition of “establishment” be amended and that there be included definitions of “group of companies”, “group company”, “parent company”, “subsidiary”, “ultimate parent company”, “group main proceedings”, “non-EU proceedings”, “non-EU main proceedings”, “non-EU non-main proceedings”, “non-EU liquidator” and “court from a non-Member State”.

Commentary to inclusion of definition of “centre of main interests”:

- 2.2 INSOL Europe suggests that the definition of the centre of main interests be included within Article 2. It is appropriate to include the definition of “centre

of main interests” in Article 2, because this term is relevant not only with regard to the determination of the Member State where proceedings can be opened, but also in relation to the location of receivables (see this Article under (h)). In addition to the definition included under Article 2(a) a provision on a look back period is suggested in relation to Article 3 paragraph 1. For a further explanation of the rationale of the refinement reference should be made to the commentary on Article 3.

2.3 The introduction of the term “operational head office functions” is intended to define cases where an exemption should be made with regard to the centre of main interests as being the equivalent of the registered seat by means of a rebuttal of this general assumption. The term “operational head office functions” is not therefore meant to introduce a completely new concept but to follow already existing case law. From various cases regarding the definition of centre of main interests it can be seen that in most of the cases (46%)¹⁸ the operational head office was already used as a key connecting factor for the identification of the centre of main interests. To a lesser extent the courts have used such terms as business operations (41%) or operational head office and business operations (25%). In particular in the *Daisytek* case (a UK decision), the *Eurotunnel* case (a French decision), *Collins & Aikman* (a UK decision) and *Rover* (a UK decision) the courts have used several factors in order to identify the centre of main interests. These factors include:

- the location of the strategic, financial and operational management;
- the financial functions of the subsidiaries performed by the headquarters (factoring agreement);
- financial information compiled in accordance with the requirements of the holding company (and not according to the requirements of each subsidiary);
- the subsidiaries’ inability to make purchases above a certain amount without the approval of their headquarters;
- cash management and pooling functions;
- the absence of budgeting autonomy;
- the recruitment of all senior employees of the subsidiary after consultation with headquarters;
- the appointment and removal of senior employees as performed by headquarters;

¹⁸ I. Mevorach, Jurisdiction in insolvency: a study of European Courts’ decisions, *Journal of private International law* 2010, p. 346.

- all information technology and support as performed by headquarters;
- over 70% of the purchases negotiated and dealt with by headquarters;
- the absence of independent trading by the subsidiaries; and
- branding, strategy and production design considerations.

2.4 Other courts have used the following factors:

- despite the moving of its registered office the company still owned significant immovable assets at its former registered seat, and still performed significant obligations pertaining to its business located there (Interdil Srl, Italy Judgment No. 10606, Corte di Cassazione, May 20, 2005);
- no acceptance of any fraudulent removal of operational headquarters (German Federal Court of Justice, IX ZB 238/06, December 13, 2007);
- no acceptance of the removal of the registered office if after the transfer of the registered office no transfer of the effective exercise of entrepreneurial, managerial, administrative or organisational activities have taken place (La Longeva Srl, Italy, Judgement No. 11398, Corte die Cassazione Sezione Unite, May 18, 2009);
- the location of activities, assets and obligations, especially owed to employees (Sweden, Svea Court of Appeal, Ö 4105-03, May 3, 2003);
- tax payments and VAT registration considerations (Belgium, Eurogyp, unreported, Commercial Court, Brussels, December 8, 2003); and
- the location of production facilities, place where materials are delivered to and legal relations with suppliers are kept (Local Court of Weilheim, IN 260/05, June 22, 2005).

2.5 Consequently a centre of main interests may be established in a jurisdiction other than the place of a debtor's operational head office functions if certain key functions are performed elsewhere. This would be the case if the following features are present at such location:

- internal management and financial and strategic decisions;
- the location relevant to the contractual relationship with employees;
- the location relevant for suppliers; and
- the location of debts (including tax debts), assets and/or production facilities.

2.6 However, the requirement of ascertainability by third parties is not just another factor by which to determine the place of the operational head office; it will constitute a second and individual test to apply besides the test for the operational head office.

2.7 The European Court of Justice has narrowed down the concept of the centre of main interests in its Eurofood judgment of 2 May 2006 (C-341-04) in which the ECJ considered that

“the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.”

2.8 And

“the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.”

2.9 And in its judgment of 20 October 2011 (Case C 396/09) re Interedil/Intesa the ECJ considered

“where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation that the centre of the company’s main interests is located in that place is wholly applicable. In such a case, as the Advocate General observed at point 69 of her Opinion, it is not possible that the centre of the debtor company’s main interests is located elsewhere.

The presumption in the second sentence of Article 3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company’s central administration is located is not the same as that of its registered office.”

2.10 The proposed exception with respect to mere holding companies and those persons or parties which can be regarded as mere holding legal entities refers to the situation where the holding company does not perform any substantial

role except for holding shares in the subsidiaries. The exception with respect to these mere holding companies/legal persons is included in order to prevent the possibility that, if any such mere holding company is the ultimate parent company as defined in Article 3(n), the group main proceedings will be located in a Member State with which the group has no actual connection.

- 2.11 The proposal regarding individuals should be considered particularly in the light of the insolvency tourism that has increasingly been observed in the case of private persons. In the latter case it is often attempted, usually at great expense, to relocate the official domicile abroad and also to prove this by means of pointing to activities within the desired jurisdiction. However if despite change of domicile the professional activities are continued in the original Member State this jurisdiction should remain the jurisdiction of the centre of main interests.

Current version of definition of “insolvency proceedings”:

- 2.12 “insolvency proceedings” shall mean the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A;

Commentary to the amended definition of “insolvency proceedings”:

- 2.13 The current version contains a twofold definition of “insolvency proceedings”. On the one hand the provision refers to Article 1(1). On the other hand it refers to Annex A. The suggested new definition is designed to express more clearly the fact that the listing in Annex A is the determinative factor (see also the commentary to Article 1(1)). It should be noted that the definition of “insolvency proceedings” in Article 2 sub-paragraph (a) does not include insolvency proceedings opened outside the European Union, which are the subject of Chapter VII.

Current version of definition of “liquidator”:

- 2.14 “liquidator” shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. Those persons and bodies are listed in Annex C.

Commentary to the amended definition of “liquidator”:

- 2.15 The new definition takes into account the possibility that no separate person is appointed as liquidator and that the debtor or its management itself might administer the insolvency. Furthermore the new definition includes a reference to reorganisations. The reference to Annex C has been replaced by a reference

to Annex B, because the list of winding-up proceedings (presently Annex B) and the definition of winding-up proceedings are deleted.

Current definition of “winding-up proceedings”:

- 2.16 “winding-up proceedings” shall mean insolvency proceedings involving realizing the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B.

Commentary to deletion of definition of “winding-up proceedings”:

- 2.17 It is suggested that the last sentence of Article 3 paragraph 3 be deleted which provides that secondary proceedings must be winding-up proceedings. In practice this limitation is regarded as being superfluous as well as counter-productive. It is furthermore suggested that Article 37 be amended in the sense that the liquidator of the main proceedings has the same rights as the liquidator of the secondary proceedings to request conversion of one type of proceedings into another type of proceedings. In view of these suggested changes there is no need any more for a definition of “winding-up proceedings”.

Location of claims:

- 2.18 The current wording of 2(h) as far as the location of claims is concerned reads:
- “the Member State in which assets are situated” shall mean, in the case of:
- claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);”
- 2.19 In the proposal of INSOL Europe, the words “as determined in Article 3(1)” are deleted, because Article 2(a) provides for a definition of centre of main interests. Some debate has arisen over the question whether the word “claims” includes shares and securities. INSOL Europe is of the opinion that this is not the case and that therefore there is no reason to carve out shares or securities from this provision.

Addition of a provision on the location of bank accounts

- 2.20 It has also been observed¹⁹ that the definition “claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests” (in Article 2 (g) of the present version and 2 (h) in the first

¹⁹ Jennifer Marshall, Article 5 (rights *in rem*), p. 65 and M. Veder, Applicable law, in particular security rights, p. 87, presentations at the Amsterdam conference, both at <http://www.eir-reform.eu> and Gabriel Moss in his (unpublished) comment to the Committee's first draft.

draft of the amended version) leads to a surprising result in respect of bank accounts. For example, if the insolvent debtor has a bank account in England with the English branch of an overseas bank, Article 2 (g) would seem to suggest that the bank account will not be situated in England but instead will be situated in the Member State in which the bank has its centre of main interests. This does not appear to be the view of Virgos/Garcimartin²⁰ who have stated that “in the case of *current accounts* and *deposits* in banking institutions, for these purposes each branch must be considered an *autonomous entity* (i.e. as if it were a distinct debtor), in accordance with the special structure of these institutions; consequently the claim will be considered situated in the State where the office serving the customer account is located”.

As the Committee agrees with the above-mentioned observations and with Virgos/Garcimartin, a provision on bank accounts has been added.

2.21 INSOL Europe has taken note of the recent legislative proposal regarding the *Regulation Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters*²¹, which aims at introducing a new uniform procedure for the freezing of bank accounts of the debtor in cross-border cases.

2.22 In Article 4 of this recent proposal, the Commission includes a definition of a Member State where a bank account is located, which is material for present purposes in relation to article 2(h). The definition reads:

“Article 4(6). “Member State where the bank account is located” means:

- (a) for a bank account containing cash, the Member State indicated in the account’s IBAN;
- (b) for a bank account containing financial instruments, the Member State where the bank holding the account has its habitual residence as determined by Article 19 of Regulation (EC) No 593/2008 of the European Parliament and of the Council²².”

2.23 Although the legislative proposal does not apply to bankruptcy and similar proceedings²³, INSOL Europe is of the view that this proposal could have a bearing on the interpretation of the proposed draft of Article 2(h). However, INSOL Europe has chosen to adhere to the simple and clear proposed draft mentioned above.

²⁰ Virgos/Garcimartin, op. cit., p.168.

²¹ COM (2011) 445. The proposal was published on 25 July 2011; at the moment, the first reading in the European Parliament has been announced.

²² I.e. the Rome I Regulation on the Law Applicable to Contractual Obligations.

²³ The wording is similar to Article 1 of the Brussels I Regulation.

Current definition of “establishment”:

- 2.24 “establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

Commentary to the amended definition of “establishment”:

- 2.25 It is suggested that the words “or services” be added at the end of the definition. Thus the definition of “establishment” is the same as in Article 2 sub (f) of the UNCITRAL Model Law.
- 2.26 It has been observed²⁴ that in the English version “goods” should be read as “assets”, since “goods” are strictly speaking restricted to tangible movables, whereas the French version speaks of “biens”, which has been held to refer to movable and immovable property. INSOL Europe agrees with this observation, but trusts that the reader will understand its use of the term “goods”.

Commentary to the inclusion of definitions of “group of companies”, “group company”, “parent company”, “subsidiary”, “ultimate parent company”, “group main proceedings”

- 2.27 The definitions of “group of companies”, “group company”, “parent company”, “subsidiary”, “ultimate parent company”, and “group main proceedings” are added in view of the suggested Chapters V and VI on insolvency of group companies and the European Rescue Plan. Reference should be made to the explanations provided with respect to those Chapters.

Commentary to the inclusion of definitions of “non-EU proceedings”, “non-EU main proceedings”, “non-EU non-main proceedings”, “non-EU liquidator” and “court from a non-Member State”

- 2.28 The definitions of “non-EU proceedings”, “non-EU main proceedings”, “non-EU non-main proceedings”, “non-EU liquidator” and “court from a non-Member State” are added in view of the suggested Chapters VII regarding provisions on insolvency proceedings opened outside the European Union.

Article 3²⁵

International jurisdiction

1. *The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated at the time the request for opening of the proceedings is submitted to the court shall have jurisdiction to open insolvency proceedings. If one year prior to the request for the opening of insolvency*

²⁴ Moss, G., Isaacs and Fletcher (eds.), *The EC Regulation on insolvency proceedings, A Commentary and Annotated Guide*, Oxford University Press, Oxford, 2009, p. 244.

²⁵ For literature on Article 3 see Virgos/Garcimartin, 2004, pp. 37-61.

proceedings the centre of main interests of a debtor was located in a Member State and the centre of main interests is no longer located in that Member State at the time of the request for the opening of insolvency proceedings then only the courts of the Member State where the centre of main interests was located one year prior to the request have jurisdiction to open insolvency proceedings under this paragraph provided the debtor has left unpaid liabilities caused at the time its centre of main interests was located in this Member State and unless

- (i) all creditors of these unpaid liabilities have agreed in writing to the transfer of the centre of main interests out of this Member State; or*
 - (ii) the debtor is a company or legal person and has moved its registered office to the Member State of its new centre of main interests more than one year prior to the request for opening of the proceedings.*
- 2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. The same applies with respect to the Member State where the debtor has its centre of main interests and an establishment if no insolvency proceedings can be opened in that Member State under paragraph 1.*
- 3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings.*
- 4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:*
 - (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or*
 - (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office*

in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

5. *Where the centre of a debtor's main interests is not situated within the territory of a Member State and there is no court of a Member State which has jurisdiction under paragraph 1, the courts of a Member State shall have jurisdiction to open insolvency proceedings against that debtor subject to requirements under the laws of the Member State. The effect of such proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.*
6. *The court of the Member State within the territory of which insolvency proceedings have been opened shall have jurisdiction to decide on issues referred to in Article 25(1) to the extent such issues are under the scope of the insolvency proceedings concerned. If such claim is brought before such court that court also has jurisdiction with respect to other claims between the same parties which are not claims in relation to issues referred to in Article 25(1) provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*
7. *So far as practical an application to open insolvency proceedings shall be accompanied by a statement identifying all insolvency proceedings and all non-EU proceedings that are known.*

Commentary to the suggested amendments to Article 3

Current version of Article 3:

International jurisdiction

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.
2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.
4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:
 - (a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
 - (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.

Commentary to the amended provisions

- 3.1 The current version of Article 3(1) has been the subject of extensive literature and case law²⁶ and has been the subject of intense specialist debate. It has transpired in several cases that insolvency proceedings have been opened in Member States in which the debtor's enterprise will not have been active from the start but to which it only "moved" at the time of its (approaching) crisis, sometimes with the explicit intention of opening proceedings under Article 3(1) in the latter member state and of invoking the insolvency law of the new centre of main interests.. This phenomenon has been referred to as forum shopping or COMI-shift and even as insolvency tourism.
- 3.2 Recital 4 of the Regulation reads:

"It is necessary for the proper functioning of the internal market to avoid

²⁶ G. Moss, I. Fletcher, S. Isaacs, The EC Regulation on Insolvency Proceedings, 2009, p. 44-53; B. Wessels, International Insolvency Law, 2006, p. 292-352; C.G. Paulus, The aftermath of Eurofood (2007) 20 (6) *Insolvency Intelligence* 85; S. Bariatti, Recent case law concerning jurisdiction and the recognition of judgments under the EIR, *RechtsZ* BD. 73 (2009), pp. 629-659; I. Mevorach, Jurisdiction in insolvency: a study of European Courts' decisions, *Journal of private International law* 2010, p. 327ff; G. Moss, *Daisytek* followed in new German case (2004) 17 (10) *Insolvency Intelligence* 141; G. Moss and F. Toube, The EU Regulation in practice: three recent cases (2004) 17 *Insolvency Intelligence* 29; Virgos/Garcimartin, The European Insolvency Regulation, Law and Practice, par. 27, 44-70, 297; Peter Mankowski, 'Gläubigerstrategien zur Fixierung des schuldnerischen Centre of Main Interests (COMI)', *ZIP* 2010, p. 1376ff; P. Wautelet, Some considerations on the COMI as jurisdictional test under the EIR, in: G. Affaki (ed.), Cross-border Insolvency and Conflict of Jurisdictions, 2007.

Case law: ECJ 17 January 2006, Case C-1/04 (Staubitz-Schreiber); ECJ 2 May 2006, Case C-341/04 (Eurofood); High Court of Justice Leeds 16 May 2003, [2003] BCC 562; [2003] *All E.R.*

(D) 312 (Jul)(Daisytek); Chancery Division (UK) 20 June 2008, [2009] BCC 155 (Lennox Holdings Plc); II SCA [2009] EWHC 3199 (Ch) (Hellas Telecommunication (Luxembourg)); [2010] EWCA Civ 137 (Stanford International Bank Ltd); [2010] EWHC 836 (Ch); [2010] EWCA Civ 518 (Re Kaupthing Capital partners).

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)."

Similar considerations can be found in the Virgos/Schmit report²⁷.

- 3.3 In its report of 17 October 2011 (Lehne Report) the Committee on Legal Affairs of the European Parliament stressed the importance of curtailing the abuse of forum shopping (recital B and paragraph 2.2). Recital 4 of the Regulation expresses the view that forum shopping should be avoided.
- 3.4 For INSOL Europe the proper starting point is that parties who enter into a contract with the debtor or become creditors in another way rely and should be able to rely on the insolvency regime that will apply if the debtor enters into insolvency proceedings. Such a regime may determine the remedies of such creditors, their position vis-à-vis other creditors and their influence on the administration of the estate. As a working rule such reliance should be honoured and therefore these rules should not suddenly be changed if and because the debtor moves its centre of main interests to another jurisdiction. On the other hand such reliance cannot be honoured for ever: if the debtor does move its centre of main interests to another Member State and an 'old' creditor remains in place that creditor will ultimately have to accept that insolvency proceedings under Article 3(1) will be governed by the new jurisdiction. INSOL Europe therefore proposes that one year after the shift of the centre of main interests, the former centre of main interests can no longer constitute the forum under Article 3(1).
- 3.5 INSOL Europe therefore proposes an amendment to Article 3(1) which introduces further rules which protect the reasonable expectations of creditors. If the company has moved its centre of main interests less than a year prior to the request for opening of insolvency proceedings and there are still debts which were incurred prior to the shift, the Member State relating to the old centre of main interests will have jurisdiction unless the old creditors agree to the COMI shift. However, if the company moved its registered office more than one year prior to the request for opening of the proceedings, the court does not need to investigate whether the COMI shifted over the last year. It may however still have to investigate whether the actual COMI is located in the Member State of the company's actual registered office. These provisions on the one hand safeguard the fact that during one year creditors are not deprived of their rights as a result of a COMI shift but on the other hand reflect the fact that if all creditors agree that the COMI shift yields a better result it will be effective in any event.

²⁷ Virgos-Schmit Report on the Convention on insolvency proceedings, par. 7.

- 3.6 The present proposed amendment however has been criticised on account of its apparent failure to abide by the policy underling the proposed kind of amendment set out in the previous paragraph. It is claimed that there is no principled basis for what is in effect an arbitrary look-back period of, in this case, 1 year. It is also claimed that the proposed amendment fails to reflect the paramount consideration which reflects the interests of creditors generally. Support for this view is drawn from the Opinions of the Attorney-General in the cases of *Staubitz-Schreiber* and *Seagon*. In addition the argument is made that the policy reflected in Recital (4) against forum shopping only applies to fraudulent steps which are taken to damage creditors. It is also argued that the proposed amendment seriously restricts the ability of a debtor to move its or his COMI in order to achieve or obtain a rescue or some other organisation proceeding in a jurisdiction which is in some material way “better” for creditors as a whole. These reasons, it is claimed, are far from theoretical and occur regularly in practice.
- 3.7 Against these arguments the following counter arguments can be put. First, it can be said that in practice, it is very difficult to ascertain whether a transfer is fraudulent or not. In many cases the shift in applicable regime and law may be beneficial to some creditors or other stakeholders and detrimental to others, whereas under the present regime those creditors who suffer from the COMI shift have no say in it. INSOL Europe is therefore of the opinion that a distinction between *fraudulent* or *good faith* COMI-shifts is not appropriate, but that the issue is that in most cases the COMI-shift is detrimental to some stakeholders. However, in the event that the insolvency regime of the new COMI is beneficial to all the ‘old’ creditors, they may agree to the new regime. This result may also be achieved if the new regime is not beneficial to a few of the ‘old’ creditors but the latter are taken out by the others.
- 3.8 Furthermore, any fraud-based test would involve to some degree the application of subjective criteria and the application of such criteria would be even more problematic than those which apply at present. In a situation where a COMI shift will be beneficial to some creditors and prejudicial to others, it will be difficult to define what constitutes a fraudulent COMI-shift and a large degree of subjectivity may be involved. Moreover the court of the Member State of the old COMI may look upon such matters very differently from the attitude taken by the court of the Member State of the new COMI and this may cause a race to the courts. INSOL Europe prefers the system suggested in this draft which applies objective criteria and provides sufficient leeway in the

sense that if all the ‘old’ creditors have been paid, there is no issue and if they are not, they can consent to the shift. By comparison to a criterion based on *fraud*, the application of the proposed amendment is straightforward.

