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# CONTRACTING OUT OF SECONDARY INSOLVENCY PROCEEDINGS: THE MAIN LIQUIDATOR'S UNDERTAKING IN THE MEANING OF ARTICLE 18 IN THE PROPOSAL TO AMEND THE EU INSOLVENCY REGULATION

*Prof. Dr. Bob Wessels\**

## INTRODUCTION

The European Insolvency Regulation<sup>1</sup> aims to improve the efficiency and effectiveness of insolvency proceedings having cross-border effects within the European Union. For that purpose, the Insolvency Regulation lays down rules on jurisdiction common to all member states of the European Union (Member States), rules to facilitate recognition of insolvency judgments, and rules regarding the applicable law. The model of the Regulation will be known. It allows for one main proceeding, opened in one Member State, with the possibility of opening secondary proceedings in other EU Member States. The procedural model can only be successful if these proceedings are coordinated:

Main insolvency proceedings and secondary proceedings can...contribute to the effective realization 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.<sup>2</sup>

In this article, I will analyze a proposal that is included in the amendments to the EU Insolvency Regulation (InsReg). These amendments have been made by the European Commission on December 12, 2012. The

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1. *See generally* European Union Insolvency Regulation, Council Regulation 2000/1346, 2000 O.J. (L 160) 1 (EC) [hereinafter EU Insolvency Regulation]. It applies to 27 EU Member States, with the exception of Denmark.

2. *Id.* recital 20 (emphasis added).

proposal provides that the liquidator, appointed in the main insolvency proceedings,

. . . may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall be subject to the form requirements, if any, of the State of the opening of the main proceedings and shall be enforceable and binding on the estate.<sup>3</sup>

In Part I, I will first discuss the powers that a liquidator, appointed in main insolvency proceedings has, including their effects outside the Member State, the court of which has appointed the liquidator.<sup>4</sup> Thereafter, attention will be given to InsReg Articles 31(1) and (2) which reflect the fundamental foundation of the Insolvency Regulation, i.e. the coordination of main insolvency proceedings and secondary insolvency proceeding in which the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other and to cooperate with each other. On the other hand, InsReg Article 31(3) is a reflection of the dominant role of the main proceedings: 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.<sup>5</sup> Then, in Part II, I will highlight some of the provisions in Chapter III of the Regulation (Secondary Insolvency Proceedings) to illustrate the nature and function of secondary insolvency proceedings with a focus on the coordination of main insolvency proceedings and secondary insolvency proceedings, as well as to clarify aspects of the so-called “dominant” role of the main insolvency proceedings. In the following section, I provide a short overview of cross-border insolvency practice in Europe, which serves as the cradle on the European Commission’s proposal regarding the “as if” undertaking, given by a main liquidator. After stating the Court of Justice of the European Union’s view on the question of how to combine and align main and secondary proceedings which have different or even contrasting aims in Part IV, I turn in Part V to the European Commission’s proposals of December 2012 and in Part VI to the amendments suggested by the European Parliament (EP), the text of which was approved on February 5,

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3. *Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No. 1346/2000 On Insolvency Proceedings*, para. 28(a)(1), COM (2012) 744 final (Dec. 12, 2012) [hereinafter *Proposal to Amend the EU Insolvency Regulation*].

4. EU Insolvency Regulation, *supra* note 1, art. 2(b) provides as a definition for liquidator, “... 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”. Annex C lists around 100 national names of these “liquidators”.

5. See *Margreet de Boer and Bob Wessels, The Dominance of Main Insolvency Proceedings under the European Insolvency Regulation*, in *INTERNATIONAL INSOLVENCY LAW: THEMES AND PERSPECTIVES* 185 (Paul Omar ed., 2008).

2014. I will then offer for debate in Part VII some critical observations to the constituent (or lacking) elements of an “as if” undertaking, and in Part VIII, some queries about the law applicable in such “as if” undertakings.

## I. DOMESTIC POWERS OF THE LIQUIDATOR IN MAIN INSOLVENCY PROCEEDINGS

InsReg Article 18 acknowledges the general authority of the main liquidator to exercise his powers in other Member States.<sup>6</sup> InsReg Article 19 comprises a rule relating to the proof of his appointment.<sup>7</sup> In principle the liquidator, appointed by a court that has jurisdiction pursuant to InsReg Article 3(1) to open main insolvency proceedings, has the authority to exercise all the powers conferred on him by the *lex concursus* in the other Member States. Recognition of main proceedings under InsReg Article 16 takes place “automatically,” and includes recognition of the liquidator appointed in such proceedings.<sup>8</sup> His powers shall be recognized “automatically” too in all Member States.<sup>9</sup> In these states the liquidator may exercise the powers conferred to him by the *lex concursus*, the law of the State in which main proceedings have been opened.<sup>10</sup> The liquidator can exercise his powers abroad (within the area of the 27 Member States) in principle without any prior or further formality, especially without having to obtain an exequatur, without having to propose a form of bail and, furthermore, without the need to ensure publication of his appointment in one or more other Member States.

The number of powers that a liquidator in the main insolvency proceedings may have and the nature of such powers and their legal effects are all determined by the *lex concursus*. Furthermore, the *lex concursus* is decisive with regard to the liquidator’s legal tasks, duties, the scope of his power, and the grounds and procedure for his removal. Therefore, for instance, in Dutch main insolvency proceedings, the appointed liquidator will also be subject to supervision by the supervisory judge (*rechter-commissaris*) when taking steps in other Member States. The Spanish professors Virgós and Garcimartín submit that the *lex concursus* will also be decisive in determining the liquidator’s liability for failure or weakness of performance, including the standard of care required.<sup>11</sup> I submit that the possibility cannot be excluded that certain (third) parties could start liability

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6. EU Insolvency Regulation, *supra* note 1, art. 18.

7. *Id.* art. 19.

8. *Id.* art. 16.

9. *Id.*

10. I agree with the proposition of Berends A.J., *Grensoverschrijdende insolventie*, Nederlands Instituut voor het Bank- en Effectenbedrijf, 152, (1999) that Article 18(1) is, in this regard, helpful as a practical repetition of Article 4(2)(c), but is unnecessary. See EU Insolvency Regulation, *supra* note 1.

11. MIGUEL VIRGÓS & FRANCISCO GARCIMARTÍN, *THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A PRACTICAL COMMENTARY* ¶ 364 (Kluwer Law International 2004).

proceedings before the courts of the state within the territory where certain acts by the liquidator have caused damages, when to such claims the law of the latter Member State (including its provisions on private international law) will be applicable.

The liquidator in the main insolvency proceedings only has authority to exercise his powers in the other Member States within the limits of the Insolvency Regulation, specifically outlined in the first sentence of Article 18(1), and therefore only “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.”<sup>12</sup> This limitation relates to the possibility of opening secondary insolvency proceedings pursuant to InsReg Article 3(2).<sup>13</sup> The Virgós-Schmit Report refers to this limitation as a logical restriction, since the assets cannot be subject to the powers of two different liquidators:

Once territorial proceedings have been opened, the direct powers of the liquidator in the main proceedings no longer apply to assets situated in the state of the opening of the territorial proceedings. The liquidator in the territorial proceedings has exclusive powers over those assets. This does not imply that the main liquidator loses all influence over the debtor’s estate situated in the other ... state, but that that influence must be exercised through the powers conferred on that liquidator by [the Regulation] to coordinate the territorial proceedings and the main proceedings.<sup>14</sup>

As indicated, the limitation in Article 18(1)’s first sentence also concerns situations in which provisional protective measures are incompatible with the exercise of the powers of the main liquidator which have already been adopted as a consequence of the request to open secondary proceedings. Examples of measures of this type in the Netherlands are provided for in the Dutch Bankruptcy Act (*Faillissementswet*) and include the placing under seal of the estate (which, however, in practice hardly takes place),<sup>15</sup> as well as measures to protect the interests of creditors.<sup>16</sup>

The second sentence of InsReg Article 18(1) explicitly provides for the main liquidator’s power to remove the debtor’s assets from the territory of the Member State in which they are situated, subject to InsReg Articles 5

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12. EU Insolvency Regulation, *supra* note 1, art. 18.

13. *Id.* art. 3(2).

14. Miguel Virgós & Etienne Schmit, *Report on the Convention of Insolvency Proceedings*, para. 163, Council 6500/1996 (May 3, 1996), available at [http://aei.pitt.edu/952/1/insolvency\\_report\\_schmidt\\_1988.pdf](http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf).