- 3.9 Another argument that has been raised against the incorporation of a look-back period is that it violates the freedom of establishment with respect to companies. As enshrined in articles 49 and 54 of the TEFU. This freedom has been the subject of important case-law of the ECJ (e.g. 27 September 1988 Case 81/87, *Daily Mail and General Trust*, 5 November 2002, C-208/00, *Überseering*, 30 September 2003, C-167/01 *Inspire Art*, 16 December 2008, C-210/06, *Cartesio*, 29 November 2011, C-371/10, *National Grid Indus*). *INSOL Europe* is of the opinion that Articles 49 and 54 TFEU do not preclude a look-back period as envisaged here nor does the ECJ’s case law in any way stand in the way of such a provision. The look back period in no way prevents the transfer of central management and control to another Member State or the relocation of a business’ centre of main interests. The proposed amendment to Article 3(1) is simply a protective measure which is applicable to the interests of creditors who are entitled to expect that the appropriate insolvency forum will be selected or decided upon. Support for this approach can be found in the ECJ decision in Case C-371/10 *National Grid Indus v Rijnmond* (2011) where it was held that EU law did not in principle preclude the charging of tax on the unrealised capital gains relating to the assets of a company which had transferred its place of management to another Member State. Finally, the look-back period is short and, as indicated above, it will not apply either if there are no “old” creditors or if such creditors otherwise agree to the change of COMI. Thus the proposal does not violate the freedom of establishment and moreover it is justifiable and proportionate in the light of its legitimate aim.
- 3.10 It should furthermore again be noted that for the purposes of company law, the relocation of a company to another Member State is primarily a matter for the company and its shareholders, whereas the movement of a centre of main interests primarily concerns the creditors of the company. It is the company that decides to relocate its centre of main interests and the creditors may have little or no influence on such a decision.
- 3.11 The provision of the look back period is relevant both to the courts of the former centre of main interests and to the courts of the new centre of main interests. If the court of the old centre of main interests is asked to open main insolvency proceedings it will have to establish when the registered office was moved to the Member State of the new centre of main interests. If it cannot be shown that that happened less than a year before the filing it will dismiss the filing. If it can be shown that that happened less than a year before the filing,

the party requesting the opening of the proceedings will have to show that there are still old creditors. If that is the case the court will investigate whether all these creditors prefer the proceedings to be opened in the Member State of the new centre of main interests. If filing takes place in the Member State of the new centre of main interests, proof of the time of vesting the registered office in that Member State will be decisive in determining the question whether the court will have to consider to apply the look back period and dismiss the filing. The investigation will be along the same lines as the investigation of the court in the Member State of the former centre of main interests.

- 3.12 Article 3(2) provides that the effects of territorial proceedings shall be limited to the assets of the debtor which are situated within the territory of the Member State which opened the proceedings under Article 3(2). Thus proceedings under Article 3(2) are territorial with respect to those assets only. With regard to liabilities however, these proceedings are not territorial. Pursuant to Article 32 any creditor may lodge his claim in the main proceedings and in any secondary proceedings. In the current version however, the Insolvency Regulation does not provide to what extent agreements fall under the scope of territorial proceedings. INSOL Europe suggests that there be included provisions with respect to this issue as Article 31a.
- 3.13 Article 3(3) currently provides that if secondary proceedings are opened, they should be winding-up proceedings. Territorial proceedings that are opened prior to the opening of the main proceedings (under Article 3(2) in conjunction with Article 3(4)) can be both winding-up proceedings and reorganisation proceedings, but if subsequently main proceedings are opened, the liquidator of the main proceedings may ask the court in the territorial proceedings to convert the territorial reorganisation proceedings into territorial winding-up proceedings. This means that if it is desirable that the territorial proceedings – if they are to be opened – are reorganisation proceedings, they should be opened prior to the main proceedings. However this is not always possible nor indeed is it always desirable that the secondary proceedings are opened at all. There is no compelling reason why secondary proceedings cannot be reorganisation proceedings. INSOL Europe therefore suggests that the last sentence of Article 3(3) be deleted. INSOL Europe furthermore suggests that Article 37 be amended in the sense that the liquidator of the main proceedings has the same rights as the liquidator in the secondary proceedings to request conversion of one type of proceedings to another type of proceedings. In view of these suggested changes there is no need any more for a definition of “winding-up proceedings” and the current Annex B can be deleted.

- 3.14 No changes are suggested with regard to Article 3(4).
- 3.15 Article 3 (1) of the Regulation provides that the courts of a Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Article 3 (2) provides that where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against the debtor but only if he possesses an establishment within the territory of that other Member State. Articles 16 up to and including 26 deal with the recognition of proceedings opened under Article 3 paragraphs 1 and 2. Thus presently the Regulation only deals with proceedings which can be or have been opened in a Member State in cases where the centre of main interests of the debtor is located within the European Union. It does not provide any rules or principles which address:
- (i) the opening in a Member State of proceedings with respect to a debtor which does not have its centre of main interests in the European Union;
 - (ii) the recognition in other Member States of proceedings as referred to under (i);
 - (iii) the recognition of proceedings which have been opened in a country outside the European Union if the debtor has its centre of main interests in that non-Member State; or
 - (iv) the recognition of proceedings which have been opened in a country outside the European Union if the debtor has its centre of main interests in another country outside the European Union or in a Member State.
- 3.16 The UNCITRAL Model Law on Cross-Border Insolvency provides rules which apply in the instances addressed under (iii) and (iv) above. This Model Law has been implemented in Greece, Poland, Romania, Slovenia and the United Kingdom as well as in a considerable number of non-Member States such as the United States of America, Mexico, Canada, Japan, Australia and South Africa. It is desirable that the Community adopt rules with regard to the issues under (i) up to and including (iv) and that they be included in the Insolvency Regulation. The adoption of such rules will enhance the proper functioning of the internal market and support a unified external trade policy.
- 3.17 The new paragraph 5 of Article 3 suggested by INSOL Europe deals with the issue under (i).
- 3.18 The issue under (ii) is provided for in Articles 16, 17 and 18 as suggested by INSOL Europe.

- 3.19 With regard to the issues under (iii) and (iv) INSOL Europe suggests that there be included a new Chapter VII in the Insolvency Regulation.
- 3.20 As to proceedings which are to be opened in a Member State, in the case of the centre of main interests of the debtor being located outside the European Union (which is provided for in the suggested Article 3(5)), there will be due conformity with the systems reflected both by the Insolvency Regulation and by the Model Law by virtue of the fact that such proceedings will be only territorial proceedings under Article 3(4) of the Insolvency Regulation. However there seems no reason to require that there should at least be an establishment of the debtor in the Member State where the territorial proceedings are opened. If the centre of main interests is located within the European Union such a minimum requirement is justified by the community trust with respect to main proceedings in the Member State of the centre of main interests; if the centre of main interests is located in a non-Member State, no such trust is assumed and there may be good reasons to open territorial proceedings in a Member State even if there are only assets of the debtor present in that Member State.
- 3.21 Article 25 paragraph 1 provides that insolvency related judgments, which are not under the scope of the ECRegulation of 22 December 2000 (pursuant to Article 1(2)(b) thereof), shall be recognised and enforced in the other Member States. This Article however does not provide that the courts of the Member State where the proceedings have been opened have jurisdiction in these cases. The ECJ so decided in its judgment of 12 February 2009, C 339/07 (Christopher Seagon/Deko Marty) with respect to claims under Article 13. INSOL Europe suggests that an explicit provision be included to this effect as Article 3(6). In the event that such a claim is closely related to a claim between the same parties which does not fall under the scope of the Regulation, what is sometimes called objective cumulation should be allowed i.e. there should exist the ability to make several claims against the same party even though the underlying grounds may be different. The provisions of Article 3(6) do not concern the exercise of powers by a liquidator which are conferred on him by the law of the State of the opening of the proceedings. These are dealt with in Article 18. Nor does Article 3(6) concern residual rights and powers of the debtor.
- 3.22 INSOL Europe proposes to add paragraph 7, which needs no further explanation.

Law applicable

1. *Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.*
2. *The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:*
 - (a) *against which debtors insolvency proceedings may be brought on account of their capacity;*
 - (b) *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;*
 - (c) *the respective powers of the debtor and the liquidator;*
 - (d) *the conditions under which set-offs may be invoked;*
 - (e) *the effects of insolvency proceedings on current contracts to which the debtor is party;*
 - (f) *the effects of the insolvency proceedings on proceedings brought by individual creditors (including actions or proceedings brought by way of enforcement alone) with the exception of lawsuits pending; for the purpose of this Article lawsuits pending include all civil and commercial matters which are subject to Council Regulation (EC) 44/2001 as well as arbitration proceedings which matters and proceedings are pending at the time of the opening of the proceedings;*
 - (g) *the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;*
 - (h) *the rules governing the lodging, verification and admission of claims;*
 - (i) *the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;*
 - (j) *the conditions for and the effects of closure of insolvency proceedings, in particular by composition;*

²⁸ For literature on Article 4 see Virgos/Garcimartin, 2004, pp. 72-78, 111-115, 121-123.

- (k) *creditors' rights after the closure of insolvency proceedings;*
- (l) *who is to bear the costs and expenses incurred in the insolvency proceedings;*
- (m) *the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.*

Commentary to the suggested amendments to Article 4

It is suggested that Article 4(2)(f) be amended.

Current version of Article 4(2)(f):

- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

Commentary to the amended provision:

- 4.1 Article 4 contains in effect conflict of law rules which replace the various national rules of private international law regarding insolvency proceedings: see the Virgos/Schmit Report especially at paragraphs 89-91 inclusive.
- 4.2 The general principle is given effect to by Article 4(1). It is the law of the State where the proceedings are commenced which is the law applicable to the insolvency proceedings. This is called the *lex concursus*. The *lex concursus* will apply to the main insolvency proceedings and to both secondary and territorial proceedings under Article 3(2) and 3(5).
- 4.3 The expression “proceedings brought by individual creditors” in Article 4(2)(f) concerns primarily “individual enforcement actions”. The relation between the collective feature of the insolvency proceedings and individual actions by the creditors is primarily a matter of the *lex concursus*. An exception is made for lawsuits which are pending at the time of the opening of the proceedings in other Member States. INSOL Europe suggests that it be made clear that the provision applies to actions or proceedings brought by way of enforcement alone. It furthermore suggests that it be made explicit that the exception for lawsuits pending applies both to court proceedings and to arbitration.
- 4.4 The present respective wordings of Article 4(2)(f) and Article 15 do not quite match, because Article 15 is limited to lawsuits concerning an asset or right of which the debtor has been divested. INSOL Europe suggests to delete this limitation in Article 15.
- 4.5 A stay opened by or under the *lex concursus* will have automatic effect across all Member States under Article 17 of the Regulation.

Third parties' rights in rem

1. *The effects of insolvency proceedings on the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of unidentified or mixed assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings shall be governed solely by the law of the Member State within which the assets are situated.*
2. *The rights referred to in paragraph 1 shall in particular mean:*
 - (a) *the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;*
 - (b) *the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;*
 - (c) *the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;*
 - (d) *a right in rem to the beneficial use of assets.*
3. *The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.*
4. *Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).*

Commentary to the suggested amendments to Article 5(1)

Current version of Article 5(1)

The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from

²⁹ For literature on Article 5, see For literature on Article 4 see Virgos/Garcimartin, 2004, pp. 91-108;

M. Veder, Cross-Border Insolvency Proceedings and Security Rights, A comparison of Dutch and German law, the EC Insolvency regulation, and the UNCITRAL Model law, dissertation, 2004, pp. 332 ff; Berends, A.J. The EU Insolvency Regulation: Some Capita Selecta, Netherlands International Law Review, LVII: 423-442, 2010; Flessner, A., *Dingliche rechte nach dem europäischen Insolvenzübereinkommen*, in: J. Basedow e.a. (red.), *Festschrift für Ulrich Drobnig*, Mohr Siebeck, Tübingen, 1998, pp. 277 ff.

time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

Commentary to the amended provision

- 5.1 Article 5 is an exception to the general rule which is set out in Article 4(1) that the law applicable to insolvency proceedings is that of the law of the State of the opening of the proceedings, i.e. the *lex concursus*. It also constitutes an exception to the general principle that the main insolvency proceedings will generally have a “universalist” effect, i.e. that they will affect the debtor’s assets wherever they are situated.
- 5.2 The relevant Recital in the Regulations is Recital 24 which states that the exceptions to the general rule in Article 4(1) are designed to protect the legitimate expectations and certainties in relation to various transactions which occur in and across the Member States.
- 5.3 Recital 25 addresses rights in rem. It describes these as “of considerable importance for the granting of credit”. In addition, Recital 11 notes the fact that the laws on security interests, and in particular, their creation, validity and scope differ widely across Member States.
- 5.4 Article 5 does not operate as a normal conflict of laws rule³⁰: it does not state that the effects of the insolvency proceedings on the rights in rem will be governed by one specific or some other national law (i.e. the *lex fori concursus* or the *lex rei sitae*). It operates rather as a negative conflict rule: the opening of insolvency proceedings will not impinge upon those rights in rem.

Article 5 provides that “the opening of insolvency proceedings shall not affect the rights in rem of creditors” As the wording “shall not affect” is not quite clear, commentators appear to have interpreted it in four different ways³¹:

- (i) *The right in rem is limited by the lex rei sitae*: the right in rem will not be affected by the *lex concursus* of the main proceedings, but will be bound by any limitations imposed by the *lex rei sitae* (the law of the Member State in which the asset is situated);
- (ii) *The right in rem is limited only to the extent that the limitations of the lex rei sitae match with those of the lex concursus*. According to this view the principle of legal certainty that Article 5 aims to protect is not infringed when (as a result of insolvency proceedings opened in another Member State) security rights in rem are not affected to a larger extent

³⁰ Miguel Virgos and Francisco Garcimartin, *The European Insolvency Regulation: Law and Practice*, 2004, No. 163.

³¹ B. Wessels, *International Insolvency Law*, 2006, pp. 363 et seq.

than would be the case if local national insolvency proceedings were opened³²;

(iii) *The right in rem is only limited by the lesser limitations of either the lex rei sitae or the lex concursus.* This means that the secured creditor may profit from the difference between the two regimes³³.

(iv) *The right in rem is neither affected by the lex concursus nor by the lex rei sitae.* This so called “hard and fast rule” or “maximalist view”³⁴ implies that the holder of the right in rem can exercise its rights without any exception or limitation.

5.5 Most commentators³⁵ point out that the fourth approach has been followed during the negotiations prior to the Regulation: it appears to follow from the Virgos/Schmit report, nrs. 92 and 94-99³⁶ that the drafters of the convention had this approach in mind when drafting the current text.

5.6 However, the majority of commentators agree that the current “hard and fast rule” is highly debatable, as it overprotects the secured creditor: it may afford a stronger level of protection against the insolvency of the debtor than that which the national laws demand³⁷.

The overprotection offered by the current text of Article 5 can only be understood if one realizes that the main aim of this text is to facilitate the administration of the insolvency proceedings.

5.7 In fact, the application of the insolvency rules of the place where the asset is located appears to reflect quite a widely supported analysis and proposal³⁸. Virgos/Garcimartin³⁹ point out that this is the reason why the majority of commentators agree that Article 5 goes beyond what is described as its substantive foundation.

³² S. Kortmann and P. Veder, *De Europese Insolventieverordening*, WPNR 2000, p. 770.

³³ U. Drobniig, *Secured Credit in Cross-Border Insolvency Proceedings*, in: 33 *Texas International Law Journal* 1998, 53.

³⁴ M. Virgós, *The 1995 European Community Convention on Insolvency Proceedings: an Insider's View*, in: *Forum Internationale*, no. 25, March 1998 and E. Dirix and V. Sagaert, *Zekerheidsrechten in de Europese insolventieverordening*, in: *Tijdschrift voor insolventierecht* 2002, p. 112.

³⁵ M. Balz, *Das neue Europäische Insolvenzübereinkommen*, in: *ZIP* 1996, p. 950; J. Taupitz, *Das (zukünftige) Europäische Internate Insolvenzrecht*, in: *ZZP* 1998, p. 336; J.M. Garrido, *Some Reflections on the EU Bankruptcy Convention and its Implications for Secured and Preferential Creditors*, in: *International Insolvency Review*, 1998, p. 87; N. Kayser, *A Study of the European Convention on Insolvency Proceedings*, in: *International Insolvency Review* 1998, p. 95; O. Liersch, *Sicherungsrechte im Internationale Insolvenzrecht*, in: *NZI* 2002, p. 16; J. Isräël, *European Cross-Border Insolvency regulation*, 2005, p. 277.

³⁶ The Virgos Schmit report also indicates in no. 97 how the proposal to apply the insolvency law of the *lex rei sitae* (second approach) was considered and rejected during the process.

³⁷ Virgos/Garcimartin, p. 105.

³⁸ U. Drobniig, *Bemerkungen zur Behandlung dinglicher Rechte Dritter, insbesondere von Sicherungsrechten*, in: H. Stoll, *Stellungnahmen und Gutachten zur Reform des Deutschen Internationalen Insolvenzrechts*, 1992, p. 179 et seq.

³⁹ Virgos/Garcimartin, p. 105, footnote 182.

- 5.8 It should be noted that the current wording of Article 5(1) does not prevent secondary proceedings being commenced with regard to local assets which may prevent the enforcement of rights in rem over local assets since the local law as a whole will be applicable to the secondary proceedings.⁴⁰
- 5.9 INSOL Europe agrees with the objection that secured creditors are overprotected as a result of the hard and fast rule of the current text. The discrepancy regarding the treatment of security rights depending on whether insolvency proceedings have actually been opened in the Member State where the assets are located may be understandable on the basis of the history of the negotiations that eventually led to the Regulation, but no longer seems justified. INSOL Europe therefore suggests that there be an amendment to Article 5(1) along the lines of the second approach mentioned above and that there be a provision which is similar to the provisions of Articles 8 and 10. As indicated above, security rights in rem should not be affected to a any larger extent than would be the case if local insolvency proceedings were opened.
- 5.10 As can be seen, Article 5(1) contains no definition of a right in rem. Virgos Schmit suggest at paragraph 100 that this is a matter to be left to the national law.
- 5.11 INSOL Europe also queries the precise meaning properly to be attributable to the adjective “indefinite” in the current version of Article 5(1). It is suggested that the term “unidentified and/or mixed” represents the true import of Article 5(1).
- 5.12 Article 4(2)(m) provides that rules relating to the voidness, voidability or unenforceability or legal acts detrimental to all creditors are in general to be governed by the law of the State of the opening of proceedings. Article 5(4) states that the exception created by Article 5(1) to the general rule in Article 4(1) is not to preclude any of the actions envisaged by Article 4(2)(m).
- 5.13 This means that the act by which the right in rem is created might be subject to a challenge in the form of an action which would be governed by the law of the State of the opening of the proceedings.

Article 6⁴¹

Set-off

1. *The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such*

⁴⁰ Moreover, as the Virgos Schmit Report also points out at paragraph 96, Article 5(1) applies only to rights which are created before the main proceedings. Any post-commencement rights will be subject to the *lex concursus*.

⁴¹ For literature on Article 6 see Virgos/Garcimartin, 2004, pp. 111-121.

a set-off is permitted by the law applicable to the debtor's claim.

2. *Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2) (m).*
3. *Netting agreements shall be governed solely by the law of the contract which governs such agreements.*

Commentary to the suggested amendments to Article 6

Current version of Article 6:

1. The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.
2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Commentary to the amended provision of Article 6(3):

- 6.1 The system underlying article 6 is as follows. If the *lex concursus* allows for set-off, the creditor may set off its claim. On the other hand, if the *lex concursus* does not allow for it, the creditor is still allowed to set off its claim, if that creditor shows that this is permitted by the law applicable to the debtor's claim (*lex causae*). In practice, this means that set-off is allowed if either the *lex concursus* or the *lex causae* permits it.
- 6.2 In some national law systems, the rules for set-off in formal insolvency proceedings are different from those applicable under the general civil law. If such a system of national law is or constitutes the "law applicable to the insolvent debtor", does this wording refer to the set-off rules in formal insolvency or those of the general civil law? INSOL Europe is of the opinion that the referral made by Article 6 (1) to the law of the insolvent debtor's claim is one that is made to the insolvency rules of that legal system. The Report is very clear on this point⁴²: "... Article 6 constitutes an exception to the general application of that law in this respect, by permitting the set-off according to *the conditions established for insolvency set-off* by the law applicable to the insolvent debtor's claim"⁴³ (emphasis supplied).

⁴² Virgos/Garcimartin, op. cit., no 187.

⁴³ Virgos Schmit Report no. 109; Virgos, The 1995 European Community Convention on Insolvency Proceedings: an Insider's View, Forum Internationale, No 25, March 1998, p. 21; also Herchen, Das Übereinkommen über Insolvenzverfahren der Mitgliedstaaten der Europäischen Union vom 23.11.95, 2000, p. 136; Von Milmowsky, Aufrechnung in Internationalen Insolvenzfällen-kollisionsrecht der Insolvenzaufrechnung, KTS 1998, pp. 360-361; Eidenmüller, Europäische Verordnung über Insolvenzverfahren und Zukünftiges deutsches internationales Insolvenzrecht, IPRax, 2001, p. 2 et seq.; Leible/Staudinger, Die Europäische Verordnung über Insolvenzverfahren, KTS, 4/2000, p. 555.

- 6.3 INSOL Europe proposes to add paragraph 2 regarding netting, which is similar to Article 25 of the Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (with the knowledge that a specific rule applies with respect to the Collateral Law Directive (close out netting) and the Settlement Finality Directive (netting)).

Article 7⁴⁴

Reservation of title

1. *The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.*
2. *The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.*
3. *Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).*

Article 8

Contracts relating to immoveable property

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

Article 9⁴⁵

Payment systems and financial markets

1. *Without prejudice to Article 5, the effects of the insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a regulated market or an Multilateral Trading Facility (MTF) shall be governed solely by the law of the Member State applicable to that system or market or MTF.*
2. *Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system, regulated market or MTF.*

⁴⁴ For literature on Article 7 see Virgos/Garcimartin, 2004, pp. 108-110.