15. Dutch Bankr. Act art. 7.

16. Pursuant to *id.* arts. 225, 290.

and 7 (provisions on rights in rem and reservation of title respectively).<sup>17</sup> The provision creates a substantive rule, as this power may also be exercised when the *lex concursus* does not include a power of this nature. It is therefore a pure “European Union” power. One may submit that the power to remove assets already flows from the first sentence of InsReg Article 18(1), and Article 4(2)(c) stating the *lex concursus* determines “the respective powers of the debtor and the liquidator.”<sup>18</sup> The express stipulation follows however from the need to remove any doubt.<sup>19</sup>

In addition to the limitations on the liquidator’s powers, InsReg Article 18(3) provides that the liquidator in the main proceedings shall, in exercising his powers, “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 realization of assets.”<sup>20</sup> Such powers may not include coercive measures or the right to rule on legal proceedings or disputes.<sup>21</sup>

The Virgós-Schmit Report explains how compliance with a Member State’s law takes shape.<sup>22</sup> The following points can be noted: the general principle of prohibition of the exercise of coercive powers in another state applies to a “foreign” main liquidator, thus he may only take action in other states if he complies with this principle.<sup>23</sup> For this reason, Article 18(1) expressly prohibits direct recourse to coercive measures. In fact, according to the Virgós-Schmit Report: “Any use of force or coercive action is

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17. EU Insolvency Regulation, *supra* note 1, art. 18(1) (“[The liquidator] 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.”); *Id.* arts. 5, 7.

18. *Id.* arts. 18(1), 4(2)(c).

19. See Virgós & Schmit, *supra* note 14, para. 161, in which it is stipulated that when removing assets the liquidator must respect Articles 5 and 7, as the main proceedings cannot affect rights in rem of creditors or third parties over assets situated, at the time of the opening, in a Member State other than the state of the opening of proceedings.

20. EU Insolvency Regulation, *supra* note 1, art. 18(3).

21. *Id.* art. 18(2) relates to the liquidator appointed in secondary proceedings and therefore by a court which has jurisdiction pursuant to Article 3(2). He “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.” *Id.* Furthermore, he may “bring any action to set aside which is in the interests of the creditors.” *Id.* On these additional powers of the secondary liquidator, see BOB WESSELS, INTERNATIONAL INSOLVENCY LAW, ¶ 10762 (3rd ed. 2012).

22. Virgós & Schmit, *supra* note 14, para. 164.

23. The Insolvency Regulation, quite rightly, is built on the principle that a person may not act as judge in its own case. Such a situation would be in direct conflict with e.g. the English law “principle of natural justice *nemo iudex in sua causa*”. See *Ex parte Pinochet*, [2000] AC (HL) 119 (mentioned in THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE, ¶ 8.165 (G. Moss et al. eds., 2d ed. 2009)). See also K. Staak, *Der deutsche Insolvenzverwalter im europäischen Insolvenzrecht. Eine Analyse der EG-Verordnung Nr. 1346/2000 des Rates vom 29. Mai 2000 über Insolvenzverfahren unter besonderer Berücksichtigung der Person des deutschen Insolvenzverwalters*, *Europäischen Hochschulschriften, Reihe II, Rechtswissenschaft, Vol. 3889*, Frankfurt am Main: Peter Lang 2004, at 144.

excluded.”<sup>24</sup> In any given case where the persons affected by a liquidator’s act do not voluntarily agree to the liquidator’s performance, and coercive measures are required with regard to assets or persons, the liquidator must apply to the authorities of the state where the assets or persons are located to have these measures adopted and implemented. Scholars Moss and Smith correctly submit that local courts should have a “big-hearted” attitude: “Also, as a matter of principle, local law and courts should as far as possible make available to liquidators in main proceedings all the remedies available to local liquidators, so as to avoid discrimination against a European Union citizen. This may sometimes necessitate the opening of secondary proceedings.”<sup>25</sup> The English text (“shall comply”), however, appears to be stricter than various other texts, such as texts in the Netherlands: “*eerbiedigen*” (which is the equivalent of “to respect”), France: “*doit respecter*,” and in Spanish: “*deberá respetar*.” The rationale is that the main liquidator “must take the constraints of the outside world as a given.”<sup>26</sup> The liquidator shall exercise his powers without infringing the laws of the state in which he takes action.

Where local law provides for certain formal procedures for the realization of assets, the liquidator shall comply with the law of the state in which the assets are located. The *lex concursus* of the main proceedings establishes the extent of the powers of the liquidator and the manner in which such powers may be exercised. Only the *lex concursus* of the main proceedings is decisive with regard to, for example, whether the sale of immovable property can be a private market transaction or whether a sale by public auction is necessary. Once the *lex concursus* has determined the form of sale, the procedures by which the assets are realized must, however, be in accordance with the provisions of the national law of the approached Member State. If the latter *lex fori concursus* requires a sale by public auction, the procedure for carrying out this sale in the state where the immovable property is situated shall therefore be determined by the law of that latter state. On the other hand, if Dutch insolvency law prescribes the approval of the court when a liquidator intends, for example, to start civil law proceedings, the foreign main liquidator does not need this approval, as Article 18(3) does not function as a conflict of law rule.<sup>27</sup>

The Insolvency Regulation does not provide for any form of objection to the main liquidator’s performance. Due to the lack of provisions regarding objections to the exercise of powers by the liquidator and the lack

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24. Virgós & Schmit, *supra* note 14, para. 164.

25. THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE, ¶ 8.165 (G. Moss et al. eds., 2d ed. 2009).

26. See, e.g., Virgós & Garcimartin, *supra* note 11, para. 369, and Staak, *supra* note 23, at 143, who correctly submits that the principle of the *lex concursus* of the main insolvency proceedings stays intact, with due respect to the *lex fori* of the other Member State.

27. See A.J. Berends, *Insolventie in het internationaal privaatrecht* 342 (2005) (doctoral thesis, Vrije Universiteit Amsterdam).

of provisions requiring the liquidator to act or prevent the liquidator from acting, the Virgós-Schmit Report submits that the authorities of the Member States within which the powers are intended to be exercised shall have jurisdiction to decide if the grounds for opposition lie in the non-recognition of the proceedings opened in another Member State, or of the judgment appointing the liquidator.<sup>28</sup> The examples in the Virgós-Schmit Report relate to a situation in which the grounds for opposition are a breach by the liquidator of the provisions of the Regulation that govern the exercise of his powers in other Member States, such as InsReg Article 18(1) or InsReg Article 3(3).<sup>29</sup> Alternatively, “[i]f the opposition concerns the substance of the exercise of those powers, i.e. the justification for a measure which the liquidator intends to take, jurisdiction lies with the judicial authorities of the state of the opening of the proceedings.”<sup>30</sup>

## II. SECONDARY PROCEEDINGS

As explained, secondary proceedings can cut off the powers of the main liquidator in as far as these are determined by the *lex concursus* of the Member State, the court of which has opened main proceedings and appointed her or him. The model of main insolvency proceedings opened in one Member State, with the possibility of opening secondary insolvency proceedings in other Member States, has its roots in the European Convention on Certain Aspects of Bankruptcy, signed in Istanbul on June 5, 1990.<sup>31</sup> Its introduction at that time was based on the utility of secondary proceedings from the perspective of local creditors.<sup>32</sup> Consequently, main insolvency proceedings opened in one Member State do not deprive courts

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28. Virgós & Schmit, *supra* note 14, para. 166.

29. *Id.*

30. See also M. Bogdan, in THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE, *supra* note 25, ¶ 8.166. It should be noted that a Dutch main liquidator in main liquidation proceedings will be subject to Article 69 of the Dutch *Faillissementswet*:

1. Each of the creditors, the appointed creditors committee and also the bankrupt, may file a petition with the supervisory judge to object against any act of the liquidator or to procure that the supervisory judge orders the liquidator to perform or refrain from performing any intended act. 2. Within three days the supervisory judge must issue his decision having heard the liquidator.

Dutch Bankr. Act art. 69. For an extended analysis of Article 18, see WESSELS, *supra* note 21, ¶ 10754.

31. For a list of signatories and ratifications, see *European Convention on Certain International Aspects of Bankruptcy*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/en/Treaties/Html/136.htm> (last visited May 31, 2014). Article 44(k) has replaced the Istanbul Convention, which was signed by seven states and ratified by only one Member State (Cyprus). *Id.*

32. See Manfred Balz, *The European Convention on Insolvency Proceedings*, 70 AM. BANKR. L.J. 485, 494 (1996).



in other Member States of the authority to open secondary proceedings.<sup>33</sup> If these proceedings are opened they shall be secondary insolvency proceedings within the meaning of Chapter III of the Regulation (“Secondary Insolvency Proceedings”). The universal effect of the main proceedings throughout the European Union does not apply to the secondary proceedings, opened in another Member State, while the effects of the secondary proceedings may not be challenged in other Member States.<sup>34</sup> Because the procedural and substantive effects of the secondary proceedings are determined by the *lex concursus*, through rules contained in InsReg Articles 4 and 28, the focus of the secondary insolvency proceedings is the protection of local interests.<sup>35</sup>

Various types of secondary proceedings are listed by country in Annex B to the Regulation.<sup>36</sup> They amount to approximately sixty types of proceedings operational in 27 Member States. They are liquidation proceedings—although the Insolvency Regulation uses the term “winding-up proceedings”—within the meaning of Article 1(1).<sup>37</sup> Such liquidation proceedings aim to “realize 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.”<sup>38</sup>

#### A. FUNCTION OF SECONDARY PROCEEDINGS

Although Annex B lists “national” insolvency “winding-up” proceedings, the primary function of secondary proceedings dictates the view that while a secondary proceeding may be “in name” a national proceeding, it is however necessary to understand that they have a function to operate within the scope of the EU Insolvency Regulation. This function can be explained in three ways:

(i) Although secondary proceedings are opened in another Member State (in which the debtor has an “establishment”),<sup>39</sup> the secondary

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33. See EU Insolvency Regulation, *supra* note 1, art. 16(2).

34. See *id.* art. 17(2).

35. See, e.g., S. Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfiel sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung?* Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking (2001) (doctoral dissertation), who at page 13 characterizes this focus understandably as a “protective function” (*Schutzfunktion*).

36. See generally Signe Viimsalu, *The Meaning and Functioning of Secondary Insolvency Proceedings*, (2011) (doctoral thesis, University of Tartu, Estonia).

37. EU Insolvency Regulation, *supra* note 1, art. 1(1) (“collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a [creditor]”; these are listed in Annex A, amounting to around one hundred).

38. See *id.* arts. 2(c), 3(3).

39. See *id.* arts. 3(2), 2(h).

proceedings are concerned with the same (insolvent) debtor as the main insolvency proceedings;<sup>40</sup>

(ii) Despite the secondary proceedings only being permitted to be proceedings as listed in Annex B, and therefore winding-up proceedings with territorial effect,<sup>41</sup> Chapter III of the Insolvency Regulation provides the liquidator appointed in the main insolvency proceedings with several powers to change the character of the secondary proceedings and to align the proceedings in accordance with developments in the main proceedings (see below); and

(iii) Despite “local” creditors being able to lodge claims in secondary proceedings, they are also allowed to lodge claims in the main proceedings or in any other secondary proceedings pending in other member States.<sup>42</sup>

Virgós and Garcimartín refer to secondary proceedings as having an auxiliary function, and therefore, should be considered in the context of the main proceedings.<sup>43</sup> The Insolvency Regulation does not, however, aim to ring-fence secondary proceedings; these proceedings have their formal character and comprise assets, located in its territory, but the Regulation’s concept of the universality of the main proceedings “is allowed to become fragmented . . . but [is] not finally renounced.”<sup>44</sup> The mutual connection between both proceedings is founded on the maxim that, ultimately, the administration concerns one debtor with one estate and one group of creditors. The Regulation stems from the need for “coordination of the

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40. Article 2(h) defines “establishment” as “. . . any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.” *Id.* art. 2(h). The Court of Justice of the European Union applies strict criteria. *See* Case C-396/09, *Interedil Srl v. Fallimento Interedil Srl*, 2011 E.C.R. I-09915, para. 64, holding “that the term ‘establishment’ within the meaning of Article 3(2) must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.” The court goes on to say that “. . . in order to ensure legal certainty and foreseeability concerning the determination of the courts with jurisdiction, the existence of an establishment must be determined, in the same way as the location of the centre of main interests, on the basis of objective factors which are ascertainable by third parties.” *Id.* para. 63.

41. *See* EU Insolvency Regulation, *supra* note 1, arts. 3(2), 27.

42. *Id.* art. 32.

43. Virgós & Garcimartín, *supra* note 11, ¶ 290. For a discussion of the supportive function of secondary proceedings, *see, e.g.*, H. Duursma-Kepplinger, D. Duursma & E. Chalupsky, *Europäische Insolvenzverordnung Kommentar*, Wien: Springer 2002, art. 27, nr. 11; K. Staak, *Der deutsche Insolvenzverwalter im europäischen Insolvenzrecht. Eine Analyse der EG-Verordnung Nr. 1346/2000 des Rates vom 29. Mai 2000 über Insolvenzverfahren unter besonderer Berücksichtigung der Person des deutschen Insolvenzverwalters*, Europäischen Hochschulschriften, Reihe II, Rechtswissenschaft, Vol. 3889, Frankfurt am Main: Peter Lang 2004, at 483; U. Ehrlicke, *Das Verhältnis des Hauptinsolvenzverwalters zum Sekundärinsolvenzverwalter bei grenzüberschreitenden Insolvenzen nach der EuInsVo*, in *Zeitschrift für Wirtschaftrecht (ZIP)* 25-26/2005 at 1106.

44. *See* IAN F. FLETCHER, *INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES* ¶ 7.136 (James J. Fawcett ed., 2d ed. 2005).

measures to be taken regarding an insolvent debtor's assets."<sup>45</sup> This may be referred to as the principle of unity of estate.<sup>46</sup>

### **B. POWERS OF LIQUIDATOR IN MAIN INSOLVENCY PROCEEDINGS TO INTERFERE WITH SECONDARY PROCEEDINGS**

The concept of one debtor with one estate to satisfy all creditors is reflected—though less systematically—by the powers assigned to the liquidator in the main insolvency proceedings by the Insolvency Regulation. The following illustrates these rights and powers:

(i) He has the power to apply for secondary proceedings in other member states;<sup>47</sup>

(ii) He can ask liquidators in the secondary proceedings for information;<sup>48</sup>

(iii) He can demand that they cooperate with him;<sup>49</sup>

(iv) He can exercise the power to put forward certain proposals in the context of the secondary proceedings;<sup>50</sup>

(v) He may request a stay of the process of liquidation in these secondary proceedings;<sup>51</sup>

(vi) He may request the termination of a stay;<sup>52</sup>

(vii) He may propose a rescue plan in the secondary proceedings,<sup>53</sup> also during the stay of the process of liquidation;<sup>54</sup>

(viii) He shall lodge in other proceedings claims which have already been lodged in the main proceedings;<sup>55</sup>

(ix) He has the power to participate in the other proceedings on the same basis as the creditors;<sup>56</sup>

45. See EU Insolvency Regulation, *supra* note 1, art. 3.

46. According to the Court of Justice of the EU's Advocate General Sharpston, "[t]he 'principle of unity' means that there is a single set of insolvency proceedings", and "[t]he 'principle of universality' means that those proceedings extend to all the debtor's assets, wherever they may be situated. The secondary proceedings may only be winding up proceedings and have effects only in respect of assets located in that Member State . . . . The system laid down by the Regulation has appropriately been referred to by one commentator as one of 'co-ordinated universality.'" See Bob Wessels, *The Changing Landscape of Cross-border Insolvency Law in Europe*, XII JURIDICA INTERNATIONAL 116 (2007). See also Case C-328/12, *Ralph Schmid v Lilly Hertel*, <http://curia.europa.eu> (Sep. 10, 2013) (reference to a law review published in Estonia (!)).

47. EU Insolvency Regulation, *supra* note 1, art. 29.

48. *Id.* art. 31(1).

49. *Id.* art. 31(2).

50. *Id.* art. 31(3).

51. *Id.* art. 33(1).

52. *Id.* art. 33(2).

53. *Id.* art. 34(1).

54. *Id.* art. 34(3).

55. *Id.* art. 32(2).

56. *Id.* art. 32(3).

(x) He has the right to request the return to the main proceedings of anything already obtained by creditors as they have satisfied their claims by any means on the assets of the debtor situated in the other member state;<sup>57</sup> and

(xi) He has the power to collect any remaining assets from the secondary proceedings if all claims in these proceedings have been met.<sup>58</sup>

These powers have their origin in the Insolvency Regulation, and therefore may be regarded as the “union” powers of the main liquidator. In addition, the liquidator may use his or her domestic powers in the whole of the European Union, with the exception of Denmark.<sup>59</sup> The recitals devote only a few words to the guiding notion of unity of the estate. Recital 3 states that,

[t]he 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.<sup>60</sup>

See also Recital 12, explaining the characteristics of main proceedings and secondary proceedings, adding that “[m]andatory rules of coordination with the main proceedings satisfy the need for unity in the Community.”<sup>61</sup> Furthermore, as observed, Recital 20 states that “[m]ain insolvency proceedings and secondary proceedings can, however, contribute to the effective realization 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,”<sup>62</sup> while Recital 21 sets out the principle that “[e]very creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor’s assets.”<sup>63</sup>

To summarize, the Insolvency Regulation’s concept of the EU-wide universality of main proceedings is that, ultimately, the administration concerns one debtor with one estate and one group of creditors: the principle of unity of estate. This maxim dominates the mutual relationship between the main insolvency proceedings opened in one Member State, and one or more secondary proceedings opened in another Member State in

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57. *Id.* art. 20.

58. *Id.* art. 35.

59. *See id.* art. 18.

60. *Id.* recital 3.

61. *Id.* recital 12.

62. *Id.* recital 20.