⁴⁵ For literature on Article 9, see Virgos/Garcimartin, 2004, pp. 126 -131.

Commentary to the suggested amendments to Article 9

Current version of Article 9:

1. Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.
2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Commentary to the amended provision of Article 9(1):

- 9.1 Financial market is not a defined term in any of the other financial directives.
- 9.2 In the financial directives reference is made to a Regulated Market on the one hand and to Multilateral Trading Facility (MTF) on the other. Both systems should be treated equally in case of an insolvency event.
- 9.3 **‘Regulated market’** means a multilateral system operated and/or managed by a market operator which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments within the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III.
- 9.4 **‘Multilateral trading facility (MTF)’** means a multilateral system, operated by an investment firm or a market operator which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the provisions of Title II.
- 9.5 INSOL Europe suggests that there be added references to Multilateral Trading Facilities (MTF) to bring Article 9 into line with the Markets in Financial Instruments Directive (Mifid) 2004/39/EC (OJL 145, 30.4.2004).
- 9.6 Article 9 is a simple conflict of law provision stating that the law of the Member State where the payment system, regulated market or MTF is situated shall define the effects of an insolvency proceeding on the rights and obligations of the parties in the system.

- 9.7 For example in the case of a bankruptcy proceeding in France, this would mean that if a pledge on securities held in Euroclear existed, Belgian law will define, pursuant to Article 5 the rights *in rem* of the third party creditors on these securities on the one hand **and** Belgian law will, pursuant to Article 9, also deal with the fungibility of the securities, and the lien on all securities in favour of Euroclear etc.
- 9.8 The Virgos-Schmit Report states at paragraph 124 that the reference to Article 5 means that protection of rights *in rem* of any kind of creditors or third parties over assets belonging to the debtor is always carried out in the same way under the Convention: i.e. by reference to the location of the assets, regardless of the type of creditor or institution which may benefit from its function as a guarantee. The reason for this is that rights *in rem* affect third parties, and uniform treatment of them is essential in order to protect trade.

*Article 10*⁴⁶

Contracts of employment

1. *The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.*
2. *The effects of the transfer of an undertaking, business or part of an undertaking or business as referred to in Article 1 of Council Directive 2001/23/EC of 12 March 2001 shall be governed by the law of the Member State where the undertaking, business or part of the business or undertaking was located prior to the transfer.*

Commentary to the suggested amendments to Article 10

Current version of Article 10:

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

Commentary to the inclusion of Article 31a and to the inclusion of Article 10(2):

- 10.1 Article 10(1) provides that the effect of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. If both main and secondary proceedings have been opened the question arises which liquidator is responsible for the termination of employment agreements with regard to employees working in the Member State of the secondary proceedings. This

⁴⁶ For literature on Article 10, see Virgos/Garcimartin, 2004, pp. 125 and 126.

is not a matter of applicable law, but of the scope of the secondary proceedings. It is attended to in the new Article 31a.

- 10.2 Council Directive 2001/23/EC of 12 March 2001 deals with the employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses. Article 3(1) of this Directive provides that in case of a transfer of an undertaking, business etc., the employment agreement is transferred as well. However the Member States are allowed to exclude transfers in winding-up proceedings from this rule. Some Member States have done so and some have not. It is not clear whether rules on dragging along employment contracts in case of transfer of an enterprise during insolvency proceedings are governed by Article 10. E.g. under German law employees are dragged along if an enterprise is transferred during bankruptcy, under Dutch law they are not. Therefore it is important to determine which law applies here. INSOL Europe is of the view that it is preferable in this type of case to apply the law of the enterprise or business which is the object of the transfer.
- 10.3 Article 10 does not apply to the ranking of the employees' claims because this is not a matter concerning the effect of insolvency proceedings on employment contracts. This issue is therefore dealt with by the law of the proceedings. INSOL Europe suggests that this rule be left as it is.
- 10.4 Several cases have been submitted to the European Court of Justice regarding conflict-of-law and related issues pertaining to the rights of workers. Two of these cases will be mentioned here.

On 3 March 2001 (C-235/10, Claes) the ECJ ruled that until the legal personality of an establishment whose dissolution and winding up have been ordered has ceased to exist, the obligations under Articles 2 and 3 of Directive 98/59⁴⁷ must be fulfilled. The employer's obligations pursuant to those provisions must be carried out by the management of the establishment in question, where it is still in place, even with limited powers of management over that establishment, or by its liquidator, where that establishment's management has been taken over in its entirety by the liquidator.

- 10.5 Both according to the ECJ's ruling of 16 October 2008 (C-310/07, Holmqvist) and Article 9 of the Directive 2008/94/CE⁴⁸, the competent guarantee institution is the one residing in the Member State in whose territory the employees work or habitually work.

⁴⁷ Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies. Article 2 contains provisions on the employer's obligation to inform and consult the workers' representatives. The subject matter of Article 3 is the employer's obligation to notify the competent public authorities of projected collective redundancies.

⁴⁸ Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

10.6 Finally, it is useful to keep the following conflict-of-laws rules in mind when applying this Article:

- reliefs regarding lay-offs are governed by the law applicable to the contract;
- wage claims and legal privileges of employees are determined by the law of the opening Member State⁴⁹.

Article 11

Effects on rights subject to registration

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

Article 12

Community patents and trade marks

For the purposes of this Regulation, a patent, a copyright, a trade mark or any other intellectual property right (whatever its place of registration) may be included only in the proceedings referred to in Article 3(1).

Current version of Article 12:

For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).

Commentary to the amended provision:

12.1 The main objective of the amendment is to extend the provision to all intellectual property rights and to include such rights which are not community rights. In general, a splitting up of such rights over the jurisdictions where proceedings have been opened considerably impairs their value.

*Article 13*⁵⁰

Detrimental acts

Article 4 (2) (m) shall not apply if the law of the Member State where the centre of main interests of the debtor was situated at the time of the legal act does not allow any means of challenging that legal act in the relevant case.

⁴⁹ See the current recital 28 as well.

⁵⁰ For literature on Article 13 see Virgos/Garcimartin, 2004, pp. 134-137.

Commentary to the suggested amendments to Article 13

Current version of Article 13:

Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

Commentary to the amended provision:

- 13.1 Pursuant to Article 4(2)(m), the law of the State of the insolvency proceedings shall establish the substantive rules which determine the voidness, voidability or unenforceability of legal acts⁵¹ detrimental to all creditors.
- 13.2 An important exception to this rule is found in the current Article 13 dealing with detrimental acts, which provides that the law of the State of the opening of the proceedings shall not apply to determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors in the case where the person who benefited from an act detrimental to all the creditors provides proof that (i) the said act is subject to the law of a Member State other than that of the State of the opening of proceedings and (ii) that law does not allow any means of challenging that act in the relevant case.
- 13.3 This provision relating to the applicability of the law of contract is aimed at protecting the counterparty that relied on the transaction in question. It gives such other party the possibility to assert that the avoidance action also has to be judged by the law that was applicable to the legal transaction itself.
- 13.4 However, various objections have been made to the current Article 13. It has been pointed out⁵² that this Article leads to the undesirable result that the parties to a contract detrimental to mutuality of creditors may succeed in protecting it from being challenged by introducing into it a choice-of-law clause in favour of a legal system not permitting the challenge.
- 13.5 There is no compelling reason why a party should be allowed to presume that an act can only be invalidated if the law that applies to the act allows such

⁵¹ The term “legal act” allows for a very wide interpretation of this provision, which includes unilateral or bilateral acts (payments, transfers, gifts, contracts etc.), including acts of a procedural nature: see Virgos/Garcimartin, p. 136.

⁵² Professor Michael Bogdan in *The EC Regulation on Insolvency Proceedings, A Commentary and Annotated Guide*, ed. G. Moss, I. F. Fletcher and S. Isaacs, 2nd edition, 2009.

invalidation⁵³. In the decision of *Canada Southern Railroad vs Gebhard*⁵⁴ the US Supreme Court quite rightly considered that: “Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy (of) that government authorizes”.

- 13.6 INSOL Europe believes that the extent to which a counterparty or creditor of the debtor should observe a duty of care towards the other creditors of that debtor (which is essentially the basis for the avoidance of detrimental acts) should not depend on the choice of law which was made by him and the debtor. In short, it seems undesirable that a legal act can be made avoidance proof by selecting the law applicable to the contract.
- 13.7 The starting point should be the proposition that the other party to an agreement should only rely on the avoidance rules forming part of the law of the centre of main interests of his counterparty. However, a problem does arise if, after entering into a contract, the debtor moves its centre to another jurisdiction which applies avoidance rules which are less favourable to the other party to the contract. The principle underlying the abovementioned case of *Canada Southern Railroad vs Gebhard* does not imply that the other party should at the time of entering into the transaction take into account the possibility that the debtor moves his centre of main interests to an unknown jurisdiction. It is both in the interest of the certainty that the parties need to obtain that their contract cannot be annulled in the future because of a change of the applicable avoidance law and in the interest of a fair application of the law that the other party is protected against such change. INSOL Europe therefore proposes to provide that Article 4 (2) (m) shall not apply if the law of the Member State where the centre of main interests of the debtor was situated at the time of the legal act does not allow any means of challenging that legal act in the relevant case.
- 13.8 Finally, both under the current and the proposed version of Article 13, the relationship between the power of the liquidator in the main proceedings to avoid detrimental acts and the power of the liquidator in any secondary proceedings to do so should be examined⁵⁵.
- 13.9 Most authors take the view that the liquidator in the main proceedings initially has the power to avoid the legal act. However, would such power be limited by secondary proceedings and if so, in what way? Some authors⁵⁶ state that the

⁵³ Robert van Galen in Dutch legal journal *Ondernemingsrecht*, 2001, 292.

⁵⁴ 109 US 527 (1883).

⁵⁵ See Bob Wessels, *International Insolvency Law*, 206, pp. 416 and 417.

⁵⁶ Verhagen/Veder in the Dutch legal journal *Nederlands Internationaal Privaatrecht (NIPR)*, 2000, p. 3.

secondary liquidator may avoid such acts only when such acts are at the expense of the estate of the secondary proceedings. See also the Virgós/Schmit report (1996), at paragraph 224, which refers to the power of the secondary liquidator to avoid the act outside the State and to claim back goods that have been transferred after the opening of secondary proceedings to another Member State to the detriment of the creditors in the secondary proceedings.

- 13.10 “The secondary liquidator has, however, the right to act outside his territory in order to recover an asset moved out of that State after the opening of the secondary proceedings or fraudulently against the creditors of those proceedings.(Article 18 (2)). He is allowed to bring actions in the other States for the voidness, voidability or unenforceability of detrimental legal acts (Article 4 (2) (m) and Article 13). The purpose of these actions outside the territory is, in fact to seek the return of the assets which were legally situated in the territory of the proceedings at the time of the opening or which, in the absence of fraud, would have been situated in the territory of the proceedings at the time of the opening. The action of the secondary liquidator in the matter of the return of assets which are actually situated abroad but which would normally be included in the secondary proceedings is to be assessed on the basis of the law of the secondary proceedings, pursuant in particular to Article 4 (2) (m), subject to Article 13”.
- 13.11 Thus, INSOL Europe is of the opinion that the liquidator initially should have the power to avoid the legal act and that the power to act under secondary proceedings is limited to situations in which the estate of the secondary proceedings suffers.
- 13.12 In the abovementioned INSOL Europe Note *Harmonisation of Insolvency Law at EU Level*, which was presented by INSOL Europe to the European Parliament in April 2010, INSOL Europe recommended inter alia that the rules on the treatment of detrimental acts be harmonised. The appendix to this report contains a proposal for such harmonisation.

Article 14

Protection of third-party purchasers

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:

- *an immoveable asset, or*
- *a ship or an aircraft subject to registration in a public register, or*

- *securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.*

Article 15⁵⁷

Effects of insolvency proceedings on lawsuits pending

The procedural effects of the insolvency proceedings on lawsuits pending shall be governed solely by the law of the Member State in which that lawsuit is pending. Such lawsuits include all civil and commercial matters which are subject to Council Regulation (EC) 44/2001 as well as arbitration proceedings. Article 15 shall not have the effect of altering the law applicable to any question of the validity of a current contract or to any other substantive issue in the lawsuit pending.

Commentary to the suggested amendments to Article 15

Current version of Article 15:

The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending.

Commentary to the amended provision:

- 15.1 Article 4(2)(f) provides that the law of the insolvency proceedings determines the effect of insolvency proceedings on proceedings brought by individual creditors, *with the exception of lawsuits pending*. The current version of Article 15 provides that the effect of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending. These provisions do not match and it is therefore desirable that the rules on pending lawsuits are revised. This issue is also addressed in the commentary on the amendments with respect to Article 4(2)(f).
- 15.2 Article 15 represents a major exception to the general rule set out in Article 4 that insolvency proceedings are governed by the *lex concursus*. The current version of Article 15 applies the domestic law of the forum, i.e. the *lex fori processus* to determine the effects of insolvency proceedings on pending lawsuits but only those lawsuits “concerning an asset or a right of which the debtor has been divested”.
- 15.3 The national laws of all Member States address in some way and regulate the need for there to be a stay of proceedings or enforcement with regard to steps

⁵⁷ For literature on Article 15 see Virgos/Garcimartin, 2004, pp. 140-142.

taken by creditors against the debtor and/or against its assets consequent upon a formal insolvency as distinct from a reorganisation although such laws may also provide for a stay in the latter case as well.

- 15.4 The current version of Article 15 on its face shows that the position is considered to be different in the case of lawsuits which are already pending or in progress when the insolvency proceedings are opened and which concern an asset or right of which the debtor has been divested. The apparent intention behind this provision appears to be to avoid what would otherwise be the application of the rule of *vis attractiva concursus* which often applies in Member States and which means that pending proceedings may be removed from the civil or commercial courts in which the proceedings have been opened and placed under the exclusive control of the relevant insolvency court or tribunal. Although it seems reasonable to infer that the intention may have been to equate the meaning of “lawsuit pending” in both Articles 4 and in Article 15 there appear to remain problems in attempting to do so.
- 15.5 First, Article 4(2)(f) appears to describe a lawsuit pending as a sub variety of proceedings brought by individual creditors. However, it is arguable that individual enforcement actions such as attachment or sequestration which otherwise might be regarded as being lawsuits pending, are outside Article 15 for two principal reasons: first because there has been no divesting of any asset or right which otherwise is held or claimable by the debtor and second because the intention behind Article 4(2)(f) would appear to be at least to prevent any pre-empting of a claim in the insolvency prior to the same being after the commencement of the insolvency process. On this approach any pending action which seeks a determination on the merits could properly continue past the commencement of the insolvency after judgment so as to be the basis for a claim to a distribution of the insolvency itself. However, such a judgment cannot be employed to justify a seizure or some other form of enforcement of the judgment upon the debtor’s assets: see generally Virgos & Garcimartin at paragraphs 252 to 255.
- 15.6 Presently, only two language versions of the Regulation contain references to “lawsuits” being limited to court proceedings while the other 19 versions refer to terms which do not expressly limit the scope of Article 4(2)(f) and Article 15 to court proceedings. There therefore needs to be some consistency across all texts.
- 15.7 In *Elektrim v Vivendi* [2009] EWCA Civ 677, the English Court of Appeal considered the inter-relationship between Article 4(2)(f) and Article 15. The English Court of Appeal held that the phrase “proceedings brought by individual creditors” referred to what have already been called above

“individual enforcement actions” i.e. proceedings by way of execution as well as actions which were brought solely to establish a claim. In the light of this last finding, there was no reason why “lawsuit pending” should not be regarded as including a reference to arbitration. INSOL Europe suggests that for clarity’s sake, the language should be amended clearly to reflect the fact that not only court proceedings are referred to in the expression “lawsuit pending”, but also arbitration proceedings.

- 15.8 Paragraph 92 of the Virgos/Schmit Report provides that in a case where the “effects” of the insolvency proceedings are governed not by the law of the State of the opening of proceedings, but by the laws of another Member State as under Article 15 itself, the effects of insolvency proceedings are those effects attributed to domestic proceedings of the same nature as that opened in the other Member State.
- 15.9 The abovementioned Elektrim case furthermore has cast doubt on whether Article 15 is limited to procedural issues or that it also renders applicable the *lex fori* on matters of validity of the contract or other substantive issues. INSOL Europe is of the opinion that this should not be the effect of Article 15 and has therefore inserted language in order to clarify the issue.

CHAPTER II

RECOGNITION OF INSOLVENCY PROCEEDINGS

Article 16

Principle

1. *Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.*
2. *Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.*

Article 17

Effects of recognition

1. *The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.*
2. *The effects of the proceedings referred to in Article 3(2) and 3(5) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.*

Commentary to the suggested amendment

An amendment is suggested to paragraph 2

Current version of Article 17(2):

The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

Commentary to the amended provision:

17.1 In Article 17(2) a reference to Article 3(5) has been added. Territorial proceedings opened in a Member State under Article 3(5) should be recognised and given effect to in the other Member States.

Article 18

Powers of the liquidator

1. *The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any other preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.*
2. *The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) or 3(5) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.*
3. *Although the nature and extent of the liquidator's powers will be determined by the law of the Member State of the opening of the proceedings, the manner in which these powers are exercised shall be in compliance with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes.*

Commentary to the suggested amendments to Article 18

Current version of Article 18:

1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.
2. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. He may also bring any action to set aside which is in the interests of the creditors.
3. In exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures or the right to rule on legal proceedings or disputes, but the courts of the Member State within the territory of which he wishes to take such coercive measures may allow him to do so.

Commentary to the amended provisions:

- 18.1 In Article 18(2) a reference to Article 3(5) has been added.
- 18.2 With regard to Article 18(3), it is provided that in exercising his powers, a liquidator is to comply with the law of the Member State in which he intends to take action. This could mean at least two different things. First, it could mean that the manner in which a liquidator is to exercise his powers is to be determined by local law, but on the other hand, the nature and extent of those powers will be determined by the law of the opening of the proceedings. Alternatively, it could mean that local law effectively determines the powers which a liquidator can exercise on the basis that if the exercise of a particular power is barred by local law, the liquidator will not be able to exercise that power in that State. INSOL Europe is of the opinion that the first interpretation should be preferred and suggests that this be clarified within the provisions of Article 18(3).

- 18.3 If by virtue of the law of the Member State in which the insolvency proceedings have been opened, the liquidator has coercive powers at his disposal, he can not exercise them unless he has received permission to that effect from the local court. If the liquidator obtains coercive powers under a judgment of the court of the Member State in which the insolvency proceedings have been opened, the enforcement proceedings under Article 25 have to be observed or, if the judgment does not fall under the scope of Article 25, the proceedings under Brussels Council Regulation 44/2001.

Article 19

Proof of the liquidator's appointment

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction. A translation into the official language or one of the official languages of the Member State within the territory of which he intends to act may be required. No legalisation or other similar formality shall be required.

Article 20

Return and imputation

1. *A creditor who, after the opening of the proceedings referred to in Article 3(1) 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, subject to Articles 5 and 7.*
2. *In order to ensure equal treatment of creditors a creditor who has, in the course of insolvency proceedings, 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.*
3. *If administrative expenses have been incurred during the course of insolvency proceedings and have been caused by the liquidator or a court, such costs will be borne in proportion to the proceeds which have been realised in each of the insolvency proceedings and which have to contribute to the payment of administrative expenses from those proceedings. To the extent pre-bankruptcy claims are upgraded by virtue of law to administrative expenses the ranking of such claims will be determined in accordance with Article 4(2)(i).*

Commentary to the suggested amendments to Article 20

- 20.1 INSOL Europe suggests an addition in the form of paragraph 3.
- 20.2 The Regulation does not deal with the treatment of administrative expenses which have been incurred in other insolvency proceedings. Some examples can be considered.
- (i) Main proceedings are opened in Member State A. The liquidator incurs expenses related to the sale of assets which are located in Member State B. Prior to the actual sale of the assets however, secondary proceedings are opened in Member State B. It seems desirable that the administrative expenses incurred by the liquidator in the main proceedings with respect to these assets are treated as administrative expenses in the secondary insolvency proceedings with the result that the creditor claiming such expenses has the highest priority both in the main proceedings and in these secondary proceedings.
 - (ii) In some Member States claims which arise out of agreements which have been entered into prior to the insolvency proceedings are deemed to constitute administrative expenses (e.g. wages as of the date of the opening of the proceedings). These are not expenses caused by the insolvency proceedings but actually pre-insolvency claims which have been upgraded. INSOL Europe is of the opinion that in the other insolvency proceedings the ranking of such claims should be determined by the law of those other insolvency proceedings.
- 20.3 A possibly more difficult issue is how administrative expenses which have been caused or incurred in one insolvency proceeding but which are not related to the sale of assets in secondary proceedings that were subsequently opened, should be dealt with in these secondary proceedings or indeed in other insolvency proceedings. Should they be left out, treated as ordinary claims or treated as administrative expenses? INSOL Europe suggests that these claims be treated as administrative expenses, because the costs concern the same debtor and because the purpose of the opening of secondary proceedings should not be to let ordinary creditors achieve a priority over the administrative expenses. Consequently INSOL Europe suggests that the third paragraph be added to Article 20. This provision creates a system of pro rata sharing. To the extent proceeds in insolvency proceedings are exempt from contributing to the payment of administrative expenses in those insolvency proceedings they also are exempt from contributing to the payment of administrative expenses in other insolvency proceedings.

Publication

1. *Without prejudice to paragraph (2) of this article, the liquidator may 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. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1), Article 3(2) or Article 3(5).*
2. *However, any Member State within the territory of which the debtor has an establishment shall publish notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened. The liquidator or any authority mentioned in the previous sentence shall provide the authorities of the Member State within the territory of which the debtor has an establishment with all information necessary to ensure such publication.*
3. *Irrespective of whether publication takes place by reason of Article 21(1) or (2) the liquidator or relevant authority referred to in these provisions shall take all necessary steps and measures to ensure publication in all other Member States in accordance with all requirements and other means which in his reasonable opinion are necessary’.*

Commentary to the suggested amendments to Article 21

In Article 21(1) a reference to Article 3(5) is added. Furthermore paragraph 2 is amended and an addition is suggested in the form of paragraph 3.

Current version of Article 21:

1. The liquidator may 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. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2).
2. However, any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) are opened shall take all necessary measures to ensure such publication.

⁵⁸ For literature on Article 21 see Virgos/Garcimartin, 2004, pp. 143-147.

Further comments:

- 21.1 Publication is neither mandatory nor necessary for the recognition of insolvency proceedings. Nor is publication necessary as to the fact of the appointment of the liquidator. However, as the Virgos/Schmit Report at paragraph 177 points out, it was thought appropriate that publication should be made in respect of the opening of insolvency proceedings.
- 21.2 However, in the event that insolvency proceedings have been opened in one Member State and have not been published in other Member States, creditors in such other Member States who are ignorant of the insolvency proceedings enjoy very little protection against the effects of the insolvency proceedings.
- 21.3 Despite many attempts from various quarters to establish a list or register, no single register has as yet been set up to record or list in any formal and accurate and comprehensive way all relevant insolvency proceedings across the European Union.
- 21.4 Article 21(1) shows that it is up to the liquidator to decide whether or not to request that a notice of any judgment commencing the proceedings as well as any notice of the decision to appoint him be published in another Member State. However, for the protection of creditors INSOL Europe has changed the provision in Article 21(2)⁵⁹ so that any Member State in which the debtor has an establishment should publish the notice of the judgment opening insolvency proceedings and where appropriate, the decision appointing the liquidator. Moreover, the liquidator shall provide the authorities of the Member State in which the debtor has an establishment with all information necessary to ensure such publication.
- 21.5 INSOL Europe suggests that it may be desirable to consider the introduction and implementation of a single register which is accessible from all Member States.

Article 22⁶⁰

Registration in a public register

- 1. *The liquidator may request that the judgment opening the proceedings referred to in Article 3(1) be registered in the land register, the trade register and any other public register kept in the other Member States.*
- 2. *However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to in Article 3(1) have been opened shall take all necessary measures to ensure such registration.*

⁵⁹ With also a very minor adjustment of Article 21 (1).

⁶⁰ For literature on Article 22 see Virgos/Garcimartin, 2004, pp. 143-147.

Article 23

Costs

The costs of the publication and registration provided for in Articles 21 and 22 shall be regarded as costs and expenses incurred in the proceedings.

Article 24

Honouring of an obligation to a debtor

1. *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 shall be deemed to have discharged it if he was unaware of the opening of proceedings.*
2. *Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof 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 proof to the contrary, to have been aware of the opening of Proceedings.*

Article 25⁶¹

Recognition and enforceability of other judgments

1. *Judgments handed down by a court whose judgment concerning the opening of proceedings is recognized in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognized with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Council Regulation (EC) n° 44/2001 of 22 December 2000 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters, as amended (“Brussels Council Regulation (EC) n° 44/2001”).*

The first subparagraph shall also apply to other judgments taken in connection with insolvency proceedings which are excluded from the scope of the Brussels Council Regulation (EC) n° 44/2001 of 22 December 2000 pursuant to Article 2 paragraph 2 sub (b) thereof, including judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

⁶¹ For literature on Article 25, see B. Wessels, *Recognition and enforceability of judgments under the EC Insolvency Regulation*, in: *Nederlands Tijdschrift voor Handelsrecht* 2008-5, Oktober 2008, pp. 191-200 (2008p); S. Bariatti, *Recent case law concerning jurisdiction and the recognition of judgments under the EIR*, *RabelsZ* BD. 73 (2009), pp. 644- 646.

2. *The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Brussels Council Regulation (EC) n° 44/2001 referred to in paragraph 1, provided that Brussels Council Regulation (EC) n° 44/2001 is applicable.*
3. *The Member States shall not be obliged to recognize or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.*

Commentary to the suggested amendments to Article 25

Current version of Article 25:

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall also be recognized with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, (with the exception of Article 34(2)) of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that Convention is applicable.
3. The Member States shall not be obliged to recognize or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Commentary to the amended provisions:

- 25.1 With respect to insolvency proceedings under Article 3(1) or 3(2) there should be no gap between the Insolvency Regulation and Regulation EC/44/2001. Therefore all judgments that are excluded from the scope of Regulation EC/44/2001 by virtue of Article 1 paragraph 2 sub (b) thereof which relate to insolvency proceedings under Article 3(1) and 3(2) of the Insolvency Regulation, should be susceptible to recognition and enforcement under Article 25.

- 25.2 INSOL Europe suggests that a sixth paragraph be added to Article 3 providing that the courts of the Member State where the relevant insolvency proceedings have been opened have jurisdiction to decide the issues referred to in Article 25.
- 25.3 Furthermore the reference to Articles of the Brussels Convention should be replaced by references to the relevant Articles of Regulation EC/44/2001, which regulation has replaced the Brussels Convention (see also ECJ, 10 September of 2009, *German Graphics*, C-292/08).

Article 26^{62 63}

Public policy

Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

⁶² Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

⁶³ For literature on Article 26, see S. Bariatti, Recent case law concerning jurisdiction and the recognition of judgments under the EIR, *RebelsZ BD*. 73 (2009), pp. 643 and 644.

CHAPTER III

SECONDARY INSOLVENCY PROCEEDINGS

Article 27

Opening of proceedings

If proceedings have been opened under Article 3(1) by a court of a Member State which are recognised in another Member State (main proceedings), then secondary proceedings can be opened in that other Member State provided (i) a court in that other Member State has jurisdiction pursuant to Article 3(2) and (ii) the opening of secondary proceedings is justified by the interests of one or more creditors or an adequate administration of the estate. The court of the other Member State shall not investigate whether the debtor is insolvent pursuant to the laws of the other Member State. The effects of the secondary proceedings shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Commentary to the suggested amendments to Article 27

Current version of Article 27:

The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.

Commentary to the amended provisions:

- 27.1 Secondary proceedings are generally regulated and governed by the relevant national law in accordance with Article 4. The current Article 27 modifies this principle to some degree by providing that in a case in which main proceedings have been commenced with regard to a debtor, which proceedings are recognised in another Member State, then secondary proceedings can be commenced without having to establish the insolvency of the debtor. INSOL

Europe understands this to mean that the court of the secondary proceedings shall not investigate whether the local test for the opening of the proceedings is passed (eg insolvency and/or liquidity squeeze in the near future etc.,).

- 27.2 In the context of many developed systems, this rule represents a fundamental change in approach, and indeed, a change in principle. In the light of the current Article, the local court's role, when it is requested to open secondary proceedings will be three-fold. First, it must establish whether the debtor has an establishment in the Member State of the local court, second it must consider whether main proceedings have been commenced in another Member State under Article 3(1) and third, it must also consider whether the requirements for opening insolvency proceedings under the law of the local court are met. In connection with the second requirement, the local court may well consider whether the court in the main proceedings based its judgment on the debtor having his or its centre of main interests within that court's jurisdiction and if it did, the local court may only refuse to recognise the main proceedings if there has been a violation of public policy under Article 26 (ECJ 2 May 2006, C-341/04 Eurofood, paragraph 67). As to the third requirement, the local court must assume the insolvency of the debtor. Thus under the current Article, when a request is made for the opening of secondary proceedings, the tests to be applied by the local court are rather strict and the local court has no discretionary power it can use to determine whether the secondary proceedings are warranted by virtue of the interests of the relevant stakeholders.
- 27.3 There has been an extensive debate amongst experts on the question whether the possibility of secondary proceedings is desirable and whether therefore this concept should be maintained. The special regimes with respect to credit institutions and insurance companies do not provide for secondary proceedings. Pursuant to the preamble (paragraph 19) the rationale for secondary proceedings is that they may serve to protect local interests and that there may be cases which are too complex to administer as a unit or where differences between the legal systems concerned constitute an impediment for the application of the insolvency law of the Member State of the centre of main interests. However, on the other hand, secondary proceedings may unnecessarily complicate the administration, because they cause coordination and boundary problems, and because they cause the costs to increase. Furthermore the rationale for the secondary proceedings does not justify the possible consequence that they may be applied indiscriminately. Therefore INSOL Europe suggests that the court which has jurisdiction under Article 3(2) has discretionary powers to appraise and assess the need for secondary proceedings in view of the interests of one or more creditors and an adequate administration of the estate.

Article 28

Applicable law

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 29

Right to request the opening of proceedings

The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings as well as the authorised representatives of the debtor in the main proceedings in accordance with the requirements of the law of the Member State of the secondary proceedings irrespective of whether any liquidator has been appointed in the main proceedings;*
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.*

Commentary to the suggested amendments to Article 29

Current version of Article 29:

The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

Commentary to the amended provisions:

29.1 This Article entitles a “liquidator”, as that term is defined in Article 2(b) in the main proceedings, to request the opening of the secondary proceedings whether or not the local law gives him that right. He will be able to do so by producing a certified copy of the original decision which appointed him, no doubt for all practical purposes with a translation into one of the official languages of the Member State in which the application is to be made. If INSOL Europe’s suggestion to include insolvency proceedings involving self administration by the debtor or its management is adopted, the term “liquidator” should include the debtor who self administers the estate.

29.2 In the current Article under (b) it is provided that any person empowered to request the opening of insolvency proceedings under the law of the Member State of the establishment is entitled to make such request. It is however unclear whether this means that the management of the company is still entitled to do so if the liquidator has taken over from the management. Therefore INSOL Europe suggests this issue be clarified by including the debtor or its management under (a).

Article 30

Advance payment of costs and expenses

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.

Article 31

Duty to cooperate and communicate information

1. *Subject to the rules restricting the communication of information, 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.*
2. *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.*
3. *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. The liquidator in the main proceedings shall have the right to be heard and seek any appropriate redress in the secondary proceedings.*

Commentary

- 31.1 INSOL Europe suggests the last sentence to paragraph 3 be added. The liquidator in the main proceedings should have a general right to intervene in the secondary proceedings and to seek decisions from the court.

Article 31a

Agreements

1. *If an agreement is exclusively or almost exclusively connected to the operation of the establishment in the Member State where the proceedings under Article 3(2) have been opened, any powers with respect to the continuation, performance and termination of the agreement will be vested in the liquidator of the secondary proceedings and the insolvency law of the Member State in which the secondary proceedings have been opened will be applicable to the continuation, performance and termination of the agreement.*
2. *The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the exercise of powers referred to in the preceding paragraph and the court which opened the secondary proceedings, may, at the request of the liquidator in the main proceedings prevent the liquidator in the secondary proceedings from exercising his powers or order him to exercise his powers in a way requested by the liquidator in the main proceedings.*

Commentary to the suggested Article 31a

31a.1 Article 31a is a new Article.

31a.2 Articles 3(2) and 27 provide that the effects of territorial/secondary proceedings shall be limited to the assets of the debtor which are situated within the territory of the Member State which opened the proceedings under Article 3(2). Article 32 however provides that any creditor may lodge his claim in the main proceedings and in any secondary proceedings and pursuant to Article 36 this applies to primary territorial proceedings as well. Thus proceedings under Article 3(2) are territorial with respect to the assets, but not with respect to the liabilities.

31a.3 The current Articles providing for the relationship between main and territorial proceedings do not however deal with the effect of the opening of territorial proceedings on agreements and to what extent agreements fall under the scope of such territorial proceedings. e.g. should the janitor of the establishment be dismissed by the liquidator of the main proceedings or by the liquidator of the territorial proceedings. Articles 4 through 15 do not provide an answer to this question because those Articles determine the applicable law but not the applicable proceedings. In some cases the applicable proceedings will not only determine who is the liquidator who has to deal with the agreement, but also the applicable law as to the termination or continuation of the agreement and therefore the rights and obligations of the parties to the agreement. The law of the Member State of the establishment might provide that the supplier of

electricity is under an obligation to continue supplying electricity to the company during insolvency proceedings whereas under the law of the Member State of the main proceedings such supplier may terminate the contract. In such a situation it may be attractive from the perspective of the liquidators if the electricity agreement is under the scope of the secondary proceedings. In order to determine whether the liquidator of the main proceedings or the liquidator of territorial proceedings can decide on termination, compulsory continuation or performance by the debtor under the contract, INSOL Europe suggests the insertion of Article 31a. Paragraph 1 determines which agreements fall under the scope of the territorial proceedings. A close connection is required. Paragraph 2 provides for the influence by the liquidator of the main proceedings on the exercise of powers vested in the liquidator of the territorial proceedings.

Article 32

Exercise of creditors' rights

1. *Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.*
2. *The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.*
3. *The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.*

Article 33

Stay of liquidation

1. *The court, which opened the secondary proceedings, shall stay the process of liquidation of the assets and/or the enterprise, in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. The stay of the process of liquidation of the enterprise is not limited to liquidation of assets, but can also include other activities of the liquidator of the secondary proceedings which may impair the viability of the enterprise such as the termination of vital contracts.*

2. *The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:*
- *at the request of the liquidator in the main proceedings;*
 - *of 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.*

Commentary to the suggested amendments to Article 33

Current version of Article 33:

1. The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.
2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:
 - at the request of the liquidator in the main proceedings;
 - of 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.

Commentary to the amended provisions:

- 33.1 Article 33 addresses the obligation borne by a court opening secondary proceedings to stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceeding. Currently it is not clear whether the term and expression “process of liquidation” is referring to the secondary proceedings, or only to the process regarding the liquidation of assets within the secondary proceedings. Since it refers to “process of liquidation” rather than to “secondary proceedings” the first interpretation is the more plausible. An Austrian decision on the subject dated 20 October 2005 3R 149/05, NZI 2006, Vol. 11 of the 600 also suggests that Article 33 only stays the process of liquidating assets and not the secondary proceedings as a

whole. Moreover pursuant to the suggested amendment to Article 3(3) secondary proceedings no longer need to be winding-up proceedings, but they can also be reorganisation proceedings. The rationale of the Article is that if it is in the interests of the mutual stakeholders that the enterprise of the company is preserved as a whole, the liquidator of the main proceedings should be able to prevent the liquidator of the secondary proceedings from causing any impairment to the business. INSOL Europe is however of the opinion that it should be explicitly provided that the Article does not only concern the liquidation of assets, but also other activities of the liquidator of the secondary proceedings which may undermine the integrity of the enterprise, such as termination of vital contracts. Hence the suggested amendment to the Article.

Article 34

Measures ending secondary insolvency proceedings

1. *Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself. Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.*
2. *Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or a discharge of debt, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.*
3. *During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or otherwise be approved.*
4. *Nothing in this Article precludes the main proceedings being terminated or otherwise concluded by means of a rescue plan or a composition or a comparable measure, thereby allowing any secondary proceedings to be ended or concluded in the manner addressed in paragraph 1 of this Article'.*

Commentary to the suggested amendments to Article 34

Paragraph 2 is amended and paragraph 4 is added to the Article.

Current version of Article 34:

1. Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself. Closure of a secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.
2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or the discharge of a debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.
3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent may propose measures laid down in paragraph 1 of the Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.

Commentary to the amendments:

- 34.1 This Article reflects the reality that a rescue plan or composition which closes or terminates secondary proceedings is a measure or mechanism which may affect the main proceedings. Article 34(1) therefore grants a specific power to the liquidator in the main proceedings in relation to the closure of the secondary proceedings.
- 34.2 A liquidator in the main proceedings is of course entitled on his own account to propose a rescue plan or a composition or some comparable measure otherwise available under the relevant national law to close the secondary proceedings provided he had the requisite *locus standi*.
- 34.3 If such a rescue plan, etc is in fact proposed by a third party, then Article 34(1) confirms that the liquidator in the main proceedings can veto such a measure unless he is of the view that the financial interest in the main proceedings will not be adversely affected by the proposed measure. This is a reflection of the primacy of the main proceedings.

- 34.4 If a main liquidator in the main proceedings has obtained a stay of the secondary proceedings pursuant to Article 34, then Article 34(3) provides that only the liquidator in the main proceedings, or the debtor with the liquidator's consent, may propose the measures set out in sub-Article (1).
- 34.5 Article 3(2) proceedings cannot restrict creditors' rights in relation to assets in other Member States except with regard to "those creditors, who have given their consent": see Article 17(2). Similarly, rescue or composition measures which relate to a secondary proceeding cannot restrict creditors' rights with respect to such assets without the consent of those creditors: see Article 34(2). The current language of Article 34(2) however refers to the assets themselves and requires consent of all the creditors concerned. INSOL Europe is of the view that the difference in this respect between Article 17(2) and Article 34(2) is not warranted.
- 34.6 INSOL Europe therefore suggests that the same language be used in Article 34(2) as is used in Article 17(2) to avoid any possible lack of clarity.
- 34.7 English company voluntary arrangements and indeed voluntary arrangements as a whole, ie both CVAs and IVAs, would appear to fit the description "rescue plan – a composition or a comparable measure". These are proceedings which are dealt with in terms as "voluntary arrangements under insolvency legislation" in Annex A. Pursuant to the amendment to Article 3(3) suggested by INSOL Europe, secondary proceedings can be reorganisation proceedings and CVAs and IVAs, which are listed in Annex A, can also be used in secondary proceedings.

Article 35

Assets remaining in the secondary proceedings

If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings.

Article 36

Subsequent opening of the main proceedings

Where the proceedings referred to in Article 3(1) are opened following the opening of the proceedings referred to in Article 3(2) in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.

Conversion of earlier proceedings

The liquidator in the main proceedings has the same rights as the liquidator of the secondary proceedings to request conversion of one type of proceedings into another type of proceedings. The court with jurisdiction under Article 3(2) shall have jurisdiction with respect to the request for conversion.

Current version of Article 37:

The liquidator in the main proceedings may request that proceedings listed in Annex A⁶⁵ opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings. The court with jurisdiction under Article 3(2) shall order conversion into one of the proceedings listed in Annex B.

Commentary to the amended provisions:

- 37.1 Article 3(3) currently provides that if secondary proceedings are opened, they should be winding-up proceedings. Territorial proceedings that are opened prior to the opening of the main proceedings (under Article 3(2) in conjunction with Article 3(4)) can be both winding-up proceedings and reorganisation proceedings, but if subsequently main proceedings are opened, the liquidator of the main proceedings may ask the court in the territorial proceedings to convert the territorial reorganisation proceedings into territorial winding-up proceedings. This means that if it is desirable that the territorial proceedings – if they are to be opened – are reorganisation proceedings, they should be opened prior to the main proceedings but this is not always possible nor is it always desirable that secondary proceedings are opened at all. There is no compelling reason why secondary proceedings cannot be reorganisation proceedings. INSOL Europe suggests that the last sentence of **Article 3(3)**, reading “*These latter proceedings must be winding-up proceedings*” be deleted and that the liquidator of the main proceedings has the same conversion rights with respect to the secondary proceedings as the liquidator of the secondary proceedings. Thus if the liquidator of the secondary proceedings can request the court to convert winding-up proceedings into reorganisation proceedings or vice versa, the liquidator of the main proceedings should have the same right.

⁶⁴ Note the Declaration by Portugal concerning the application of Articles 26 and 37 (OJ C 183, 30.6.2000, p. 1).

⁶⁵ INSOL Europe proposes to delete the word previously.

Article 38

Preservation measures

Where the court of a Member State which has jurisdiction pursuant to Article 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.

CHAPTER IV

PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS

Article 39

Right to lodge claims

Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.

Article 40

Duty to inform creditors

- 1. As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.*
- 2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.*

Article 41

Content of the lodgement of a claim

A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.