63. *Id.* recital 21.

order to protect the local interests. In line with this maxim, the Insolvency Regulation assigns the liquidator in the main insolvency proceedings with ten specific powers, which may therefore be regarded as “union” powers.<sup>64</sup>

In addition, the liquidator in the main proceedings has in principle the authority to exercise all the powers conferred upon him by the *lex concursus* in other Member States. These so-called domestic powers may be exercised within the limits of the Insolvency Regulation, “as long as no other insolvency proceedings have been opened. . . .”<sup>65</sup> Once secondary proceedings have been opened in another Member State, the liquidator in the secondary proceedings is attributed exclusive, domestic power over the assets situated in that Member State depriving the main liquidator of his domestic powers in this respect.<sup>66</sup> This does not mean that the secondary proceedings are completely separated from the main proceedings and that the main liquidator has become broken-winged. On the contrary, as the main insolvency proceedings and the secondary proceedings are interdependent proceedings, the liquidator in the secondary proceedings has to fulfil his task under the “dominance” of the main liquidator. Coordination of the secondary proceedings and the main proceedings is essential for the effective realization of the total assets. InsReg Article 31(1) and (2) provide for the mutual duty to communicate any information which may be relevant to the other proceedings—within limits as to the extent of the details or national legislation—and to cooperate.<sup>67</sup>

Equally essential in this respect is that the main liquidator may intervene in secondary proceedings. In summary:

- **The main liquidator shall be given by the liquidator of the secondary proceedings “an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.”**<sup>68</sup>

This obligation regards important assets or decisions only. A rule is lacking on how conflicts between the main liquidator and the secondary liquidator are to be decided. It is submitted that the main liquidator has *locus standi* under the applicability of the secondary proceedings.

- **The main liquidator may apply for (i) realization of assets in secondary proceedings to be suspended for a certain period; (ii) a stay of the process of liquidation on a request of the main liquidator, to be considered by the court in relation to the interests of the creditors in the main proceedings;<sup>69</sup> or (iii) an anticipated termination of a stay provided by Article 33(2).**<sup>70</sup> As the Insolvency Regulation does not

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64. *Id.* arts. 31, 33, 34.

65. *Id.*; see also *id.* art. 18(1) (which relates to the possibility of opening secondary insolvency proceedings pursuant to Article 3(2)).

66. *Id.* art. 5(5)(2)(b).

67. *Id.* arts. 31(1), (2).

68. *Id.* art. 31(3).

69. *Id.* art. 33(1).

70. *Id.* art. 33(2).

provide explicitly for cross-border information of courts in proceedings in different Member States, it is up to the main liquidator to ground that a stay of the proceedings is in the interests of the creditors of the main proceedings.

- **The main liquidator may file a proposal for a rescue plan, a composition or a comparable measure in the secondary proceedings in case this is allowed under the law applicable to secondary proceedings.**<sup>71</sup> When such a measure was proposed by those other than the main liquidator, it needs the consent of the liquidator in the main proceedings in order to become final; failing his agreement, such a measure may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.<sup>72</sup> Here, again, the court eventually has to consider the proposed measure in weighing the financial interests of the creditors in the main proceedings, while the Insolvency Regulation does not provide for cross-border communication between courts in different member states.<sup>73</sup> During a stay of the process of liquidation, only the main liquidator or the debtor with the former's consent may propose a rescue plan, etc.<sup>74</sup>

The main proceedings are being more or less fragmented by the opening of one or more secondary insolvency proceedings in other member states; the liquidator in the main proceedings is empowered to leave his mark upon the general course of the total insolvency-unwinding. Considering the union powers conferred upon the liquidator in the main proceedings, assigning him as a dominant player, he may well be labelled as the liquidator “en-chef.” In this way, the Insolvency Regulation's concept of European Union universality—the principle of unity of estate—is respected without injuring the justified protection of local interests.

### III. TREATMENT “AS IF” SECONDARY PROCEEDINGS HAD BEEN OPENED

In Europe, there is a large body of literature dealing with all sorts of aspects and problems related to reorganization or insolvency of multinational corporate groups, providing views and ideas which all have their pros and cons.<sup>75</sup> In the absence of formal regulation many solutions

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71. *See id.* art. 34.

72. *Id.* art. 34(1).

73. It is beyond the scope of this article to further elaborate that the Insolvency Regulation also does not forbid cross-border communication between courts.

74. *Cf.* EU Insolvency Regulation, *supra* note 1, art. 34(3).

75. *See* Bob Wessels, *Multinational Groups of Companies under the EC Insolvency Regulation: Where Do We Stand?*, in *ONDERNEMINGSRECHT* 243–249; Bob Wessels, *The Ongoing Struggle of Multinational Groups of Companies under the EC Insolvency Regulation*, 6 *EUR. COMP. L.* 169–77 (2009); IRIT MEVORACH, *INSOLVENCY WITHIN MULTINATIONAL ENTERPRISE GROUPS* (2009); Irit Mevorach, *The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency*, in *NORTON ANNUAL REVIEW OF INTERNATIONAL INSOLVENCY* 89–

have been presented. In my book, I categorized ten options of choices for solution of group insolvencies, the seventh being “a treatment “as if” secondary proceedings were opened.”<sup>76</sup>

The argument is as follows: the Insolvency Regulation is based on the possibility of having secondary proceedings running parallel to main proceedings, while these secondary proceedings ultimately act as supportive proceedings for the main insolvency proceedings.<sup>77</sup> In legal practice, the different ranking of claims, which is a logical consequence of opening secondary proceedings, has been overcome in cases where courts have treated creditors in other Member States “as if” a secondary insolvency proceeding had indeed been opened in their respective jurisdiction, and thus simplifying proceedings through consolidation of local priorities.<sup>78</sup> The “as if” approach therefore results in the treatment of such creditors as they could expect under their national law. Examples of cases applying the method are *MG Rover*,<sup>79</sup> *Collins & Aikman*<sup>80</sup> and *Nortel Networks*,<sup>81</sup> shortly explained below.

According to German author Hirte, the chosen solution is “a form of ‘procedural consolidation’” which allows for different insolvency procedures but unites them in a single forum, avoids at least some transaction costs and discrepancies; in a way, this represents a step toward a group insolvency.<sup>82</sup> In the same line of thinking, the English author Mevorach submits that she is in favor of “the use of COMI in order to achieve ‘procedural consolidation’”, although stating that the concept needs “clear rules.”<sup>83</sup>

In European case law, the “as if” treatment has been followed in cases of enterprises in which subsidiary companies operate in other Member States and are regarded as “establishment” for the purpose of opening of

116 (2009); CHRISTOPH G. PAULUS, *EUROPÄISCHE INSOLVENZVERORDNUNG. KOMMENTAR* 175 (Frankfurt am Main: Verlag Recht und Wirtschaft, 4th ed., 2013); Nora Wouters & Alla Raykin, *Corporate Group Cross-border Insolvencies between the United States & European Union: Legal & Economic Developments*, 29 *EMORY BANKR. DEV. J.* 387 (2013).

76. WESSELS, *supra* note 21, ¶ 10425. I introduced the ‘as if’ treatment in the second edition of this book, in 2006.

77. *Id.* ¶

78. See Gabriel Moss, *Group Insolvency – Choice of Forum and Law: the European Experience Under the Influence of English Pragmatism*, 32 *BROOK. J. INT’L L.* 1005 (2007).

79. *In re MG Rover Belux SA/NV* (In Administration), *In the Matter of The Insolvency Act 1986*, [2006] (High Court of Justice Chancery).

80. *In re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343.

81. *In re Nortel Network*, [2009] EWHC (Ch) 206.

82. See Heribert Hirte, *Towards a Framework for the Regulation of Corporate Groups’ Insolvencies*, *EUR. COMP. FIN. L. REV.* 213, 218 (2008).

83. Irit Mevorach, *Appropriate Treatment of Corporate Groups in Insolvency: A Universal View*, 8 *EUR. BUS. ORG. L. REV.* 179, 189 (2007).

secondary proceedings.<sup>84</sup> The opening of secondary proceedings has been prevented in the following cases,<sup>85</sup> both occurring in 2006:

- **High Court of Justice Birmingham, March 30, 2006 (*MG Rover Belux SA/NV*)**. A Belgian company, a subsidiary of MG Rover, is debtor in main proceedings, opened in England. The liquidators in the main proceedings applied for permission to make distributions to the unsecured creditors as a class in accordance with Belgian law. The court observed that it had discretion to so permit, and that InsReg Article 3

does not oblige the supervising court to insist upon the adoption of its domestic law to every aspect of the insolvency or to insist that local rights can only be taken into account if secondary insolvency proceedings are commenced. I can accordingly give permission for a payment that does not strictly accord with English law if it is just and convenient to do so and helps achieve the objective of the administration.<sup>86</sup>

- **High Court of Justice, June 9, 2006 (*Collins & Aikman*)**. On July 15, 2005 the English High Court made administration orders for 24 of the European Collins & Aikman companies on the basis that the proceedings in the UK were main proceedings.<sup>87</sup> After a successful business sale of a number of the companies, the administrators sought directions from the Court to distribute the sale proceeds to creditors in accordance with the local laws of their jurisdiction. The administrators had given assurances in these jurisdictions.<sup>88</sup> Based on provisions in the Insolvency Act 1986 and the rule in *Ex parte James*,<sup>89</sup> the Court considered that it expects its officers (administrators in England and Wales are officers of the Court) to act in an honorable and high minded way.<sup>90</sup> A high ethical standard is expected and required of an officer of the Court—potentially outweighing other considerations including the prospect of a better realization for the estate. Given the due care that administrators had given to all of the creditors' interests, the court gave the directions requested by the administrators, observing that alternatives open to the administrators were not considered an attractive option, while opening secondary proceedings in the other

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84. A view that theoretically is not without problems See WESSELS, *supra* note 21, ¶ 10538.