Article 42

Languages

1. *The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim. Time limits to be observed' in all the official languages of the institutions of the European Union.*
2. *Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading 'Lodgement of claim' in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.*

CHAPTER V

INSOLVENCY OF GROUPS OF COMPANIES⁶⁶

Groups of Companies

- V.1. The Regulation applies only to single companies. There are no provisions dealing with the insolvencies of groups of companies. Since most large enterprises are organised as groups of companies the absence of such rules can cause considerable difficulties. In particular, problems arise when the assets owned by separate companies or the activities conducted in separate companies are connected in such a way that splitting up the sales process would cause a considerable loss of value to the assets. This applies for example with respect to groups that own assets in the research and development sector. Often, a patent in itself is not worth that much, but may have a significantly higher value in connection with other patents or licences owned elsewhere in the group. Here the opening of separate insolvency proceedings with respect to different companies and the appointment of separate trustees for each one may lead to the disintegration of the business, to the detriment of the creditors of all the companies.
- V.2. It should be noted here that the concept of group insolvencies does not necessarily entail the consequence that all the companies of the group be “thrown” together into one estate and that the assets as well as the liabilities be compounded. On the contrary, in those legal systems where such a doctrine, normally referred to as the doctrine of substantive consolidation, has been developed (such as the United States of America), substantive consolidation

⁶⁶ On the insolvency of groups of companies, see the literature mentioned in footnote 4, and Mevorach, I., *Appropriate treatment of corporate groups in insolvency: a universal view*, EBOR 2007, 8(2), 179-194, *Centralising insolvencies of pan-European corporate groups*, JBL 2006, Aug, 468-486, *Centralising Insolvencies of Pan-European Corporate Groups: a Creditor's Dream or Nightmare*, in: Journal of Business Law 2006, 468ff, *Determining the proper venue for multinational corporate groups' insolvency*, Paper presented to Insol International Academics, Cape Town, South-Africa, March 18, 2007, *Appropriate Treatment of Corporate Groups in Insolvency: A Universal View*, in: 8 European Business Organisation Law Review 2007, 179ff and *Insolvency Within Multinational Enterprise Groups*, Oxford University Press 2009; N.W. Tollenaar, *Dealing with the Insolvency of Multinational Groups under the European Insolvency Regulation*, *Tijdschrift voor Insolventierecht* 2010, p. 94ff, and: *Proposal for reform: Improving the Ability to rescue Multinational Enterprises under the Insolvency Regulation*, *International Insolvency Law Review* 3/2011, 252ff; B. Wessels, *Multinational Groups of Companies under the EC Insolvency Regulation: where do we stand?*, *Ondernemingsrecht* 2009-5, pp. 243-249; Rainey, K., *The European Insolvency regulation and the treatment of group companies: an analysis*, *Int. C.R.* 2006, 3(6), 322-328.

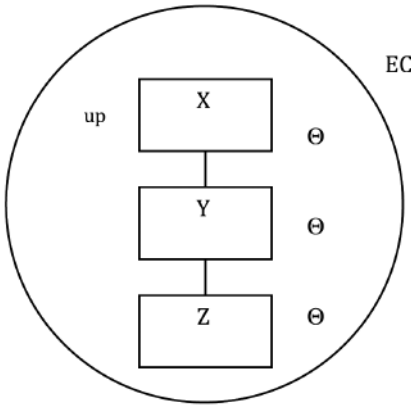
will be the rare exception. In fact there is only a necessity to apply substantive consolidation in those cases where it is not possible to determine which assets and/or liabilities and/or contracts belong to which company. However in the vast majority of cases involving the insolvency of groups it is important that some kind of coordination of the insolvency proceedings take place without the group entities losing their separate identity. The point of departure should therefore be that all group companies are dealt with as separate entities with separate assets and liabilities. Suggestions with regard to the rare cases of substantive consolidation are addressed further below.

- V.3. One possible solution for the coordination problem might be to include a provision in the Regulation stating that, with respect to groups of companies, the centre of main interests of the ultimate European parent company, is deemed to be the centre of main interests of each of the subsidiaries. This solution would have several advantages. First, in the event of group insolvency, the court of the centre of main interests would be able to safeguard the coordination of the main insolvency proceedings with respect to all the group companies and secondly the latter would in turn safeguard the application of the Regulation whenever the ultimate group centre of main interests is located outside the European Union. However, there are also some drawbacks. First of all, for the creditors of a subsidiary, it would be more difficult to ascertain the subsidiary's centre of main interests. Contrary to the present situation, the mere location of the subsidiary's registered office would no longer suffice to establish with a fair degree of certainty the location of its centre of main interests, and hence the insolvency regime applicable to main proceedings. In order to determine the centre of main interests, the creditor would have to investigate the group structure. Secondly, the subsidiary's centre of main interests would have to be deemed to be located at the group centre, regardless of whether the parent company or other group companies enter into insolvency proceedings as well. This means that a "foreign" insolvency regime would apply, even if the subsidiary was the only group company entering insolvency proceedings. The alternative approach, whereby the centre of main interests is only deemed to be located at the group's headquarters if other group companies also enter insolvency proceedings, is unattractive for various reasons. The most important would be that it would be impossible to determine beforehand which insolvency regime would apply to main proceedings with respect to the subsidiary in question. Thirdly, and assuming that the criterion for being considered a "subsidiary" is e.g. ownership by the parent of more than 50% of the shares, it would be very easy to shift the deemed centre of main interests by transferring the subsidiary's shares to another group of companies. Finally, it is to be doubted whether this type of construction or approach would actually result in the main insolvency proceedings having a full impact on the

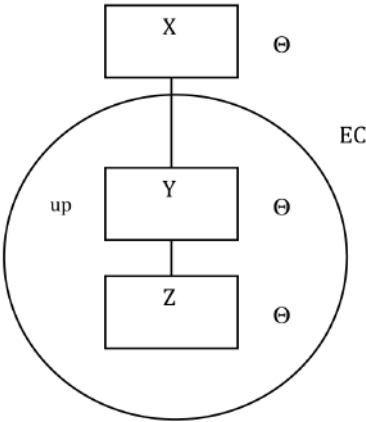
subsidiary. Usually the subsidiary will still have an establishment in its country of incorporation and all (or virtually all) the assets will be located in that country. The reason for this is that where an international enterprise is structured as a group of companies rather than as one company with branches, a subsidiary in a particular country will often limit its activities, or at least its assets, to that country alone. The opening of main proceedings, with respect to a subsidiary, in the country in which the group's headquarters are located, will therefore often be followed by the opening of secondary proceedings in the Member State in which the subsidiary is incorporated. Such secondary proceedings will then encompass virtually the whole of that subsidiary's estate. In such a case, the main proceedings will, with respect to the subsidiary, be largely limited to (i) coordination activities on the part of the liquidator (see Articles 29 et seq. of the Regulation) and (ii) certain extraterritorial effects which the secondary proceedings at the establishment in the state of incorporation cannot bring about.

- V.4. In view of the drawbacks of the above solution (i.e. shifting the subsidiary's centre of main interests), INSOL Europe suggests another, less drastic solution. In essence, its proposal is that if a subsidiary and its ultimate parent company both enter into insolvency proceedings, the liquidator of the parent company be given powers similar to those that the liquidator in main proceedings has vis-à-vis secondary proceedings. The starting point should therefore be the application, in a more or less analogous fashion, of the provisions of Articles 27 et seq. of the Regulation. Below, first some general principles will be discussed and then the analogous application of some of the Regulation's provisions will be addressed.
- V.5. Since the coordination function should be attributed to one of the main proceedings of one of the group companies, the question arises as to how these proceedings should be defined. INSOL Europe suggests that the group main proceedings should constitute the main insolvency proceedings of the ultimate parent with its centre of main interests in the European Union that is in insolvency proceedings. A few examples may illustrate this:

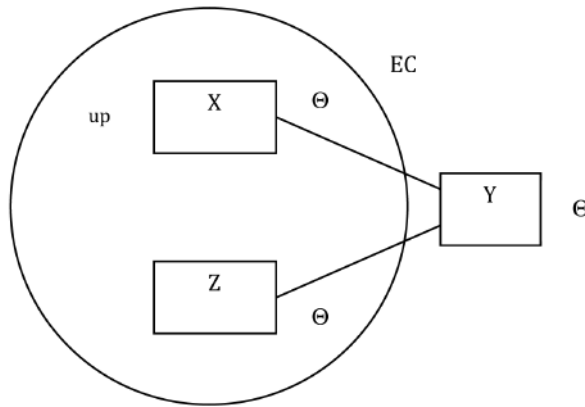
V.6. X is the parent company of Y and Y is the parent company of Z. X, Y and Z have their centre of main interests within the European Union. All three companies open main proceedings. X is deemed the ultimate parent company (“up”) and X’s main proceedings are deemed the group main proceedings. See the figure below. The culturally neutral symbol Θ indicates that the company has entered insolvency proceedings.



V.7. If X does not have its centre of main interests within the European Union but Y does, Y’s main proceedings are deemed to be the group main proceedings.



- V.8. If Y does not have its centre of main interests in the European Union, but X and Z do, X's main proceedings are deemed the group main proceedings.



- V.9. As for the definition of parent company, INSOL Europe suggests that this is (i) the company which has a majority of the shareholders' or members' voting rights in the other company; if no company meets such definition it is (ii) the company that has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of the other company and is at the same time a shareholder in or member of that other company, respectively (iii) the company that has the right to exercise a dominant influence over another company of which it is a shareholder or member, pursuant to a contract entered into with that other company or to a provision in its memorandum or Articles of association. This definition is derived from the definition of parent company in the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts. The definitions of "group of companies", "parent company", "subsidiary", "ultimate parent company" and group main proceedings" are included in Article 2.
- V.10. As mentioned above, it may be necessary substantially to consolidate two or more insolvent companies in the cases where it is not possible to determine which assets and/or liabilities and/or contracts belong to which company. Where therefore the option of substantive consolidation needs to be provided for in the Insolvency Regulation, the first questions to be answered are: (i) which court will supervise the consolidated proceedings? and (ii) which court will decide on the substantive consolidation? As to the first question, INSOL

Europe suggests that the court supervising the parent's main proceedings is the court that should supervise the consolidated proceedings. Since, under the proposal, the subsidiary's main proceedings will have to cease to continue as such as a result of the consolidation, INSOL Europe suggests that the court supervising these proceedings should decide on the consolidation.

- V.11. The centrepiece of the group provisions should be the possibility of proposing a plan covering two or more group companies. In essence it should provide for a restructuring mechanism which on the one hand ascertains and determines that each creditor will at least receive value which equals a distribution in case of the winding-up of its debtor, and on the other hand procures that conglomerates are saved and do not fall victim to a lack of coordination in international settings. For a further explanation reference is made to the commentary on Chapter VI.

Article 43

Opening of group main proceedings

The court opening proceedings under Article 3(1) with respect to an ultimate parent company may in its opening judgment or in a later judgment declare that such proceedings are group main proceedings. If as a result of the opening of these main proceedings another company no longer meets the requirements for an ultimate parent company and if with respect to this other company group main proceedings had been opened the court opening the new group main proceedings shall convert the earlier group main proceedings into proceedings under Article 3(1) which are no longer group main proceedings. Any judgment under this Article shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of group main proceedings and cannot be challenged in other Member States.

Article 44

Powers of the liquidator of the group main proceedings

1. *The liquidator of the group main proceedings has with respect of insolvency proceedings involving subsidiaries the powers of a liquidator in main proceedings as provided in Articles 29 under (a), 31, 31a, 33, 34 and 37.*
2. *The liquidator in the main proceedings of a subsidiary no longer has the powers and rights under Articles 29 (a), 31(3), 31a, 32(3), 33, 34 and 37.*
3. *The information to be provided by the liquidator of the group main proceedings to liquidators of the subsidiaries is limited to information which is relevant to the subsidiary's insolvency proceedings. There is no obligation on the part of the liquidator of the group main proceedings to inform the subsidiary's liquidator of the progress made in lodging and verifying claims at parent level,*

except where the ultimate parent company and the subsidiary are liable for the same debt.

4. *The obligations under Article 31(2) apply to all the liquidators in the insolvency proceedings of the group companies.*
5. *The liquidator of the group main proceedings can make a request under Article 33 also with respect to main proceedings of a subsidiary. A request by the liquidator of the group main proceedings under Article 33 with respect to a subsidiary should be rejected only if granting it would manifestly be against the interests of the group's creditors as a whole or of the creditors of the subsidiary.*

Commentary to Article 44

- 44.1 This Article essentially applies the rules on coordination provided for by Articles 29 up to and including 38 to the relation between the liquidator of the group main proceedings and the group or territorial proceedings of the subsidiaries. However not all rules should be applied or applied in exactly the same way. The reason for this is that main and secondary proceedings with respect to the same company essentially concern the same entity with the same creditors, whereas this of course is not the case with regard to the relation between parent and subsidiary. For example Article 32 provides inter alia that the liquidator of the main proceedings can lodge in secondary proceedings claims that have already been filed in the main proceedings. Since there is no equivalent identity of creditors between the parent and the subsidiary, there is no reason to apply the same rule here. The attribution of coordination powers to the liquidator of the group main proceedings should entail the consequence that some of these powers are no longer at the disposal of the liquidator of the main proceedings of a subsidiary (vis-à-vis the secondary proceedings of the subsidiary).

Article 45

Rescue plans

1. *Where the law applicable to insolvency proceedings with respect to a subsidiary allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator of the group main proceedings shall be empowered to propose such a measure or measures himself. Closure of the insolvency proceedings by a measure referred to in the preceding sentence shall not become final without the consent of the liquidator in the group main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors of group companies which have entered insolvency proceedings are not unduly impaired.*

2. *During a stay of the process of liquidation ordered pursuant to Article 33 in conjunction with 44, only the liquidator of the group main proceedings or the debtor of those proceedings with the consent of the liquidator of the group main proceedings, may propose measures laid down in paragraph 1 first sentence of this Article in the insolvency proceedings of the subsidiary.*
3. *If a European Rescue Plan has been submitted in accordance with Article 47 or such European Rescue Plan is being prepared by the liquidator of the group main proceedings, the court which opened insolvency proceedings with respect to a subsidiary will, at the request of the liquidator of the group main proceedings, stay any process with respect to a rescue plan, a composition or a comparable measure.*

Commentary to Article 45

- 45.1 This Article concerns regular rescue plans under the laws of the insolvency proceedings of the subsidiary (main or secondary). It is comparable to Article 34 except that it may also apply to main proceedings of the subsidiary. Such plans with respect to subsidiaries are to be distinguished from the European Rescue Plan provided for in the suggested Chapter VI which concerns multiple companies. The main rules with respect to such European Rescue Plan are harmonised in Chapter VI. Paragraph 3 of this Article provides for a stay of proceedings with respect to such “local” plan if a European Rescue Plan is being prepared.

Article 46

Substantive consolidation

1. *In the event that the assets and/or liabilities and or agreements of one or more group companies cannot be attributed to one company and consequently the insolvency proceedings with respect to these companies cannot be conducted in a meaningful way, each creditor of such company or companies, each liquidator of insolvency proceedings of such companies and the liquidator of the group main insolvency proceedings may request the consolidation of the insolvency proceedings.*
2. *If the consolidation is allowed and there is a parent company of the other company(ies), the main proceedings of such parent company will be the surviving main proceedings. If no such parent company can be identified, the main proceedings of the group company to which the greatest value can be attributed will be the surviving main proceedings. The debtor of the surviving main proceedings is the surviving company.*

3. *With respect to each company of which the main proceedings will not be the surviving main proceedings, the request for consolidation has to be made to the court that opened its main proceedings or, if no main proceedings have been opened, to the court that opened proceedings under Article 3(2) or 3(5).*
4. *If the consolidation is allowed, any insolvency proceedings with respect to the companies referred to in paragraph 3 which have been opened in the same Member State where the surviving main proceedings have been opened will be terminated. Any main proceedings with respect to such companies which have been opened in another Member State than the Member State of the surviving main proceedings will be converted into secondary proceedings. If the consolidation is allowed and in another Member State than the Member State of the surviving main proceedings there is more than one remaining secondary or territorial proceedings, these proceedings will be merged by the court in that Member State.*
5. *For the purpose of the insolvency proceedings all group companies included in the consolidation will be treated as one single company. However the courts in the Member State of the surviving main proceedings may take measures in order to compensate for any impairment of creditors or groups of creditors which result from the consolidation.*

Commentary to Article 46

- 46.1 In cases where the estates of two or more companies cannot be disentangled in any way it will invariably be unavoidable to treat these companies as one legal entity. This solution is called substantive consolidation. Any other solution would be entirely arbitrary. Substantive consolidation should be strictly limited to situations where disentanglement is impossible and should not be applied in cases where economic benefits can be derived from treating companies as one legal entity, for example because disentanglement is costly. In such cases solutions should be strived for through e.g. compromises between the liquidators concerned.
- 46.2 In a domestic context invariably strict criteria are used in order to decide whether substantive consolidation should be applied. However in some countries substantive consolidation is allowed not only when it is impossible to disentangle the estates, but also when the costs of separate treatment make substantive consolidation more attractive than separate treatment.
- 46.3 In an international context substantive consolidation has additional dimensions, because if two companies are consolidated, this means that there should be only one supervising court and consequently the courts of at least

one Member State lose their supervisory role to the courts of the Member State supervising the consolidated insolvency proceedings. Furthermore the law applicable pursuant to Article 4 changes as far as the company of which the insolvency proceedings are terminated is concerned. For these reasons INSOL Europe suggests that:

- (i) the possibility for substantive consolidation to cases where the estate cannot be disentangled be limited; and
- (ii) it be the role of the court of the Member State which may lose its supervisory role to decide on the request for substantive consolidation.

46.4 If one or more companies which are included in the substantive consolidation are jointly and severally liable for the same debt or if intercompany receivables have been pledged to an outside creditor, the creditor concerned may be prejudiced by the substantive consolidation. In order to avert this impairment paragraph 5 provides for powers of the supervisory court to compensate for this impairment.

CHAPTER VI

THE EUROPEAN RESCUE PLAN

The European Rescue Plan

- VI.1. As has been observed in the commentary on the suggested Chapter V, the centrepiece of the group provisions should be the possibility of proposing a plan covering the parent company and one or more subsidiaries. In this Chapter provisions for a European Rescue Plan have been included. The provisions on the European Rescue Plan do not replace any legislation of the Member States with regard to compositions and rescue plans, but introduce an additional instrument for the adoption of cross border rescue plans involving groups of companies. INSOL Europe is of the opinion that such an instrument will considerably further the proper functioning of the internal market, because it will provide a means for restructuring conglomerates which are active on several locations in the European Union.
- VI.2. The Chapter on the European Rescue Plan constitutes a set of substantive rules on the adoption of such plan which therefore apply regardless the Member State where the proceedings are conducted. INSOL Europe is of the opinion that it is important that these should be rules of community law.
- VI.3. The plan takes into account the fact that the creditors of the various subsidiaries in question and the parent company's creditors may occupy very different positions. Moreover, it should not be possible for the creditors of one subsidiary to sink the whole plan by voting against it, if the benefits they are to receive under the plan (i) are greater than those they would have received if the subsidiary was completely wound up and (ii) are fair in relation to the benefits to be received by those creditors of the other group companies involved in the plan, taking into account the relative strength of their respective positions. INSOL Europe is of the view that the following principles should apply to such a plan:
- The proceedings with regard to the plan should take place in the court which opened the proceedings with respect to the ultimate parent company.
 - The plan may be proposed by either the ultimate parent company or its liquidator.

- The creditors are divided into classes. Creditors of different companies should be placed in different classes. Creditors with different ranking in respect of the assets of a particular company should also be put in different classes.
- The creditors vote by class, whereby each class determines whether it accepts the plan. Acceptance requires a qualified majority of two thirds of the amount of the creditors voting in the relevant class and a regular majority in numbers.
- The court may apply “cram-down” provisions if one or more classes have rejected the plan, provided the benefits which the creditors of the class(es) that rejected the plan are to receive under it (a) are more than what they would have received if the company in question was completely wound up and (b) the rejection is not in good faith and creditors junior to the rejecting class receive no benefits under the Plan.
- If the plan has been accepted, the court confirms the plan unless a creditor or shareholder objects to it and (i) the European Rescue Plan unfairly favours one or more creditors or shareholders or (ii) a creditor or shareholder who is junior to a creditor who does not receive any value or to a shareholder objecting to the European Rescue Plan receives any value under the European Rescue Plan or (iii) the creditor or shareholder objecting to the European Rescue Plan receives less value than he would receive if the European Rescue Plan was not adopted or (iv) there is insufficient certainty that the Plan can and will be implemented.

VI.4. The provisions of the European Rescue Plan have been inspired by the U.S. Chapter 11 regime as have been several modern reorganisation plan regimes in Member States. However, there are important differences. e.g. the classification of claims is not part of the plan itself, but is decided upon by the court separately and, in the event that individual creditors oppose the plan, cram down possibilities are more restricted than under Chapter 11. Furthermore the Chapter 11 regime does principally concern single companies whereas the European Rescue Plan applies to groups of companies only.

Article 47

Filing of a European Rescue Plan

1. *The liquidator of the group main proceedings may submit a draft European Rescue Plan (a “**Plan**”) with respect to two or more group companies to the courts of the Member State where proceedings have been opened with respect to the ultimate parent company under Article 3 paragraph 1.*

2. *The ultimate parent company may also submit a draft Plan jointly with its request to open insolvency proceedings under Article 3 paragraph 1 or pending opening proceedings.*
3. *The draft Plan shall be accompanied by*
 - (i) *a draft schedule placing all known claims in classes (the “**class schedule**”);*
 - (ii) *a draft memorandum to the creditors of the group companies included in the Plan and to the shareholders of these group companies who are not group companies included in the Plan (the “**information memorandum**”).*

Commentary to Article 47:

- 47.1 The right to file a European Rescue Plan is a prerogative of the liquidator of the ultimate parent company and of the ultimate parent company itself. In the latter case the ultimate parent company will be represented by its legal representatives, usually the management. The plan can concern one or more companies belonging to the group in respect of which insolvency proceedings have been opened (*cf.* the definition of group companies in Article 2(k)); it may also include the ultimate parent company itself, but this is not necessarily the case. In larger groups there may be several options as to which companies are to be included in the European Rescue Plan and which are not. This is also the reason why only the ultimate parent company and its liquidator should have the right to file. Another solution would complicate matters to a degree which might impair an adequate solution. Companies which are not subject to insolvency proceedings may be involved in the Plan, but their creditors cannot be impaired as a result of the Plan.