85. For literature, see John Alderton & Antoine Adeline, *The EC Regulation on Insolvency Proceedings: Streamlining Cross-Border Insolvency? The Contrasting Approaches of the Courts in England and France*, 3 INT'L CORP. RESCUE 257 (2006); see also R. Dammann & M. Sénéchal, *La procédure secondaire du Règlement (CE) n° 1346/2000: mode d'emploi*, Lamy Droit des Affaires (October 2006); see also Stephen Taylor, *Avoiding Secondary Proceedings in EU Insolvency Regulation Cases*, 4 INT'L CORP. RESCUE 7 (2007).

86. *In re MG Rover Belux SA/NV*, [2006] EWHC (Ch) 1296.

87. *In re Collins & Aikman*, [2006] EWHC (Ch) 1343.

88. *Id.* para. 10.

89. *Ex parte James*, in *Re Condon* (1873-74) L.R. 9 Ch. App. 609 (Eng.), [1874-80] All E.R. Rep. 388. On the alleged diminished role of the rule after the UK Supreme Court's judgment in *Bloom v. The Pensions Regulator*, [2010] EWHC (Ch) 3010 (Eng.), see William Wilson, *The Rule in Ex Parte James: What's Left?*, 27 INSOLVENCY INTELLIGENCE 12 (2014).

90. *In re Collins & Aikman*, para. 17.



Member States (registered offices of subsidiaries as “establishment[s]”) could lead to delay, expense, and undesirable complication and uncertainty.<sup>91</sup> Within this discretion the administrators treated creditors in other Member States as if a secondary proceeding has been opened there.<sup>92</sup>

Subsequently, in 2009, Nortel Networks filed for insolvency:

- **High Court of Justice February 11, 2009 (*Nortel Network*).** On January 14, 2009 the High Court of Justice opened insolvency proceeding regarding Nortel Networks, including some 18 subsidiaries of some 15 EU Member State jurisdictions (centre of main interests (COMI) of all continental subs is in England). A few weeks later an application is made with a view to obtaining assistance from the courts of these various Member States in the form of prior notification to the Joint Administrators of any request or application for the opening of secondary insolvency proceedings in those jurisdictions and the giving to the Joint Administrators of an opportunity to be heard on any such application.

According to Judge Patten, in the decision of February 11, 2009, this is intended to enable them to explain to the relevant court why such proceedings would not be in the interests of the creditors: “It is not, of course, the function of this court or the purpose of the letters of request to indicate to the courts to which the letters are sent how they should determine any application to open secondary proceedings.”<sup>93</sup> The High Court observed it had “an inherent jurisdiction to issue a letter of request to a foreign court in appropriate circumstances and the only issue which I have to decide is whether I should exercise this jurisdiction in this particular case”<sup>94</sup> Judge Patten provided four main grounds:

- (i) The request for the assistance of the various foreign courts stems directly from the duty of cooperation imposed by InsReg Article 31(2).<sup>95</sup>

- (ii) “Although framed in terms of cooperation between office-holders, the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation which extends to the courts which exercise control of insolvency procedures in their respective jurisdictions.”<sup>96</sup> Patten J considers in *Re Stojevic* (November 9, 2004, 28 R 225/04w), a judgment of the Vienna Higher Regional Court, in which it said, “Although the wording of Art 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the

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91. *Id.* paras. 41, 42, 45.

92. *Id.* para. 49.

93. *In re Nortel Network*, [2009] EWHC (Ch) 206.

94. *Id.* para. 9.

95. *Id.* para. 10.

96. *Id.* para. 11.

court according to the prevailing opinion and under the UNCITRAL model law.”<sup>97</sup>

(iii) For this obligation to be effective—so the Court—“it is obviously desirable for the court dealing with an application to open secondary insolvency proceedings to be provided with the reasons why such proceedings might have an adverse impact on the main proceedings.”<sup>98</sup> An example of the advantage of permitting the Joint Administrators in English main proceedings to be heard in relation to the opening of secondary proceedings in another Member State can be found in the decision of the Court of Appeal of Versailles in *Rover France SAS* [2006] I.L.Pr. 32.

(iv) Article 33(1) allows a court that has opened secondary proceedings to stay the process of liquidation at the request of the liquidator in the main proceedings subject to suitable measures being taken to guarantee the interests of creditors in the secondary proceedings.<sup>99</sup> This would therefore halt the realization of assets located in the State of the secondary proceedings. But it would not prevent the continuation of winding-up proceedings in the Member States in which each of the Companies is incorporated,<sup>100</sup> and the effect of the commencement and continuation of such proceedings is likely to be to cause the relevant Company to cease to trade, save for the purposes of winding up.<sup>101</sup> The Joint Administrators took the view that the continuation of trading is necessary in order to achieve the re-organization of the Nortel Group.

After this argumentation, surprisingly but rightly using French and Austrian judgments, Judge Patten concludes,

In these circumstances, it seems to me highly desirable that the assistance of the foreign courts specified in the Schedule to the draft order should be sought with a view to enabling the Joint Administrators to be heard prior to the opening of any secondary insolvency proceedings in these jurisdictions and I will therefore authorize the sending of appropriate letters of request to the judicial authorities in those States.<sup>102</sup>

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97. *Id.*

98. *Id.* para. 12.

99. *Id.* para. 13.

100. *Id.* (referring to *In re Collins & Aikman*, Higher Regional Court of Graz, Oct. 20, 2005, 3 R 149/05).

101. *Id.*

102. As an aside, the High Court judgment seems a strong argument to advance cross-border cooperation between courts, although it must be said—with all due respect—that Article 31 only applies when main proceedings have been opened in one Member State (in the Nortel case, the UK) and in another Member State secondary proceedings indeed have been opened. This was clearly not the case at that stage of the proceedings because the very purpose of issuing the letters of request was if possible to avert the opening of secondary proceedings in other Member States. Also, the reference to the Vienna court’s decision seems to overlook that Austria is one of only a few Member States that lists the “bankruptcy court” (*Konkursgericht*) in Annex C, which lists “liquidators.” For this reason, Article 31 applies to the Austrian court in its role as “liquidator.”

The “as if” method chosen by the courts to prevent the formal opening of secondary insolvency proceedings and treat “local” creditors as if secondary proceedings had been opened has led to a name-game to express this approach in between the traditional well-known theories of universalism (universality) and territorialism (territoriality). U.S. scholars have introduced an expression for this pragmatic approach. Professor Janger, from Brooklyn Law School, introduced the term “virtual territoriality.”<sup>103</sup> Virtual territoriality envisions a global, procedurally centralized insolvency case that, to the extent possible, respects the entitlements created by the various jurisdictions where the debtor conducts his activities.<sup>104</sup> The procedural insolvency laws of the “home” country should govern the case, but even in a case where all assets are administered centrally, the choice of substantive law should be determined by ordinary, non-insolvency related, choice-of-law principles. It is Janger’s purpose to facilitate (i) the administration of a global insolvency case, and simultaneously (ii) the international acceptance of rescue based domestic insolvency regimes.<sup>105</sup> In choosing for the latter, Janger argues that “virtual territoriality” respects local policy choices, such as the entitlements that exist under local “debtor/creditor laws.”<sup>106</sup> It comes to no surprise that Janger uses the *Collins & Aikman* case as a practical example.<sup>107</sup>

Professor Janger’s proposal has been criticized by Professor Jay L. Westbrook.<sup>108</sup> Westbrook disagrees with the divide between universalism (placing the administration of the case in one main proceeding) and territorialism (allocating the debtor’s assets into local pools, each governed by local priority rules). He submits that such an approach rests upon two conceptual errors saying, “[i]t ties local law to the assets that happen to be seized locally, rather than identifying legitimate local interests that should be served in a global set of proceedings.”<sup>109</sup> Because multinational creditors generally make claims in all significant local proceedings, Janger’s approach prefers local distribution rules but it does not necessarily protect local creditors and leaves deserving local creditors to suffer in cases where circumstances have landed more substantial assets elsewhere.<sup>110</sup> Thus, Westbrook submits as a second objection that the theory relies upon a

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For other legal disputes (e.g., fee disputes in the *Rover* case), see WESSELS, *supra* note 21, ¶ 10846b et seq.

103. Edward J. Janger, *Virtual Territoriality*, 48 COLUM. J. TRANSNAT’L L. 401, 402 (2010).

104. *Id.* at 402.

105. *Id.*

106. *Id.* at 401.

107. *Id.* at 436–38.

108. Jay Lawrence Westbrook, *A Comment on Universal Proceduralism*, 48 COLUM. J. TRANSNAT’L L. 503, 505 (2010).

109. *Id.* at 503.