Article 48

The Class Schedule

The draft class schedule may place a claim in a particular class only if such claim is similar to the other claims of such class and provided that all claims in one class are claims against the same debtor. If several group companies included in the Plan are liable for the same debt the claim will be placed in one class for each of the group companies.

Commentary to Article 48:

- 48.1 Since all group companies involved in the European Rescue Plan are separate entities and the European Rescue Plan must meet the requirements for each of the companies, the creditors of each of the companies fall in different classes.

Furthermore preferred creditors, secured creditors and ordinary creditors should be placed in different classes, but there may be reasons to make further distinctions.

Article 49

The Information Memorandum

The information memorandum shall contain information of a kind and in sufficient detail as far as is reasonably practicable that would enable each creditor of a group company included in the Plan as well as the shareholders of each group company included in the Plan, to make an informed judgment about the Plan and the class schedule.

Commentary to Article 49:

49.1 The plan proponent is under the duty adequately to inform the creditors and shareholders of the companies involved of the consequences of the plan and about the way in which the class schedule has been drafted. As is provided in Article 51 the court needs to approve of the information memorandum, which is subsequently sent to the creditors and shareholders.

Article 50

Contents of the Plan

The Plan may contain provisions which

- (a) modify, cancel or decrease claims against all or any of the group companies included in the Plan;*
- (b) modify, cancel or decrease shares held in the group companies included in the Plan and modify or cancel rights held in such shares;*
- (c) modify or cancel security rights with respect to assets of the group companies included in the Plan;*
- (d) terminate agreements or transfer of enterprises or parts of enterprises belonging to group companies included in the Plan or sell all or part of their assets;*
- (e) constitute or provide for any other legal act on behalf of the group companies included in the Plan.*

Commentary to Article 50:

50.1 The contents of the European Rescue Plan are free and the proponent has a large degree of freedom to structure the plan as he may wish. Thus the

provisions on the European Rescue Plan provide as much flexibility as possible. The plan may modify or decrease claims, provide for debt for equity swaps, provide for internal transfers within the group etcetera. It can however not modify the rights of creditors against third parties.

Article 51

Approval of the information memorandum and setting of a date for the acceptance hearing

Provided that the court deems the information memorandum adequate it sets a date for a hearing of the shareholders and creditors of the group companies included in the Plan (the “acceptance hearing”). If it finds that the information memorandum is not adequate it will instruct the proponent of the Plan how to improve it or reject the request for proceedings on the Plan. The court sets a time at which the draft Plan, the approved information memorandum and the class schedule must be sent to the creditors and the shareholders of each of the group companies included in the Plan.

Article 52

Convocation and order of acceptance hearing

The law of the member state where the group main proceedings have been opened applies to the convocation of the creditors and shareholders, the filing of claims and the order of the acceptance hearing.

Article 53

Recognition of creditors and determination of class schedule

At the acceptance hearing, each of the group companies included in the Plan, each of the liquidators of such group companies, the ultimate parent, the liquidator of the parent company, each shareholder of a group company included in the Plan who is not itself a group company and each of the creditors of each group company may dispute each claim. The court decides if and to what amount a disputed creditor is allowed to vote on the Plan. The court furthermore establishes the class schedule after hearing the creditors and the shareholders.

Commentary to Article 53:

- 53.1 This Article concerns the preparatory decisions that need to be taken prior to the actual voting on the plan. These decisions are taken by the court after both the creditors and the shareholders have had the chance to express their views. The court determines which creditors can be recognised and for what amount; the court also decides on the classification of the creditors.

Article 54

Acceptance of the Plan

1. *At the acceptance hearing the creditors of the group companies included in the Plan vote on the Plan. The proponent of the Plan may adapt the Plan until the voting commences.*
2. *Classes of creditors who are not impaired under the Plan do not vote on the Plan.*
3. *Classes of creditors who do not receive or retain any value under the Plan do not vote on the Plan.*
4. *Classes of creditors who do receive or retain value under the Plan shall vote and shall have accepted the Plan if creditors vote in favour of the Plan who represent more than two thirds of the amount of the claims voting in such class and constitute the majority of the creditors voting in such class.*
5. *If a class of creditors who do receive or retain value under the Plan does not accept the Plan, the court may determine that such class of creditors is deemed to have accepted the Plan nevertheless provided (i) that the rejection is not in good faith and (ii) that the creditors of such class do not receive less than they would receive if no Plan was adopted and (iii) that no creditor that is junior to such class of creditors with respect to the relevant company and no shareholder of that company receives or retains any value under the Plan.*
6. *If one class of creditors as defined in paragraph 4 has rejected the Plan and is not deemed to have accepted the Plan under paragraph 5, the court establishes that the Plan has been rejected.*

Commentary to Article 54:

- 54.1 This Article concerns the voting on the European Rescue Plan. Only the creditors vote; the shareholders do not have such right (and they are therefore not included in the class schedule). Shareholders can be shareholders of the ultimate parent company, but they can also be minority shareholders of subsidiaries included in the plan. However, the shareholders can oppose the confirmation of the plan. If one or more creditors or shareholders are unfairly favoured over the opposing shareholders the court cannot confirm the plan (Article 55(3)(a)). This rule protects the minority shareholders of subsidiaries.
- 54.2 Only those creditors who receive or retain value under the plan are entitled to vote. Creditors who receive full payment have no interest in voting, creditors who receive nothing are assumed to oppose the plan. The latter can oppose the confirmation of the plan under Article 55 as can the minority shareholders.

When upon objections by such creditor or shareholder deciding on the confirmation the court will strictly apply an absolute priority rule (Article 55 (3)(b)) and will strictly apply the rule that the objecting creditor should not have received anything in case of winding-up of the company of which he is a creditor.

- 54.3 Paragraph 4 determines the qualified majorities needed in each class. Paragraph 5 contains a cram down provision in case classes of creditors vote against the European Rescue Plan and do not act in good faith. Here again one requirement is that the class of creditors that voted against the Plan can only be overruled if it receives at least the same under the Plan as it would receive without the Plan and another requirement is that creditors or shareholders junior to that class receive no value.

Article 55

Confirmation

1. *If the Plan is not rejected the court will confirm the Plan unless (i) a creditor of one of the group companies included in the Plan or (ii) a shareholder who is not a group company included in the Plan or (iii) a liquidator of the ultimate parent or one of the group companies included in the Plan, commences objection proceedings within a period of time determined by the law of the member state of the group main proceedings.*
2. *If the Plan is not rejected and objection proceedings have been opened the court will hold a hearing at which the creditors, shareholders and liquidators of the group companies included in the Plan and of the ultimate parent company will be heard.*
3. *The court will confirm the Plan unless objection proceedings have been opened and*
 - (a) *the Plan unfairly favours one or more creditors or shareholders; or*
 - (b) *a creditor or shareholder who in relation to the relevant company is junior to a creditor as referred to in Article 54 paragraph 3 objecting to the Plan or to an impaired shareholder objecting to the Plan receives any value under the Plan; or*
 - (c) *the creditor or shareholder objecting to the Plan receives less value than he would receive if the Plan was not adopted; or*
 - (d) *there is insufficient certainty that the Plan can and will be implemented.*

Commentary to Article 55:

55.1 After the plan has been accepted the court decides on confirmation of the plan. It will confirm the plan unless it is objected to by a creditor or shareholder. In that case the court will hold a hearing. Paragraph 3 sets out the test to be applied by the court.

Article 56

Appeal proceedings

The law of the Member State of the court which decides on the confirmation determines whether the judgment in which confirmation is rejected or granted is subject to appeal and the same law applies to such appeal.

Article 57

Default under the Plan

The law of the Member State of the court which decides on the confirmation determines the consequences of any failure to observe the provisions of the Plan.

CHAPTER VII

PROVISIONS ON INSOLVENCY PROCEEDINGS OPENED OUTSIDE THE EUROPEAN UNION

Commentary on Chapter VII

- VII.1. As to the recognition of insolvency proceedings opened outside the European Union the UNCITRAL Model Law provides a system which is supported by the global community which created it. Contrary to the Regulation, it is not based on a similar principle as the community trust and therefore the effect of foreign proceedings within the receiving state is much less pronounced and there are more elaborate reviews than under the Regulation. For example, there is no automatic recognition of the powers of the foreign liquidator, but there is a two tier review system. First the court of the receiving state reviews whether the foreign insolvency proceedings meet the standards of recognition and whether the centre of main interests or establishment as the case may be, is indeed located in the country where the proceedings have been opened. However if recognition of the foreign proceedings is obtained this does not entail the consequence that the foreign liquidator can exercise all his powers in the receiving state. If for example he desires to sell assets of the debtor which are located in the receiving state he will need to obtain relief from the courts of the receiving state and those courts will investigate whether the interests of the creditors and other interested parties such as the debtor are adequately protected.
- VII.2. INSOL Europe is of the opinion that it is desirable that these provisions be incorporated within the Regulation. A unified approach to insolvency proceedings opened outside the European Union will enhance the proper functioning of the internal market and support a unified external trade policy.
- VII.3. There has been extensive discussion in the drafting committee as to whether the basis in the TFEU is solid enough to build a regime for recognition of non-EU insolvency proceedings as provided for in Chapter VII. Our conclusion is that that basis is sufficient as provided by Articles 3(1)(e), 4(2)(a) and 81

TFEU. In particular because the Union has created a system for the recognition of EU insolvency proceedings it can also assume such powers in respect of non EU insolvency proceedings (see for a comparable situation the ECJ ruling in Case 22/70 Commission vs Council [1971] ECR 263 (AETR)).

VII.4. This is an important application of the doctrine of implied powers. The criterion is that the EU institutions may exercise any power “reasonably necessary” to the achievement of an objective set forth in the EU Founding Treaties (in this case Article 81 TFEU) even in the absence of an express power of action provided for in relation to that objective⁶⁷. We think that it is reasonably necessary to incorporate UNCITRAL Model Law provisions within the Insolvency Regulation in order to improve the functioning of EU insolvency proceedings. Thus this incorporation serves to eliminate these obstacles to the proper functioning of civil proceedings as far as extra-territorial proceedings have their influence within the European Union (and as far as EU proceedings may influence non-Member States proceedings). It is highly undesirable that some Member States automatically recognize the powers of the foreign liquidator, whereas other States follow the UNCITRAL system of relief being granted upon application with respect to the same foreign proceedings. Harmonization of the recognition of insolvency proceedings is the best way of avoiding this problem.

Section I. General provisions

Article 58.

Scope of application

1. *This Chapter applies where:*
 - (a) *Assistance is sought in a Member State by a court from a non-Member State or a non-EU liquidator in connection with non-EU proceedings; or*
 - (b) *Assistance is sought in a non-Member State in connection with insolvency proceedings; or*
 - (c) *non-EU proceedings and insolvency proceedings in respect of the same debtor are taking place concurrently; or*
 - (d) *Creditors or other interested persons in a non-Member State have an interest in requesting the commencement of, or participating in, insolvency proceedings.*

⁶⁷ Cases 281, 283-285, 287/85 *Germany v. Commission* [1987] ECR 3203 para. 28; T.C. Hartley, *The Foundations of European Community Law* (5th edn OUP, Oxford 2003) 106; P. Craig and G. De Burca, *EU Law* (4th edn OUP, Oxford 2008) 90-91.

2. *This Chapter does not apply to a proceeding concerning insurance undertakings and credit institutions.*

Article 59

Relations with existing international conventions and agreements

This Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party at the time of adoption of this Regulation and which concern matters governed by this Regulation, without prejudice to the obligations of Member States under Article 307 of the Treaty Establishing the European Community.

Commentary to Article 59

- 59.1 The other regulations based upon Art 81 TFEU adopt different approaches to international conventions. While the Brussels I Regulation leaves the current international conventions “on particular matters” totally in force (i.e., they may continue to apply), the Brussels II Regulation on family matters⁶⁸ makes a distinction as between the various conventions that may come into consideration.
- 59.2 Regulation 4/2009 on maintenance obligations⁶⁹ contains a more specific provision in Article 69. INSOL Europe has chosen to include paragraph 1 of this Article in its proposal, as it complies with EU law to a higher extent than the relevant provisions of the Brussels II Regulation.

Article 60

Competent court

The functions referred to in this Chapter relating to recognition of non-EU proceedings and cooperation with courts from non-Member States shall be performed by the courts of the Member States as specified in their legislation.

Article 61

Authorization liquidators to act in a non-Member State

A liquidator is authorized to act in a non-Member State on behalf of a proceeding under this Regulation, as permitted by the applicable foreign law.

⁶⁸ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

⁶⁹ Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Article 62

Public policy exception

Nothing in this Chapter prevents the court of a Member State from refusing to take an action governed by this Chapter if the action would be manifestly contrary to the public policy of this Member State.

Article 63

Additional assistance under other laws

Nothing in this Chapter limits the power of a court of a Member State or liquidator to provide additional assistance to a non-EU liquidator under the laws of the Member State.

Article 64

Interpretation

In the interpretation of this Chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

Section II. Access of liquidators from a non-Member State and creditors to courts in Member States

Article 65

Right of direct access

A non-EU liquidator is entitled to apply directly to a court in any Member State.

Article 66

Limited jurisdiction

The sole fact that an application pursuant to this Chapter is made to a court in a Member State by a non-EU liquidator does not subject the non-EU liquidator or the foreign assets and affairs of the debtor to the jurisdiction of the courts of the Member State for any purpose other than the application.

Article 67

Application by a non-EU liquidator to commence insolvency proceedings

A non-EU liquidator is entitled to apply to commence insolvency proceedings if the conditions for commencing such a proceeding are otherwise met.

Article 68

Participation of a non-EU liquidator in insolvency proceedings

Upon recognition of non-EU proceedings, the non-EU liquidator is entitled to participate in insolvency proceedings.

Article 69

Access of creditors from non-Member States to insolvency proceedings

1. *Subject to paragraph 2 of this Article, creditors from non-Member States have the same rights regarding the commencement of, and participation in insolvency proceedings as creditors in another Member State.*
2. *Paragraph 1 of this Article does not affect the ranking of claims in insolvency proceedings, except that the claims of creditors from non-Member States shall not be ranked lower than general non-preference claims unless similar claims from creditors in Member States have a rank lower than the general non-preference claims.*

Article 70

Notification to creditors from non-Member States of insolvency proceedings

1. *Whenever under insolvency proceedings notification is to be given to creditors in a Member State, such notification shall also be given to the known creditors that do not have addresses in a Member State. The court may order that appropriate steps be taken with a view to notifying any creditor whose address is not yet known.*
2. *Such notification shall be made to the creditors from non-Member States individually, unless the court considers that, under the circumstances, some other form of notification would be more appropriate. No letters rogatory or other, similar formality is required.*
3. *When a notification of commencement of a proceeding is to be given to creditors from non-Member States, the notification shall:*
 - (a) *Indicate a reasonable time period for filing claims and specify the place for their filing;*
 - (b) *Indicate whether secured creditors need to file their secured claims; and*
 - (c) *Contain any other information required to be included in such a notification to creditors pursuant to this Regulation, the law of the Member State and the orders of the court.*

Section III. Recognition of non-EU proceedings and relief

Article 71

Application for recognition of non-EU proceedings

1. *A non-EU liquidator may apply to the court for recognition of non-EU proceedings in which the non-EU liquidator has been appointed.*
2. *An application for recognition shall be accompanied by:*
 - (a) *a certified copy of the decision commencing the non-EU proceedings and appointing the non-EU liquidator; or*
 - (b) *a certificate from the court from a non-Member State affirming the existence of the non-EU proceedings and of the appointment of the non-EU liquidator; or*
 - (c) *in the absence of evidence referred to in subparagraphs (a) and (b), any other evidence acceptable to the court of the existence of the non-EU proceedings and of the appointment of the non-EU liquidator.*
3. *An application for recognition shall also be accompanied by a statement identifying all non-EU proceedings and insolvency proceedings in respect of the debtor that are known to the non-EU liquidator.*
4. *The court may require a translation of documents supplied in support of the application for recognition into an official language of the Member State.*

Article 72

Presumptions concerning recognition

1. *If the decision or certificate referred to in paragraph 2 of Article 71 indicates that the non-EU proceedings are proceedings within the meaning of subparagraph (p) of Article 2 and that the non-EU liquidator is a person or body within the meaning of subparagraph s) of Article 2, the court is entitled to so presume.*
2. *The court is entitled to presume that documents submitted in support of the application for recognition are authentic, whether or not they have been legalized.*
3. *In the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests.*

Article 73

Decision to recognize non-EU proceedings

1. *Subject to Article 62, non-EU proceedings shall be recognized if:*
 - (a) *the non-EU proceedings are proceedings within the meaning of subparagraph (p) of Article 2;*
 - (b) *the non-EU liquidator applying for recognition is a person or body within the meaning of subparagraph (s) of Article 2;*
 - (c) *the application meets the requirements of paragraph 2 of Article 71; and*
 - (d) *the application has been submitted to the court referred to in Article 60.*
2. *The non-EU proceedings shall be recognized:*
 - (a) *as non-EU main proceedings if they are taking place in the State where the debtor has the centre of its main interests; or*
 - (b) *as non-EU non-main proceedings if the debtor has an establishment within the meaning of subparagraph (i) of Article 2 in the non-Member State.*
3. *An application for recognition of non-EU proceedings shall be decided upon at the earliest possible time.*
4. *The provisions of Articles 71, 72, 73 and 74 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.*

Article 74

Subsequent information

From the time of filing the application for recognition of the non-EU proceedings, the non-EU liquidator shall inform the court promptly of:

- (a) *any substantial change in the status of the recognized non-EU proceedings or the status of the appointment of the non-EU liquidator; and*
- (b) *any other non-EU proceedings regarding the same debtor that becomes known to the non-EU liquidator.*

Article 75

Relief that may be granted upon application for recognition of non-EU proceedings

1. *From the time of filing an application for recognition until the application is decided upon, the court may, at the request of the non-EU liquidator, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including:*
 - (a) *staying execution against the debtor's assets;*
 - (b) *entrusting the administration or realization of all or part of the debtor's assets located in the Member State to the non-EU liquidator or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy;*
 - (c) *any relief mentioned in paragraph 1 (c), (d) and (g) of Article 77.*
2. *Unless extended under paragraph 1 (f) of Article 77, the relief granted under this Article terminates when the application for recognition is decided upon.*
3. *The court may refuse to grant relief under this Article if such relief would interfere with the administration of non-EU main proceedings.*

Article 76

Effects of recognition of non-EU main proceedings

1. *Upon recognition of non-EU proceedings that are a non-EU main proceedings without prejudice to secured claims or rights in rem,*
 - (a) *commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;*
 - (b) *execution against the debtor's assets is stayed; and*
 - (c) *the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.*
2. *The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of this Article are subject to the provisions in the laws of the Member State where the non-EU main proceedings are recognised, applying to exceptions, limitations, modifications and termination in respect of the stay and suspension as referred to in paragraph 1 of this Article.*

3. *Paragraph 1 (a) of this Article does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.*
4. *Paragraph 1 of this Article does not affect the right to request the commencement of insolvency proceedings or the right to file claims in such proceedings.*

Article 77

Relief that may be granted upon recognition of non-EU proceedings

1. *Upon recognition of non-EU proceedings, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the non-EU liquidator, grant appropriate relief, including:*
 - (a) *staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1 (a) of Article 76;*
 - (b) *staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1 (b) of Article 76;*
 - (c) *suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1 (c) of Article 76;*
 - (d) *providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;*
 - (e) *entrusting the administration or realization of all or part of the debtor's assets located in the Member State to the non-EU liquidator or another person designated by the court;*
 - (f) *extending relief granted under paragraph 1 of Article 75;*
 - (g) *granting any additional relief that may be available to a liquidator under the laws of the Member State.*

However, in the event that the court grants relief it will apply Articles 5, 6, 7, 8, 9, 10 paragraph 1, 11, 12, 13, 15 and 18 paragraph 3.

2. *Upon recognition of non-EU proceedings, whether main or non-main, the court may, at the request of the non-EU liquidator, entrust the distribution of*

all or part of the debtor's assets located in the Member State to the non-EU liquidator or another person designated by the court, provided that the court is satisfied that the interests of creditors in the Member State and in other Member States are adequately protected

3. *In granting relief under this Article to a non-EU liquidator in non-EU non-main proceedings, the court must be satisfied that the relief relates to assets that, under the law of the Member State, should be administered in the non-EU non-main proceedings or concerns information required in those proceedings.*

Article 78

Protection of creditors and other interested persons

1. *In granting or denying relief under Article 75 or 77, or in modifying or terminating relief under paragraph 3 of this Article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.*
2. *The court may subject relief granted under Article 75 or 77 to conditions it considers appropriate.*
3. *The court may, at the request of the non-EU liquidator or a person affected by relief granted under Article 75 or 77, or at its own motion, modify or terminate such relief.*

Article 79

Actions to avoid acts detrimental to creditors

1. *Upon recognition of non-EU proceedings, the non-EU liquidator has standing to initiate proceedings relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.*
2. *When the non-EU proceedings are non-EU non-main proceedings, the court must be satisfied that the action relates to assets that, under the law of the Member State, should be administered in the non-EU non-main proceedings.*

Article 80

Intervention by a non-EU liquidator in proceedings in a Member State

Upon recognition of non-EU proceedings, the non-EU liquidator may, provided the requirements of the law of the relevant Member State are met, intervene in any proceedings in which the debtor is a party.