110. *Id.*

substance-procedure distinction that is “as clumsy here as it is elsewhere in the law.”<sup>111</sup> According to Westbrook, Janger’s distinctions

are readily shown to illustrate the impossibility of separating, for example, the control effects of the bankruptcy moratorium (which may require determining the substance of the claim) from its purely procedural aspects. Finally, this approach attempts to avoid forum shopping while opening the way for forum stashing, encouraging irresponsible debtors to switch their assets to haven jurisdictions with management friendly laws.<sup>112</sup>

Close to Janger’s proposals, Professor Pottow’s proposal, of the University of Michigan Law School, names the proceedings resulting from “virtual territoriality” as “synthetic secondary proceedings.”<sup>113</sup> According to Pottow, these types of proceedings should be limited to: “(1) real property disputes; (2) disputes where local judicial authority is needed to exercise equitable or other nonmonetary bankruptcy-related relief; and (3) other extraordinary circumstances pursuant to some safety valve escape clause.”<sup>114</sup> Excluded from these topics are disputes involving a divergence in priority rules between the main and secondary jurisdiction. Here the term “synthetic secondary proceedings” is suggested, within the confines of the main proceedings, and the creation of an international registry of “approved” bankruptcy priorities by a respected non-state actor. The adoption of that registry should be by express statutory provision in jurisdictions where such authorization is required, or by judges in the exercise of their discretion in places where it is not. Under Pottow’s idea, the non-state actor could be International Insolvency Institute (III).<sup>115</sup>

In France this kind of “as if” treatment has been named “virtual contractual secondary proceedings” by Menjucq and Dammann.<sup>116</sup> If I understand correctly, the approach has, what the Dutch call, older papers. It goes back to the theory of “*Neuorientierung*,” or New Orientation proposed by Professor Von Wilmsowsky of the University of Erfurt, Germany. In 1997, he expressed fundamental criticism concerning both traditional concepts—universality and territoriality—because both claim applicability with regard to all types of legal questions in an international insolvency

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111. *Id.*

112. *Id.* at 503–04.

113. John A. E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcies*, 46 TEX. INT’L L.J. 579 (2011).

114. *Id.* at 599.

115. According to its website, the International Insolvency Institute is a non-profit, limited-membership organization “. . . dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings.” INT’L INSOLVENCY INST., [www.iiiglobal.org](http://www.iiiglobal.org).

116. See Michel Menjucq & Reinhard Dammann, *Regulation No. 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon*, 9 BUS. L. INT’L 145, 154 (2008).

context.<sup>117</sup> Under the universality approach, the *lex concursus* of the State in which primary or main proceedings are opened is decisive on the question of “asset deployment” (reorganization or liquidation) and on the question of “asset distribution” (distribution of the proceeds or allocation of losses respectively).<sup>118</sup> Von Wilmsky advocates a split. Questions concerning “asset deployment” should be determined by the *lex concursus* of the State in which the insolvency proceedings are opened, whereas distribution, including the ranking and preferences of a claim, should be decided by the law of the group of persons for whose benefit the insolvency law intervenes.<sup>119</sup> With regard to “asset deployment,” Von Wilmsky, favoring a choice of applicable insolvency law, agrees with the ideas of Rasmussen in that the debtor should be able to make a choice under his by-laws as to which insolvency law is decisive for the opening of insolvency proceedings.<sup>120</sup>

Conversely, with regard to the question of “distribution,” Von Wilmsky submits that every State should intervene on behalf of the creditors it aims to protect, although the money that will be distributed should not be limited to the money available in the insolvency proceedings in the respective State.<sup>121</sup>

#### IV. OVERARCHING PRINCIPLE OF SINCERE COOPERATION EX ARTICLE 4(3) EU TREATY

One of the goals of main insolvency proceeding is the reorganization of the debtor’s affairs. If these affairs include assets in another Member State, the opening in the latter state of secondary proceedings—which must be winding-up proceedings—may clash with the prime goal of the main insolvency proceedings. How to solve this matter? Is it possible to align main and secondary proceeding goals?

An example is provided by the judgment of November 22, 2012 of the Court of Justice of the European Union in the *Bank Handlowy* case.<sup>122</sup> Following the approval of a rescue plan (*procédure de sauvegarde* as main

117. See Peter von Wilmsky, *Internationales Insolvenzrecht—Plädoyer für eine Neuorientierung*, in WERTPAPIER-MITTEILUNGEN (WM) 1997, 1461 [hereinafter Wilmsky, *Internationales Insolvenzrecht*]; Peter von Wilmsky, *Choice of Law in International Insolvencies—A Proposal For Reform*, in LEGAL ASPECTS OF GLOBALISATION: CONFLICT OF LAWS, INTERNET, CAPITAL MARKETS AND INSOLVENCY IN A GLOBAL ECONOMY 197 et seq. (Jürgen Basedow & Toshiyuki Kono eds., 2000). The views of Von Wilmsky have been criticized by Kolmann, *supra* note 35, at 468, and Berends, *supra* note 10, at 53, but have been supported by Liersch, *Sicherungsrechte im Internationalen Insolvenzrecht*, in NEUE ZEITSCHRIFT FÜR DAS RECHT DER INSOLVENZ UND SANIERUNG (NZI) (2002), at 15.

118. Wilmsky, *Internationales Insolvenzrecht*, *supra* note 117, at 1463.

119. *Id.*

120. *Id.* at 1464.

121. *Id.*

122. Case C-116/11, *Bank Handlowy w Warszawie “SA” v. Christianapol Sp. z o.o.*, <http://curiaeuropa.eu>, (2012).

insolvency proceedings) by the French court in the city of Meaux, the Polish court, confronted with the request to open secondary proceedings, “asked the Tribunal de commerce de Meaux whether” the insolvency proceedings in France—which were main proceedings for the purposes of the Regulation—were still pending.<sup>123</sup> The answer given by the French court did not provide the necessary clarification.<sup>124</sup> The referring court then consulted an expert.<sup>125</sup> The Polish court (*Sąd Rejonowy Poznań-Stare Miasto w Poznaniu*) then decided to stay the proceedings pending before it and to refer questions to the Court of Justice of the EU for a preliminary ruling.<sup>126</sup> The InsReg Article 27 was interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose; “It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.”<sup>127</sup>

The Court of Justice of the EU reasoned:

The interpretation ... to the effect that the opening of main proceedings having a protective purpose precludes the opening of secondary proceedings, in addition to being incompatible with the wording of the provisions in question, runs counter to the recognised role of secondary proceedings in the system established by the Regulation. Although secondary proceedings are intended, inter alia, to protect local interests, they may also, as stated in recital 19 in the preamble to the Regulation, serve other purposes, which is why they may be opened at the request of the liquidator in the main proceedings, when the efficient administration of the estate so requires.

As observed by the referring court, the fact remains that the opening of secondary proceedings, which, under Article 3(3) of the Regulation, must be winding-up proceedings, risks running counter to the purpose served by main proceedings, which are of a protective nature.

It should be noted that the Regulation provides for a certain number of mandatory rules of coordination intended to ensure, as expressed in recital 12 in the preamble thereto, the need for unity in the Community. In that system, the main proceedings have a dominant role in relation to the secondary proceedings, as stated in recital 20 in the preamble to the Regulation.

The liquidator in the main proceedings thus has certain prerogatives at his disposal which allow him to influence the secondary proceedings in such a

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123. *Id.* at 6.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 12.

way that the protective purpose of the main proceedings is not jeopardised. Under Article 33(1) of the Regulation, he may request an order for stay of the process of liquidation for up to three months, which may be continued or renewed for similar periods. Under Article 34(1) of the same regulation, the liquidator in the main proceedings may propose closing the secondary proceedings with a rescue plan, a composition or a comparable measure. Article 34(3) provides that, during the stay of the process of liquidation under Article 33(1) of the Regulation, only the liquidator in the main proceedings or the debtor, with the liquidator's consent, may propose such measures.

The principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, ..., aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings.<sup>128</sup>

Therefore, the principle of sincere cooperation laid down in InsReg Article 4(3) requires the court with jurisdiction over secondary proceedings to address the challenge of (i) giving adequate regard to the objectives of the main insolvency proceedings, and (ii) taking into account the scheme of the Regulation, which aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings and guaranteeing the priority of the main proceedings.<sup>129</sup> In doing so, the "secondary" court will be challenged to communicate with the liquidator in the main proceedings and to ensure that he will cooperate.<sup>130</sup>

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128. *Id.* at 10.