Section IV. Cooperation with courts from non-Member States and liquidators from non-Member States

Article 81

Cooperation and direct communication between a court of a Member State and a court from a non-Member State or a non-EU liquidator

1. *In matters referred to in Article 58, the court of a Member State shall cooperate to the maximum extent possible with courts from a non-Member State or a non-EU liquidator; either directly or through a liquidator.*
2. *The court is entitled to communicate directly with, or to request information or assistance directly from, courts from a non-Member State or non-EU liquidators.*

Article 82

Cooperation and direct communication between the liquidator and courts from non-Member States or liquidators from non-Member States

1. *In matters referred to in Article 58, a liquidator shall, in the exercise of its functions and subject to the supervision of the court, cooperate to the maximum extent possible with courts from non-Member States or non-EU liquidators.*
2. *The liquidator is entitled, in the exercise of its functions and subject to the supervision of the court, to communicate directly with courts from non-Member States or non-EU liquidators.*

Article 83

Forms of cooperation

Cooperation referred to in Articles 81 and 82 may be implemented by any appropriate means, including:

- (a) appointment of a person or body to act at the direction of the court;*
- (b) communication of information by any means considered appropriate by the court;*
- (c) coordination of the administration and supervision of the debtor's assets and affairs;*
- (d) approval or implementation by courts of agreements concerning the coordination of proceedings;*
- (e) coordination of concurrent proceedings regarding the same debtor.*

Section V. Concurrent proceedings

Article 84

Commencement of insolvency proceedings after recognition of non-EU main proceedings

After recognition of non-EU main proceedings, insolvency proceedings may be commenced only if the debtor has assets in the Member State; the effects of such proceedings shall be restricted to the assets of the debtor that are located in the Member State and, to the extent necessary to implement cooperation and coordination under Articles 81, 82 and 83, to other assets of the debtor that, under the law of the Member State, should be administered in such proceedings.

Article 85

Coordination of insolvency proceedings and non-EU proceedings

Where non-EU proceedings and insolvency proceedings are taking place concurrently regarding the same debtor, the court shall seek cooperation and coordination under Articles 81, 82 and 83, and the following shall apply:

- (a) When the insolvency proceedings are taking place at the time the application for recognition of the non-EU proceedings is filed,*
 - (i) any relief granted under Article 75 or 77 must be consistent with the insolvency proceedings; and*
 - (ii) if the non-EU proceedings are recognized in a Member State as non-EU main proceedings, Article 76 does not apply;*
- (b) When the proceedings in the Member State commence after recognition, or after the filing of the application for recognition, of the non-EU proceedings,*
 - (i) any relief in effect under Article 75 or 77 shall be reviewed by the court and shall be modified or terminated if inconsistent with the proceeding in the Member State; and*
 - (ii) if the non-EU proceedings are non-EU main proceedings, the stay and suspension referred to in paragraph 1 of Article 76 shall be modified or terminated pursuant to paragraph 2 of Article 76 if inconsistent with the insolvency proceedings in the Member State;*
- (c) In granting, extending or modifying relief granted to a non-EU liquidator in non-EU non-main proceedings, the court must be satisfied that the relief relates to assets that, under the law of the Member State, should be administered in the non-EU non-main proceedings or concerns information required in those proceedings.*

Article 86

Coordination of more than one non-EU proceedings

In matters referred to in Article 58, in respect of more than one non-EU proceedings regarding the same debtor, the court shall seek cooperation and coordination under Articles 81, 82 and 83, and the following shall apply:

- (a) *any relief granted under Article 75 or 77 to a non-EU liquidator in non-EU non-main proceedings after recognition of non-EU main proceedings must be consistent with the non-EU main proceedings;*
- (b) *if non-EU main proceedings are recognized after recognition, or after the filing of an application for recognition, of non-EU non-main proceedings, any relief in effect under Article 75 or 77 shall be reviewed by the court and shall be modified or terminated if inconsistent with the non-EU main proceedings;*
- (c) *if, after recognition of non-EU non-main proceedings, other non-EU proceedings are recognized, the court shall grant, modify or terminate relief for the purpose of facilitating coordination of the proceedings.*

Article 87

Presumption of insolvency based on recognition of non-EU main proceedings

In the absence of evidence to the contrary, recognition of non-EU main proceedings is, for the purpose of commencing rescue, reorganisation and insolvency proceedings, proof that the debtor is insolvent in the sense of Article 27.

Article 88

Rule of payment in concurrent proceedings

Without prejudice to secured claims or rights in rem, a creditor who has received part payment in respect of its claim in non-EU proceedings may not receive a payment for the same claim in insolvency proceedings regarding the same debtor, so long as the payment to the other creditors of the same class is proportionately less than the payment the creditor has already received.

CHAPTER VIII

TRANSITIONAL AND FINAL PROVISIONS

Article 88⁷⁰

Applicability in time

The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force. Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.

Article 89

Relationship to Conventions

1. *After its entry into force, this Regulation replaces, in respect of the matters referred to therein, in the relations between Member States, the Conventions concluded between two or more Member States, in particular:*
 - (a) *the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899;*
 - (b) *the Convention between Belgium and Austria on Bankruptcy, Winding-up, Arrangements, Compositions and Suspension of Payments (with Additional Protocol of 13 June 1973), signed at Brussels on 16 July 1969;*
 - (c) *the Convention between Belgium and the Netherlands on Territorial Jurisdiction, Bankruptcy and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925;*
 - (d) *the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Vienna on 25 May 1979;*
 - (e) *the Convention between France and Austria on Jurisdiction, Recognition*

⁷⁰ For literature on this Article (the former Article 43) see Virgos/Garcimartin, 2004, pp. 30-32.

and Enforcement of Judgments on Bankruptcy, signed at Vienna on 27 February 1979;

- (f) the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930;*
- (g) the Convention between Italy and Austria on Bankruptcy, Winding-up, Arrangements and Compositions, signed at Rome on 12 July 1977;*
- (h) the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962;*
- (i) the Convention between the United Kingdom and the Kingdom of Belgium providing for the Reciprocal Enforcement of Judgments in Civil and Commercial Matters, with Protocol, signed at Brussels on 2 May 1934;*
- (j) the Convention between Denmark, Finland, Norway, Sweden and Iceland on Bankruptcy, signed at Copenhagen on 7 November 1933;*
- (k) the European Convention on Certain International Aspects of Bankruptcy, signed at Istanbul on 5 June 1990;*
- (l) the Convention between the Federative People's Republic of Yugoslavia and the Kingdom of Greece on the Mutual Recognition and Enforcement of Judgments, signed at Athens on 18 June 1959;*
- (m) the Agreement between the Federative People's Republic of Yugoslavia and the Republic of Austria on the Mutual Recognition and Enforcement of Arbitral Awards and Arbitral Settlements in Commercial Matters, signed at Belgrade on 18 March 1960;*
- (n) the Convention between the Federative People's Republic of Yugoslavia and the Republic of Italy on Mutual Judicial Cooperation in Civil and Administrative Matters, signed at Rome on 3 December 1960;*
- (o) the Agreement between the Socialist Federative Republic of Yugoslavia and the Kingdom of Belgium on Judicial Cooperation in Civil and Commercial Matters, signed at Belgrade on 24 September 1971;*
- (p) the Convention between the Governments of Yugoslavia and France on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Paris on 18 May 1971;*

- (q) *the Agreement between the Czechoslovak Socialist Republic and the Hellenic Republic on Legal Aid in Civil and Criminal Matters, signed at Athens on 22 October 1980, still in force between the Czech Republic and Greece;*
- (r) *the Agreement between the Czechoslovak Socialist Republic and the Republic of Cyprus on Legal Aid in Civil and Criminal Matters, signed at Nicosia on 23 April 1982, still in force between the Czech Republic and Cyprus;*
- (s) *the Treaty between the Government of the Czechoslovak Socialist Republic and the Government of the Republic of France on Legal Aid and the Recognition and Enforcement of Judgments in Civil, Family and Commercial Matters, signed at Paris on 10 May 1984, still in force between the Czech Republic and France;*
- (t) *the Treaty between the Czechoslovak Socialist Republic and the Italian Republic on Legal Aid in Civil and Criminal Matters, signed at Prague on 6 December 1985, still in force between the Czech Republic and Italy;*
- (u) *the Agreement between the Republic of Latvia, the Republic of Estonia and the Republic of Lithuania on Legal Assistance and Legal Relationships, signed at Tallinn on 11 November 1992;*
- (v) *the Agreement between Estonia and Poland on Granting Legal Aid and Legal Relations on Civil, Labour and Criminal Matters, signed at Tallinn on 27 November 1998;*
- (w) *the Agreement between the Republic of Lithuania and the Republic of Poland on Legal Assistance and Legal Relations in Civil, Family, Labour and Criminal Matters, signed in Warsaw on 26 January 1993;*
- (x) *the Convention between Socialist Republic of Romania and the Hellenic Republic on legal assistance in civil and criminal matters and its Protocol, signed at Bucharest on 19 October 1972;*
- (y) *the Convention between Socialist Republic of Romania and the French Republic on legal assistance in civil and commercial matters, signed at Paris on 5 November 1974;*
- (z) *the Agreement between the People's Republic of Bulgaria and the Hellenic Republic on Legal Assistance in Civil and Criminal Matters, signed at Athens on 10 April 1976;*
- (aa) *the Agreement between the People's Republic of Bulgaria and the Republic of Cyprus on Legal Assistance in Civil and Criminal Matters, signed at Nicosia on 29 April 1983;*

- (ab) *the Agreement between the Government of the People's Republic of Bulgaria and the Government of the French Republic on Mutual Legal Assistance in Civil Matters, signed at Sofia on 18 January 1989;*
 - (ac) *the Treaty between Romania and the Czech Republic on judicial assistance in civil matters, signed at Bucharest on 11 July 1994;*
 - (ad) *the Treaty between Romania and Poland on legal assistance and legal relations in civil cases, signed at Bucharest on 15 May 1999.*
2. *The Conventions referred to in paragraph 1 shall continue to have effect with regard to proceedings opened before the entry into force of this Regulation.*
 3. *This Regulation shall not apply:*
 - (a) *in any Member State, to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy from a convention concluded by that State with one or more third countries before the entry into force of this Regulation;*
 - (b) *in the United Kingdom of Great Britain and Northern Ireland, to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time this Regulation enters into force.*

Article 90

Amendment of the Annexes

The Council, acting by qualified majority on the initiative of one of its members or on a proposal from the Commission, may amend the Annexes.

Article 91

Reports

No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.

Article 92

Entry into force

This Regulation shall enter into force on 31 May 2002.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

ANNEX A

Insolvency proceedings referred to in Article 2(b)

BELGIË/BELGIQUE

- Het faillissement/La faillite
- De gerechtelijke reorganisatie door een collectief akkoord/La réorganisation judiciaire par accord collectif
- De gerechtelijke reorganisatie door overdracht onder gerechtelijk gezag/La réorganisation judiciaire par transfert sous autorité de justice
- De collectieve schuldenregeling/Le règlement collectif de dettes
- De vrijwillige vereffening/La liquidation volontaire
- De gerechtelijke vereffening/La liquidation judiciaire
- De voorlopige ontneming van beheer, bepaald in artikel 8 van de faillissementswet/Le dessaisissement provisoire, visé à l'Article 8 de la loi sur les faillites

БЪЛГАРИЯ

- Производство по несъстоятелност

ČESKÁ REPUBLIKA

- Konkurs
- Reorganizace
- Oddlužení

DEUTSCHLAND

- Das Konkursverfahren
- Das gerichtliche Vergleichsverfahren
- Das Gesamtvollstreckungsverfahren
- Das Insolvenzverfahren

EESTI

- Pankrotimenetlus

ΕΛΛΑΣ

- Η πτώχευση
- Η ειδική εκκαθάριση
- Η προσωρινή διαχείριση εταιρείας. Η διοίκηση και διαχείριση των πιστωτών
- Η υπαγωγή επιχείρησης υπό επίτροπο με σκοπό τη σύναψη συμβιβασμού με τους πιστωτές

ESPAÑA

- Concurso

FRANCE

- Sauvegarde
- Redressement judiciaire
- Liquidation judiciaire

IRELAND

- Compulsory winding-up by the court
- Bankruptcy
- The administration in bankruptcy of the estate of persons dying insolvent
- Winding-up in bankruptcy of partnerships
- Creditors' voluntary winding-up (with confirmation of a court)
- Arrangements under the control of the court which involve the vesting of all or part of the property of the debtor in the Official Assignee for realisation and distribution
- Company examinership

ITALIA

- Fallimento
- Concordato preventivo
- Liquidazione coatta amministrativa
- Amministrazione straordinaria

KYΠΡΟΣ

- Υποχρεωτική εκκαθάριση από το Δικαστήριο
- Εκούσια εκκαθάριση από πιστωτές κατόπιν Δικαστικού Διατάγματος
- Εκούσια _____ εκκαθάριση από μέλη
- Εκκαθάριση με την εποπτεία του Δικαστηρίου
- Πτώχευση κατόπιν Δικαστικού Διατάγματος
- Διαχείριση της περιουσίας προσώπων που απεβίωσαν αφερέγγυα

LATVIJA

- Tiesiskās aizsardzības process
- Sanācija juridiskās personas maksātnespējas procesā
- Izlīgums juridiskās personas maksātnespējas procesā
- Izlīgums fiziskās personas maksātnespējas procesā
- Bankrota procedūra juridiskās personas maksātnespējas procesā
- Bankrota procedūra fiziskās personas maksātnespējas procesā

LIETUVA

- Įmonės restruktūrizavimo byla
- Įmonės bankroto byla
- Įmonės bankroto procesas ne teismo tvarka

LUXEMBOURG

- Faillite
- Gestion contrôlée
- Concordat préventif de faillite (par abandon d'actif)
- Régime spécial de liquidation du notariat

MAGYARORSZÁG

- Csődeljárás
- Felszámolási eljárás

MALTA

- Xoljiment
- Amministrazzjoni
- Stralċ volontarju mill-membri jew mill-kredituri
- Stralċ mill-Qorti
- Falliment f’każ ta’ negozjant

NEDERLAND

- Het faillissement
- De surséance van betaling
- De schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Das Konkursverfahren
- Das Ausgleichsverfahren

POLSKA

- Postępowanie upadłościowe
- Postępowanie układowe
- Upadłość obejmująca likwidację
- Upadłość z możliwością zawarcia układu

PORTUGAL

- Processo de insolvência
- Processo de falência
- Processos especiais de recuperação de empresa, ou seja:
- Concordata
- Reconstituição empresarial
- Reestruturação financeira
- Gestão controlada

ROMÂNIA

- Procedura insolvenței
- Reorganizarea judiciară
- Procedura falimentului

SLOVENIJA

- Stečajni postopek
- Skrajšani stečajni postopek
- Postopek prisilne poravnave
- Prisilna poravnava v stečaju

SLOVENSKO

- Konkurzné konanie
- Reštrukturalizačné konanie

SUOMI/FINLAND

- Konkurssi/konkurs
- Yrityssaneeraus/företagssanering

SVERIGE

- Konkurs
- Företagsrekonstruktion

UNITED KINGDOM

- Winding-up by or subject to the supervision of the court
- Creditors' voluntary winding-up (with confirmation by the court)
- Administration, including appointments made by filing prescribed documents with the court
- Voluntary arrangements under insolvency legislation
- Bankruptcy or sequestration

ANNEX B

Liquidators referred to in Article 2(c)

BELGIË/BELGIQUE

- De curator/Le curateur
- De gedelegeerd rechter/Le juge-délégué
- De gerechtsmandataris/Le mandataire de justice
- De schuldbemiddelaar/Le médiateur de dettes
- De vereffenaar/Le liquidateur
- De voorlopige bewindvoerder/L'administrateur provisoire

БЪЛГАРИЯ

- Назначен предварително временен синдик
- Временен синдик
- (Постоянен) синдик
- Служебен синдик

ČESKÁ REPUBLIKA

- Insolvenční správce
- Předběžný insolvenční správce
- Oddělený insolvenční správce
- Zvláštní insolvenční správce
- Zástupce insolvenčního správce

DEUTSCHLAND

- Konkursverwalter
- Vergleichsverwalter
- Sachwalter (nach der Vergleichsordnung)

- Verwalter
- Insolvenzverwalter
- Sachwalter (nach der Insolvenzordnung)
- Treuhänder
- Vorläufiger Insolvenzverwalter

EESTI

- Pankrotihaldur
- Ajutine pankrotihaldur
- Usaldusisik

ΕΛΛΑΣ

- Ο σύνδικος
- Ο προσωρινός διαχειριστής. Η διοικούσα επιτροπή των πιστωτών
- Ο ειδικός εκκαθαριστής
- Ο επίτροπος

ESPAÑA

- Administradores concursales

FRANCE

- Mandataire judiciaire
- Liquidateur
- Administrateur judiciaire
- Commissaire à l'exécution du plan

IRELAND

- Liquidator
- Official Assignee
- Trustee in bankruptcy
- Provisional Liquidator
- Examiner

ITALIA

- Curatore
- Commissario giudiziale
- Commissario straordinario
- Commissario liquidatore
- Liquidatore giudiziale

ΚΥΠΡΟΣ

- Εκκαθαριστής και Προσωρινός Εκκαθαριστής
- Επίσημος Παραλήπτης
- Διαχειριστής της Πτώχευσης
- Εξεταστής

LATVIJA

- Maksātnespējas procesa administrators

LIETUVA

- Bankrutuojančių įmonių administratorius
- Restruktūrizuojamų įmonių administratorius

LUXEMBOURG

- Le curateur
- Le commissaire
- Le liquidateur
- Le conseil de gérance de la section d’assainissement du notariat

MAGYARORSZÁG

- Vagyonfelügyelő
- Felszámoló

MALTA

- Amministratur Proviżorju
- Riċevitur Uffiċjali
- Stralċjarju

- Manager Specjali
- Kuraturi f'każ ta' proċeduri ta' falliment

NEDERLAND

- De curator in het faillissement
- De bewindvoerder in de surséance van betaling
- De bewindvoerder in de schuldsaneringsregeling natuurlijke personen

ÖSTERREICH

- Masseverwalter
- Ausgleichsverwalter
- Sachwalter
- Treuhänder
- Besondere Verwalter
- Konkursgericht

POLSKA

- Syndyk
- Nadzorca sądowy
- Zarządca

PORTUGAL

- Administrador da insolvência
- Gestor judicial
- Liquidatário judicial
- Comissão de credores

ROMÂNIA

- Practician în insolvență
- Administrator judiciar
- Lichidator

SLOVENIJA

- Upravitelj prisilne poravnave
- Stečajni upravitelj
- Sodišče, pristojno za postopek prisilne poravnave
- Sodišče, pristojno za stečajni postopek

SLOVENSKO

- Predbežný správca
- Správca

SUOMI/FINLAND

- Pesänohittaja/boförvaltare
- Selvittäjä/utredare

SVERIGE

- Förvaltare
- Rekonstruktör

UNITED KINGDOM

- Liquidator
- Supervisor of a voluntary arrangement
- Administrator
- Official Receiver
- Trustee
- Provisional Liquidator
- Judicial factor

Commentary to the Annexes

INSOL Europe suggests to delete the current Annex B and rename the current Annex C as Annex B.

APPENDIX

Harmonized rules on detrimental acts

Article I

Transactions at an undervalue

I.1. Gifts

If during the period of two years ending with the application for insolvency, a debtor makes a gift to third party or otherwise enters into a transaction with a third party for which the debtor receives no consideration and the debtor is insolvent at the time of the transaction, the office holder may regard the transaction as null and void.

I.2. Transactions for inadequate value

Related persons

If during the period of two years ending with the application for insolvency, a debtor enters into a transaction with a related person for a consideration the value of which in money or money's worth is significantly less than the value, in money, or money's worth of the consideration provided by the debtor, and the debtor is insolvent at the time of entering the transaction, the office holder may avoid the transaction.

The court will not permit the office holder to avoid the transaction if the related person may satisfy the court that at the time it entered into the transaction (i) the debtor was able to pay its debts and (ii) there were reasonable grounds for believing that the transaction would benefit the debtor.

Related persons include:

- a) as to a debtor that is a legal entity: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor;*
- b) as to a debtor that is an individual person: other persons who are related to the debtor by consanguinity or affinity.*

Non-related persons

If during the period of six months ending with the application for insolvency, a debtor enters into a transaction with a counterparty for a consideration the value of which in money or money's worth is less than the value, in money, or money's worth of the consideration provided by the debtor and the debtor is insolvent at the time of the transaction, the office holder may avoid the transaction.

The court will not permit the office holder to avoid the transaction if the counterparty may satisfy the court that at the time it entered into the transaction, (i) the debtor was able to pay its debts and (ii) there were reasonable grounds for believing that the transaction would benefit the debtor.

Article II

Preferential transactions

Related persons

If during the period of two years ending with the application for insolvency, a debtor has given a preference to a related person and the debtor was insolvent at the time of giving the preference, the office holder may avoid the transaction. For the purposes of this section, a debtor gives a preference if:

a) the related person is one of the debtor's creditors or a surety or guarantor for any of the debtor's debts or other liabilities, and

b) the debtor does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the debtor's insolvency, will be better than the position he would have been in if that thing had not been done,

and c) the debtor which made the preference was influenced in deciding to give it by a desire to produce in relation to that person the effect mentioned under b).