129. EU Insolvency Regulation, *supra* note 1, art. 4(3).

130. The European Commission, with assistance from the International Insolvency Institute, supports a large study (by Leiden Law School and Nottingham Law School) for the development of principles and guidelines courts in the EU can use when they are involved in cross-border insolvency cases. Several elements of these *EU Cross-Border Insolvency Court-to-Court Principles and Guidelines* (in development) build further upon the Global Principles for Cooperation in International Cases (Global Principles), laid down in a report from June 2012, presented to the American Law Institute (ALI) and International Insolvency Institute (III). These Global Principles were drafted by Professors Ian F. Fletcher (University College London, UK) and myself. See AM. LAW INST., *Global Rules on Conflict-of-Laws Matters in Insolvency Cases*, in *TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES* ann. at 200 (2012), available at <http://www.iiglobal.org/component/jdownloads/finish/557/5932.htm>. These Global Principles build further on the American Law Institute's Principles of Cooperation among the member-states of the North American Free Trade Agreement (NAFTA). These Principles were evolved within the American Law Institute's Transnational Insolvency Project, conducted between 1995 and 2000, for which the Reporter was Professor Jay L. Westbrook, with the objective to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states, consisting of the United States, Canada and Mexico. See AM. LAW INST., *PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES*, *TRANSNATIONAL INSOLVENCY:*

## V. SINCE 2012: AMENDING THE EU INSOLVENCY REGULATION

The European Insolvency Regulation has been in force for over twelve years. InsReg Article 46 (“Reports”) reads,

No later than [June 1,] 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.<sup>131</sup>

On December 12, 2012, the proposal for a Regulation amending the Insolvency Regulation was published.<sup>132</sup> It contains an Explanatory Memorandum, 13 recitals and 51 amendments. It is accompanied by a report on the application of the Insolvency Regulation (Report), as per InsReg Article 46,<sup>133</sup> and a so-called “Impact Assessment.”<sup>134</sup>

In the Explanatory memorandum it is stated that the Insolvency Regulation is generally considered to operate successfully in facilitating cross-border insolvency proceedings within the European Union.<sup>135</sup> The consultation of stakeholders and legal and empirical studies commissioned by the European Commission however have revealed a range of problems in the application of the Regulation in practice. Moreover, the Regulation

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COOPERATION AMONG THE NAFTA COUNTRIES (2003). The development of the European project (known as “JudgeCo project”) can be followed via my weblog, at [www.bobwessels.nl](http://www.bobwessels.nl). The JudgeCo project as such only touches lightly on the topic of communication between courts and liquidators.

131. EU Insolvency Regulation, *supra* note 1, art. 46.

132. *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, at 1. I should mention that I served as an expert to the European Commission in Brussels, assigned with drafting the text of the proposal.

133. *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, COM (2012) 743 final (May 29, 2000), in EXTERNAL EVALUATION OF REGULATION NO. 1346/2000/EC ON INSOLVENCY PROCEEDINGS, available at [http://ec.europa.eu/justice/civil/files/evaluation\\_insolvency\\_en.pdf](http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf) [hereinafter the *Heidelberg-Luxembourg-Vienna Report*, indicating the universities coordinating the work].

134. See *Commission Staff Working Document, Impact Assessment, Accompanying the Document Revision of Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, SWD (2012) 416 final (Dec. 12, 2012); *Commission Staff Working Document, Executive Summary of the Impact Assessment, Accompanying the Document Revision of Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, SWD (2012) 417 final (Dec. 12, 2012). I served as an advisor to the consultancy firm preparing the report for this assessment. Also on 12 December 2012 a Communication was published, containing ‘A new approach to business failure and insolvency’. See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on A New European Approach to Business Failure and Insolvency, available at <http://leidenlawblog.nl/articles/european-business-rescue-looking-for-the-best-approach>. For its follow-up, see European Commission’s Recommendation, “New Approach to Business Failure and Insolvency”, (Mar. 12 2014) available at <http://bobwessels.nl/blog/page/11/>.

135. *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, Explanatory Memorandum.



“does not sufficiently reflect current EU priorities and national practices in insolvency law, in particular in promoting the rescue of enterprises in difficulties.”<sup>136</sup> It further clarifies that “[t]he overall objective of the revision of the Insolvency Regulation is to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises. . . .”<sup>137</sup>

The Commission’s proposal in general has received positive reactions.<sup>138</sup> It should be noticed that the developments in changes of the cross-border insolvency regime in the Insolvency Regulation is a part of a larger wave (albeit slow) of change in insolvency regimes in Europe.<sup>139</sup>

The Explanatory Memorandum signals “five main shortcomings” in the present Insolvency Regulation: (1) the limited scope of the Regulation; (2) the ongoing practice of “forum shopping” due to the inconsistent application of the vague concept of the debtor’s “centre of main interests” (COMI); (3) the inadequate system of publication and registration of insolvency proceedings; (4) the lack on rules dealing with the insolvency of multinational groups; and (5) the lack of coordination between main and secondary insolvency proceedings.<sup>140</sup>

- **Scope of the Regulation.** The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition in InsReg Article 1(1).

136. *Id.*

137. *Id.*

138. See David Marks, *European Insolvency Regulation: Where Does it Go Next?*, 10 INT’L CORP. RESCUE 22 (2013); Horst Eidenmüller, *A New Framework for Business Restructuring in Europe: The EU Commission Proposals for a Reform of the European Insolvency Regulation and Beyond* (Eur. Corporate Governance Inst., Law Working Paper No. 199/2013), available at <http://ssrn.com/abstract=2230690>; M. Menjucq, *La proposition de règlement modifiant le règlement (CE) no. 1346/2000 sur les procédures d’insolvabilité: une evolution mais pas de revolution*, *Revue des procédures collectives*, Janvier 2013, 18; Gabriel Moss, *A Very Decent Proposal: the European Commission’s Proposal for Reforming the EC Regulation on Insolvency Proceedings 1346/2000*, 26 INSOLVENCY INTELLIGENCE 55 (2013). Rather critical is G. McCormack, *Reforming the European Insolvency Regulation: A Legal and Policy Perspective*, 10 J. PRIVATE INT’L L. 41 (2014).

139. See IAN F. FLETCHER & BOB WESSELS, HARMONIZATION OF INSOLVENCY LAW IN EUROPE 147 (Kluwer 2012) (the concluding chapter is available via <http://bobwessels.nl/wordpress/wp-content/uploads/2012/12/Perspectives-on-harmonisation-of-insolvency-law-in-Europe-Ch-7.pdf>); Bob Wessels, 5th Edwin Coe Lecture in Brussels: On the Future of European Insolvency Law (Oct. 11, 2012) (forthcoming), available at <http://bobwessels.nl/wordpress/wp-content/uploads/2012/10/ON-THE-FUTURE-OF-EUROPEAN-INSOLVENCY-LAW-Wessels-2012-10-21.pdf>; Bob Wessels, *Themes of the Future: Rescue Businesses and Cross-border Cooperation*, 27 INSOLVENCY INTELLIGENCE 49 (2014).

140. *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, Explanatory Memorandum.

- **Jurisdiction.** The proposal clarifies the existing jurisdiction rules and improves the procedural framework for determining jurisdiction.<sup>141</sup>

- **Publicity of proceedings and lodging of claims.** The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims.

- **Groups of companies.** The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.<sup>142</sup>

- **Lack of coordination between main and secondary insolvency proceedings.** For present purposes, it is noticeable that secondary proceedings will change in nature and function rather drastically. The proposal provides for a more efficient administration of insolvency proceedings: (i) by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors; (ii) by abolishing the requirement that secondary proceedings must be winding-up proceedings (and therefore deleting Annex B); and (iii) by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved.<sup>143</sup> These changes have been proposed in InsReg Article 18(1) and a new Article 29a(2), as well as the deletion of the “liquidation only” requirement for secondary proceedings in a revised InsReg Article 3(3).<sup>144</sup> The proposal broadens the duties of cross-border cooperation and communication for liquidators,<sup>145</sup> extends these duties to the courts

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141. See Frederico M. Mucciarelli, *The Unavoidable Persistence of Forum Shopping in European Insolvency Law* (Working Paper Ser.), available at <http://ssrn.com/abstract=2375654>.

142. For mixed reactions, see Horst Eidenmüller and Tilmann Frobenius, *Ein neues Konzept zur Bewältigung von Gruppeninsolvenzen: Verfahrenskonsolidierung im Kontext nationaler und internationaler Reformvorhaben*, available at <http://ssrn.com/abstract=2258874>; Eidenmüller, *supra* note 138; Irit Mevorach, *The New Proposed Regime for EU Corporate Groups in Insolvency: A Critical Note*, 4 CORP. RESCUE & INSOLVENCY 89 (2013).

143. See Bob Wessels, *Some Remarks on Exchange of Information in International Insolvency Cases*, in J. REIZIGER, A.M. VAN DER SCHEE E.A. (RED.), *CURATOR EN INFORMATIE*, 203–24 (Kluwer, 2013), available at <http://bobwessels.nl/wordpress/wp-content/uploads/2013/07/Insolad-Jaarboek-2013.pdf>; Michelle Reumers, *Cooperation Between Liquidators and Courts in Insolvency Proceedings of Related Companies Under the Proposed Revised EIR*, 7 EUR. COMP. & FIN. L. REV. 544 (2013).

144. *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, arts. 18(1), 29a(2), 3(3).