The court will not permit the office holder to avoid the transaction if the related person may satisfy the court that

(i) the transaction was consistent with normal commercial practice and, in particular with the ordinary course of business between the parties to the transaction,

or (ii) in general, that the related person can show that it did not know a preference would be created.

Related persons include:

- a) as to a debtor that is a legal entity: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor;*
- b) as to a debtor that is an individual person: other persons who are related to the debtor by consanguinity or affinity.*

Non-related persons

If during the period of six months ending with the application for insolvency, a debtor has given a preference to a counterparty and the debtor was insolvent at the time of giving the preference, the office holder may avoid the transaction. For the purposes of this section, a debtor gives a preference if:

- a) the counterparty is one of the debtor's creditors or a surety or guarantor for any of the debtor's debts or other liabilities, and*
- b) the debtor does anything or suffers anything to be done which (in either case) has the effect of putting that counterparty into a position which, in the event of the debtor's insolvency, will be better than the position he would have been in if that thing had not been done,*
- and c) the debtor which made the preference was influenced in deciding to give it by a desire to produce in relation to that counterparty the effect mentioned under b).*

The court will not permit the office holder to avoid the transaction if the counterparty may satisfy the court that:

- (i) the transaction was consistent with normal commercial practice and, in particular with the ordinary course of business between the parties to the transaction,*
- or (ii) in general, that the counterparty can show that it did not know a preference would be created.*

For the purpose of this section, the following transactions are presumed to constitute a preference:

- a) payment or set-off of debts not yet due;*
- b) granting of a security interest to secure existing unsecured debts;*
- c) an unusual method of payment of debts that are due (for example, other than in money).*

Article III

Transactions intended to defeat, delay or hinder the ability of creditors to collect claims

If during a period of two years ending with the application for insolvency a debtor enters into a transaction with a third party or creditor for the purpose:

a) of putting assets beyond the reach of a person who is making, or may at some time, make a claim against him;

or

b) of otherwise prejudicing the interest of such a person in relation to the claim which he is making or may make, while the debtor is insolvent at the time of the transaction, the office holder may avoid the transaction. If such a transaction is a gift, the office holder may regard the transaction as null and void.

The court will not permit the office holder to avoid the transaction if the counterparty may satisfy the court that it did not enter the transaction for a purpose as mentioned above. This rule does not apply to gifts.

Article IV

Conduct of avoidance proceedings

The office holder has the principal responsibility to commence avoidance proceedings. An individual creditor may commence avoidance proceedings if the office holder gives it permission to do so. If the office holder does not give this permission, the creditor may seek leave of the court to commence such proceedings.

Article V

Time limits for commencement of avoidance proceedings

An avoidance action must be commenced within three years after the commencement of insolvency proceedings. In the case of transactions referred to under I, II and III above that have been concealed and that the office holder or individual creditor could not be expected to discover, the avoidance action must be commenced within three years after the time of discovery.

Article VI

Liability of counterparties to avoided transactions

A counterparty to the transaction that has been avoided must return to the estate the assets obtained or, if the court so orders, make a cash payment to the estate for the value of the transaction. After these assets have been returned and/or this cash payment has been made, the value received by the debtor under the avoided legal act or the value thereof shall be returned by the office holder, to the extent the value continues to exist in a distinct form in the estate, or to which it has augmented the estate. The counterparty may file a claim for any shortfall as an unsecured creditor. If the counterparty (who may be a third party or a creditor) entered into the transaction for the purpose of defeating, delaying or hindering the ability of (other) creditors to collect claims, it is at the court's discretion to disallow the claim by the counterparty. This claim may also be disallowed if the counterparty does not comply with the court order avoiding the transaction.

Commentary to the proposed Appendix with Articles I up to and including III (harmonized rules on detrimental acts)

Harmonized rules on the voidness, avoidability and unenforceability of detrimental acts

A. Why harmonization?

In April 2010 the Note *Harmonisation of Insolvency Law at EU Level* was presented by INSOL Europe to the European Parliament (the INSOL Europe Note). Without being exhaustive, the INSOL Europe Note identified and reported on situations where disparities between national insolvency and restructuring laws created obstacles, as well as on the comparative advantages and/or disadvantages or difficulties with regard to companies with cross-border activities or ownership within the EU. Such disparities could, inter alia, become obstacles to a successful restructuring of insolvent companies.

Harmonization of certain aspects of insolvency law could therefore, inter alia, (i) protect the value of assets of the estate, thereby returning a greater value to creditors and shareholders, (ii) reduce the costs of the administration of the estate, and (iii) increase predictability on the parts of creditors and shareholders, thereby encouraging the provision of increased working capital.

The INSOL Europe Note provides examples of problems which might occur in the absence of common rules on insolvency. According to the INSOL Europe Note, one of these problems is constituted by the rules on the annulment of contracts entered into prior to the opening of the insolvency proceeding (avoidance actions).

On p. 9 of this Note, it was observed that “the rules on the annulment of transactions entered into prior to the opening of insolvency proceedings (avoidance actions) vary as to the periods and onus of proof during which such transactions can be liable for annulment, reducing the predictability of such proceedings”.

In paragraph 1.3 of the Lehne Report (Report with recommendations to the Commission on insolvency proceedings in the context of EU Company law) (2011/2006 (INI)) (A7-9999/2011) the Committee on Legal Affairs of the European Parliament also proposes harmonisation of aspects of avoidance actions in certain respects.

B. Specific recommendations for harmonization

In the INSOL Europe Note, it was suggested that consideration should be given to a specific list of matters relating to avoidance actions. These recommendations are also included in the highly systematic list given by the UNCITRAL Legislative Guide on Insolvency Law (2005), which seems to cover the whole array of possible detrimental acts. For brevity’s sake, only the latter list will be dealt with here. The UNCITRAL GUIDE is intended to be used as a reference by national authorities and legislative bodies when preparing new laws or reviewing the adequacy of existing laws and regulations. It is likely to be very useful in drafting harmonized rules for the purpose of this project.

Before presenting the specific recommendations, we will deal first with the major divisions apparent with regard to the criteria relating to avoidance actions

B.1 Avoidance criteria

Approaches to establishing the criteria for avoidance actions vary considerably between insolvency laws both in terms of specific criteria and the manner in which they are combined within each legal system. In terms of the specific criteria, they can be regarded either as objective or as subjective criteria.

Objective criteria (such as suspect periods)

One approach emphasizes the reliance on general, objectivised criteria for determining whether transactions are avoidable. The relevant question would be, for example, whether the transaction took place within the suspect period or whether the transaction evidenced any one or more of certain general characteristics (e.g. whether appropriate value was given for the assets transferred, whether the debt was mature or the obligation due, or whether there was a special relationship between the parties to the transaction). While such generalized criteria may be easier to apply than criteria that rely on proof of intent, they can also have arbitrary results if exclusively relied upon. So, for example, legitimate and useful transactions that fall within the specified

suspect period might be avoided, while fraudulent or preferential transactions that fall outside the period are protected.

Subjective criteria (intention of the parties)

Another approach emphasises case-specific, subjective criteria. The most important of these criteria are whether there is an intention to hide assets from creditors, and whether the counterparty knew that the debtor was insolvent at the time that the transaction occurred. This approach may also raise the question whether the transaction was unfair in relation to certain creditors. This individualized approach may require a detailed consideration of the intent of the parties to the transaction

Combining subjective and objective criteria

Very few insolvency laws rely solely on subjective criteria as the basis for that law's avoidance provisions; they are generally combined with time periods within which the transactions must have occurred. In some countries, heavy reliance upon subjective criteria has led to considerable litigation and the imposition of extensive costs on insolvency estates.

Some laws adopt a two-tiered approach combining a requirement for a short period within which all transactions are avoided and with regard to which no defences are available to creditors, with a longer period in which certain additional elements have to be proven. The law may specify that a certain type of transaction occurring within, for example, a six-month period before commencement, is avoided without requiring the insolvency representative to show anything other than that it is a transaction as defined for the purposes of the legislation and that it occurred within the time limit. In such a case, no defences may be available to the counterparty.

B.3 The UNCITRAL Recommendations and commentary

Seven important recommendations given by UNCITRAL will be dealt with here. INSOL Europe supports these recommendations. The commentary of UNCITRAL (with additional remarks by INSOL) will also prove to be useful with regard to the interpretation of the harmonized rules.

I. Avoidable transactions

The insolvency law should include provisions that apply retroactively and are designed to overturn transactions or assets of the estate, and that have the effect of either reducing the value of the estate or upsetting the principle of the equitable treatment of creditors. The insolvency law should specify the following types of transactions as avoidable⁷¹:

⁷¹ To the opinion of the INSOL Working Group the words "or void" should be added here.

(a) Transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;

(b) Transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value or for inadequate value and which occurred when the debtor was insolvent or as a result of which the debtor became insolvent (undervalue transactions);

(c) Transactions involving creditors where a creditor obtained, or received the benefit of, more than its pro rata share of the debtor's assets that occurred at a time when the debtor was insolvent (preferential transactions).

In the commentary to this recommendation, UNCITRAL observes that these types of avoidable transaction broadly share the same common features, and are found in most legal systems. As these can also be found in the legal systems of the EU countries, INSOL Europe is in favour of following the same main distinctions which arise with regard to the most common types of transaction. Some transactions may have several principal characteristics, depending upon the individual circumstances of each transaction. For example, transactions that appear to be preferential may partake more of the character of transactions which are intended to defeat, hinder or delay creditors when (i) the purpose of the transaction is to put the assets beyond the reach of creditors or otherwise to prejudice the interests of the creditors and (ii) the transaction occurs when the debtor will be unable to pay its debts as they fall due or where they leave the debtor with insufficient assets to conduct its business.

Transactions at an undervalue fall into the first category of transactions when there is a clear intent to hinder, defeat or delay creditors.

In practice, it is very important that if specific transactions have the characteristics of more than one of the different classes, the insolvency representative may be able to choose the category under which a particular transaction is to be avoided and thus take advantage of the variations in requirements of proof and suspect periods that typically apply.

Transactions intended to defeat, hinder or delay creditors

These transactions involve the debtor transferring assets to any third party with the intention of putting them beyond the reach of creditors. These transactions generally cannot be avoided automatically by reference to an objective test of a fixed period of time in which the transactions occurred because of the need to prove the intent of the debtor. That intent is rarely proved by direct evidence, but rather by identifying

circumstances that are common to these types of transaction. Although differing between jurisdictions, there is a number of common indicators, including:

- (a) the relationship between the parties to the transaction, where a transaction took place directly with a related person or via a third party to a related person;
- (b) the lack⁷² or inadequacy of the value received for the transaction;
- (c) the financial condition of the debtor both before and after the transaction was entered into, in particular where the debtor was already insolvent or became insolvent after the transaction occurred;
- (d) the existence of a pattern or series of transactions transferring some or substantially all of the debtor's assets occurring after the onset of financial difficulties or the threat of action by the creditors; and
- (e) the concealment of the transaction by the debtor, especially when it is not made in the ordinary course of business, or where fictitious parties were involved.

Some laws also specify circumstances or types of transactions where the requisite intent or bad faith is deemed, or may be presumed, to exist, for example, in the case of transactions involving related persons occurring within a specified period of time prior to the commencement of proceedings.

Under other laws it may be sufficient for a transaction to be avoided if the debtor could, and therefore should, have realized that the effect, if not the intent, of a transaction would have been to disadvantage creditors and the beneficiary could, and therefore should, have realized that the debtor's action could produce that effect.

Undervalue transactions

A debtor who is in need of cash may sell assets quickly at a price significantly below the real value in order to achieve a quick result, without ever having any intention to defeat or delay creditors. The result however, may be a clear reduction of the assets available to creditors in insolvency. For this reason, many insolvency laws focus on the exchange of value in a transaction. Transactions would generally be avoidable where the value received by the debtor was either nominal or non-existent, such as a gift, or a much lower consideration than the true value or market value, provided that the transaction occurred within the suspect period. These undervalue transactions include those with both creditors and third parties.

⁷² Of course, a gift is the ultimate example of this.

An important question in respect of these types of transaction is what constitutes a sufficient “undervalue” for the purposes of avoidance and how it can be determined. In many States, this is left to be determined by reference to standards such as reasonable market value prevailing at the time the transaction occurred on the basis of appropriate expert evidence. Where the relevant amount in a transaction may not be certain, one approach which can assist the court may be for the insolvency representative to provide the court with an estimated valuation of such amounts, which could be disputed upon the presentation of further evidence by the counterparty to the transaction.

Furthermore, some laws presume a less than fair, or no, consideration to be evidence of a transaction intended to defeat, hinder or delay creditors.

Preferential transactions

Preferential transactions may be subject to avoidance where:

- a) the transaction took place within the specified suspect period;
- b) the transaction involved a transfer to a creditor on account of a pre-existing debt; and
- c) as a result of the transaction, the creditor received a larger percentage of its claim from the debtor’s assets than other creditors of the same rank or class (in other words, a preference).

The rationale for including these types of transactions within the scope of avoidance provisions is that, when they occur very closely to the commencement of proceedings, a state of insolvency is likely to exist and they therefore breach the key objective of an equitable treatment of similarly situated creditors by giving one member of a class more than they would otherwise legally be entitled to receive.

Examples of preferential transactions may include

- the payment or set-off of debts not yet due;
- the granting of a security interest to secure existing unsecured debts;
- unusual methods of payment (Iey other than in money), of debts that are due;
- the payment of a debt of a considerable size in comparison to the assets of the debtor; and
- in some circumstances, payment of debts in response to extreme pressure from a creditor, such as litigation or attachment, where that pressure has a doubtful basis.

A set-off, while not avoidable as such, may be considered prejudicial when it occurs within a short period of time before the application for the commencement of the insolvency proceedings and it has the effect of altering of the balance of the debt between the parties in such a way as to create a preference or where it involves transfer or assignment of claims to build up set-offs.

A defence to an allegation that a transaction was preferential may be to show that, although containing the elements of a preference, the transaction was in fact consistent with normal commercial practice and, in particular with the ordinary course of business between the parties to the transaction. For example, a payment made on receipt of goods that are regularly delivered and paid for may not be preferential, even if made within close proximity of the commencement of insolvency proceedings. This approach encourages suppliers of goods and services to continue to do business with a debtor that may be having financial problems, but is still potentially viable.

Other defences available under insolvency laws include the fact that the counterparty extended credit to the debtor after the transaction and that credit has not been paid (such a defence is usually limited to the amount of new credit); the fact that the counterparty gave new value for which it was not granted a security interest; the fact that the counterparty can show that it did not know a preference would be created; that the counterparty did not know or could not know that the debtor was insolvent at the time of the transaction, or the fact that the debtor's assets exceeded its liabilities at the time of the transaction.

II. Establishing the suspect period

The insolvency law should specify that the transactions described in the first recommendation may be avoided if they occurred within a specified period (the suspect period) calculated retroactively from a specified date, being either the date of application for, or commencement of, the insolvency proceedings. The insolvency law may specify different suspect periods for different types of transactions.

Most insolvency laws explicitly specify the duration of the suspect period with reference to the specific types of transactions to be avoided and indicate the date from which the period is calculated retroactively. For example, the law may prescribe the number of days or months before a particular event or date, such as (i) the date of the application for commencement of proceedings is made, (ii) the effective date of commencement of insolvency of proceedings or (iii) the date decided by the court as being the date on which the debtor ceased paying its debts in the normal way ("cessation of payments"). The event or date specified by the law will depend upon other 'design features' of the insolvency regime such as the requirements for commencement, including whether there is a potential for delay between the

application for, and commencement of, insolvency proceedings. For example, if commencement typically takes several months from the time of application and the suspect period is a fixed period relating back from the effective date of commencement, then several months of that period will be taken up by the period of delay between application and commencement, thus limiting the potential effectiveness of the avoidance powers. However, if the proceedings commence automatically when an application is made, the same delay will not occur.

INSOL is in favour of choosing the date of application as the date from which the period is calculated retroactively, in order to prevent problems in legal systems where commencement typically takes several months from the time of application.

Some insolvency laws provide for one suspect period for all types of avoidable transaction, while others have different periods depending upon the type of transaction and whether the transferee was a related person. As noted above, there are also examples of laws that adopt the approach of combining a short suspect period within which certain types of transaction are automatically avoided (and no defences available) and a longer period in which additional elements have to be proved. Other insolvency laws establish a very long limit (examples range from one to ten years) where the suspect period is generally calculated from the date of commencement of proceedings.

Not only UNCITRAL, but also the INSOL Europe Note as mentioned above, together with Professor Philip Wood⁷³ observe that all legislators seem to have quite different opinions on how long the suspect periods should be. The INSOL Europe Note⁷⁴ mentions the fact, for example, that under Italian law, the suspect period runs from six months to one year, but certain exceptions to this period exist. Under German law, the insolvency office holder has the right to contest detrimental transactions over a period of one month, three months to one, four or ten years prior to the insolvency petition. In many cases, the transaction can only be avoided if the counterparty acted in bad faith.

Under UK law, the transaction must have occurred when the debtor was insolvent and within two years of the insolvency in case of a transferee or third party who was connected with the debtor and within six months in the case of non-connected parties. Protection is given to transactions that a company entered into in good faith for legitimate reasons and for value. In the cases of a liquidation or administration, a floating charge can be challenged within a period of twelve months of the commencement of the insolvency proceeding and within two years if the transaction is with a connected party. Any floating charge taken by a creditor within these time

⁷³ P.R. Wood, *Principles of International Insolvency*, 2007, p. 511.

⁷⁴ INSOL Note, p. 19.

limits is therefore invalid except to the extent of the value of further monies advanced, or goods supplied in connection with the charge, subsequent to or at the same time of the granting of the charge.

France has a six months period prior to the bankruptcy declaration during which certain acts can be declared null and void.

UNCITRAL observes that with the exception of transactions involving intentionally wrongful behaviour, it is highly desirable that suspect periods be of a reasonably short duration to ensure commercial certainty and to reduce any negative impact that avoidance provisions will have on the availability and cost of credit.

Where preferential and undervalued transactions involve creditors who are not related persons, it is desirable that the subject period be relatively brief, perhaps no more than several months (e.g. from three to six months). However, where related persons are involved, stricter rules may apply and the suspect period will be longer (e.g. two years as opposed to three to six months for the same transaction when it does not involve a related person). For transactions intended to defeat, hinder or delay creditor, the suspect period could be longer, for example, one or two years.

III. Transactions with related persons

The insolvency law may specify that the suspect period for avoidable transactions involving related persons is longer than for transactions with unrelated persons.

In the glossary to the UNCITRAL Guide “related persons” are defined as follows:

“as to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity”.

IV. Conduct of avoidance proceedings

The insolvency law should specify that the insolvency representative has the principal responsibility to commence avoidance proceedings. The insolvency law may also permit any creditor to commence avoidance proceedings with the agreement of the insolvency representative, and, where the insolvency representative does not agree, the creditor may seek leave of the court to commence such proceedings.

V. Time limits for commencement of avoidance proceedings

The insolvency law or applicable procedural law should specify the time period within which an avoidance action may be commenced. That time period should begin to run on the commencement of insolvency proceedings. In respect of transactions referred to in recommendation I that have been concealed and that the insolvency representative could not be expected to discover, the insolvency law may provide that the time period commences at the time of discovery.

VI. Elements of avoidance and defences

The insolvency law should specify the elements to be proved in order to avoid a particular transaction, the party responsible for proving these elements and specific defences to avoidance. Those defences may include that the transaction was entered into in the ordinary course of business prior to commencement of insolvency proceedings. The law may also establish presumptions and permit shifts in the burden of proof to facilitate the conduct of avoidance proceedings.

VII. Liability of counterparties to avoided transactions

The insolvency law should specify that a counterparty to the transaction that has been avoided must return to the estate the assets obtained or, if the court so orders, make a cash payment to the estate for the value of the transaction. The insolvency law should determine whether the counterparty to an avoided transaction would have an ordinary unsecured claim.

The insolvency law may specify that, where the counterparty does not comply with the court order avoiding the transaction, in addition to avoidance and any other remedy, a claim by the counterparty may be disallowed.

C.

Survey of the implementation of the recommendations

The fundamental question is whether these harmonized rules should take the form of an EU Directive or whether the Member States are allowed to choose voluntarily and on their own account to implement them. On the meeting of 6 June a majority of the Drafting Committee was in favour of the second possibility. For this reason the harmonized rules have been added in the form of an appendix.

Articles I, II and III

On the basis of the UNCITRAL recommendations a distinction is made in Articles I, II and III between transactions intended to defeat, delay or hinder the ability of creditors to collect claims, transactions at an undervalue and preferential transactions.

In the cases of transactions for inadequate value and preferential transactions, there is a difference between the suspect period for non-related and related persons. In the case of non-related persons, the suspect period is six months ending with the application for insolvency, and with related persons, the said period is two years. In the case of transactions intended to defeat, delay or hinder the ability of creditors to collect claims, the suspect period is both for related and non-related persons two years, as this behaviour is invariably intentionally wrongful.

In all these choices, UNCITRAL Recommendations I, II and III are followed.

Articles I, II and III also implement Recommendation VI.

Article IV

In this Article, Recommendation IV is followed.

Article V

In this Article, Recommendation V is followed.

Article VI

In this Article, Recommendation VII is followed.

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