145. *Id.* art. 31.

involved,<sup>146</sup> creates a new regime for mandatory cooperation and communication between liquidators and courts,<sup>147</sup> and explicitly allows “protocols” as a legitimate form of cooperation.<sup>148</sup> The communication and cooperation duties apply by way of analogy to such duties in-group insolvencies.<sup>149</sup>

In paragraph 3.1.3 of the Explanatory Memorandum (“Secondary insolvency proceedings”) the European Commission explains that “[s]everal modifications are proposed with the aim of improving the efficient administration of the debtor’s estate in situations where the debtor has an establishment in another Member State.”<sup>150</sup> The proposal, however, will not affect the possibility of the liquidator to request the opening of secondary proceedings, on the basis of InsReg Article 29(a),

where this would facilitate the administration of complex cases, for example where a considerable number of employees have to be laid off in the State of the establishment. In such cases, the opening of local proceedings and the appointment of a local liquidator may still be useful to ensure an efficient administration of the debtor’s estate.<sup>151</sup>

The European Commission explains that allowing the main liquidator to give an “undertaking” to local creditors elsewhere prevents creditors from requesting the secondary proceedings.<sup>152</sup> Creditors should be treated “as if” secondary proceedings had been opened:

The court seized with a request for opening secondary proceedings should be able, if so requested by the liquidator in the main proceedings, to refuse the opening or to postpone the decision if such opening would not be necessary to protect the interests of local creditors. This could, for example, be the case if an investor made an offer to buy the company on a going-concern basis and that offer would give more to the local creditors than a liquidation of the company’s assets. The opening of secondary proceedings should also not be necessary, if the liquidator of the main proceedings promises to the local creditors that they would be treated in the main proceedings as if secondary proceedings had been opened and that the rights they would have had in such a case with respect to the determination and ranking of their claims would be respected in the distribution of the assets. The practice of such ‘synthetic secondary proceedings’ has been developed in several cross-border insolvency cases where main proceedings were opened in the United Kingdom (notably in the insolvency proceedings concerning Collins & Aikman, MG Rover and Nortel Networks). The English courts accepted that the English liquidators

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146. *Id.* art. 31a.

147. *Id.* art. 31b.

148. *Id.* art. 31(1), 31a(3)(d).

149. *Id.* art. 42a, 42b.

150. *Id.* Explanatory Memorandum, para. 3.1.3.

151. *Id.*

152. *Id.*

were entitled to distribute part of the assets according to the law of the Member State where the establishment was located. Since such a practice is currently not possible under the law of many Member States, the proposal introduces a rule of substantive law enabling the liquidator to give such undertakings to local creditors with binding effect on the estate.<sup>153</sup>

The Commission therefore codified a cross-border practice, set out in Part IV above, that has been received as useful, or even as “rather promising,” an approach that “could serve as a model for an improvement” of the Insolvency Regulation.<sup>154</sup>

Horst Eidenmüller is critical because the basic model of the legal system for the Insolvency Regulation remains in a mode of “modified” or “mitigated” universalism or, as I prefer to call it, in “coordinated” universality.<sup>155</sup> Eidenmüller submits that the chosen route of the possibility of “synthetic secondary proceedings” is a distinctly second-best approach for addressing the central regulatory problem in international insolvency cases. These proceedings,

are conditioned on an undertaking by the liquidator appointed in the main insolvency proceeding that guarantees local creditors a treatment replicating their position under “real” secondary proceedings. “Synthetic secondary proceedings” address some of the problems associated with secondary proceedings such as higher transaction costs or problems with respect to transnational restructurings. However, the condition just described retains one of the underlying flaws of territorialism, namely, that it might skew investment decisions. Moreover, whenever the required undertaking is not given, the full machinery of a main proceeding, coupled with a potential multiplicity of secondary proceedings, may be set in motion, with all the negative economic effects, for example, high transaction costs, this imposes on transnational restructurings. Agreeing to a bankruptcy contract in a complex transnational corporate restructuring, for example, is an extremely complicated and costly task, and the costs might even skyrocket if disputes under such a contract arise and enforcement issues surface.<sup>156</sup>

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153. *Id.*

154. Quotations are taken from the *Heidelberg-Luxembourg-Vienna Report*, *supra* note 133, at 356.

155. Eidenmüller, *supra* note 138, at 18.

156. Eidenmüller is concerned about the imprecise cooperation duties reflecting the coordination model between main and secondary insolvency proceedings (“... these efforts might prove counter-productive since they could potentially impose higher transaction costs”) and defends that the “... correct standard would be the achievement of a Pareto-superior outcome, *id est*, the possibility of enhancing the net value of the assets available for distribution in all proceedings involved.” *Id.* at 18–19.

## VI. THE “AS IF” UNDERTAKING

With regard to an “as if” undertaking, the proposal of the European Commission of December 2012 contains the following text formulating Amendment (28) to InsReg Article 18(1):

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. Subject to Articles 5 and 7, he may in particular remove the debtor’s assets from the territory of the Member State in which they are situated. *He may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall be subject to the form requirements, if any, of the State of the opening of the main proceedings and shall be enforceable and binding on the estate.*<sup>157</sup>

The italicized sentence is new.

It is manifest that an “undertaking” is an English legal concept. As I understand English law, the idea behind giving such an undertaking, in the meaning of Article 18(1)’s last sentence (proposal), is the insolvency office holder’s obligation to temper his strict adherence to the rules with a respect for honest dealing and justice.<sup>158</sup> In England, from this principle in *ex parte James* it follows, that the insolvency office holder must not take advantage of creditors without giving credit for their debts nor insist on taking windfalls from another’s mistake.<sup>159</sup> Furthermore, under English law as I understand it, an administrator can be sued by creditors or subsequent office holders if it is found that he has misapplied or retained money or other property of the company, has become accountable for money or other property of the company, has breached a fiduciary or other duty in relation to the company, or has been guilty of misfeasance.<sup>160</sup> However, in case an “undertaking” will be included in the text of the EU Insolvency Regulation, these “English” explanations do not bear consequences, not only because of the fact that not all insolvency office holders in other EU Member States are “officers of the court”, but because an “undertaking” has to be regarded and interpreted as an “autonomous” term. The Court of Justice of the EU held in 2012 in the *Bank Handlowy* case:

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157. *Proposal to Amend the EU Insolvency Regulation, supra* note 3, art. 18(1) (emphasis added).

158. *See Ex parte James, in Re Condon*, (1873-74) L.R. 9 Ch. App. 609, [1874-80] All E.R. Rep. 388.

159. *See Re T & N Ltd*, [2005] EWHC (Ch) 2870.

160. *See Insolvency Act*, 1986, para. 75, sch. B1 (Eng.). For the equivalent provision in the case of liquidators, *see id.* § 212.

“Although it is true that, where there are doubts with respect to their wording, provisions of European Union law must be given an autonomous and uniform interpretation, having regard to the context of the provision and the objective pursued by the legislation in question, the Court has nevertheless held that that principle holds true only for those provisions which make no express reference to the law of the Member States for the purpose of determining their meaning and scope (see, to that effect, Case C-396/09 Interedil Srl, [2011] ECR I-09915, paragraph 42 . . .).

Accordingly, questions such as the conditions for and effects of the closure of insolvency proceedings, about which Article 4(2)(j) of the Regulation makes an express reference to national law, cannot be given an autonomous interpretation, but must be decided under the *lex concursus* designated as applicable.<sup>161</sup>

In December 2013, the European Parliament (EP) presented its final report on the European Commission’s December 2012 proposal (EP Report).<sup>162</sup> Compared to the European Commission’s December 2012 proposal, there are quite some differences. The EP suggests over 60 amendments to the Commission’s proposal, not all that important, but there are several that will certainly be debated in the near future.<sup>163</sup> Four of these suggested amendments are as follows:

**(i) Substitute the name of “liquidator” to “insolvency representative”.**

This is the UNCITRAL approach, although the “representative” aspect triggers the question: representing the debtor? The creditors? A mixed bag of interests?<sup>164</sup>

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161. Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol Sp. z o.o.*, <http://curia.europa.eu> (2012).

162. *Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 0744, available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0360\(CO D\)](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2012/0360(CO D)) [hereinafter *EP Final Report*]. For the Report of the Committee on Legal Affairs, see *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings*, COM (2012) 0744, available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM\(2012\)0744](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=COM(2012)0744) [hereinafter *EP Draft Report*]. See also *The Opinion of the European Economic and Social Committee (EESC) on the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee (EESC)—A New European Approach to Business Failure and Insolvency*, COM (2012) 742 final, available at <http://www.eesc.europa.eu/?i=portal.en-int-opinions.25551>; *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3. The EESC Opinion does not contain recommendations on the topic of an “as if” undertaking.

163. See *EP Final Report*, *supra* note 162.

164. *Id.* amend. 3. As explained, the term “liquidator” covers a broad concept. In the Dutch text of the Insolvency Regulation the word “liquidator” in Article 2(b) has been translated as “curator”, which, under the Dutch Bankruptcy Act, refers to the person in charge of the bankruptcy liquidation proceeding (*faillissement*). The “curator” in the Dutch text of the

**(ii) Remove out-of-court procedures from the definition of collective insolvency proceedings (InsReg Art. 1).** For England this would mean that for instance proceedings in which an administrator is appointed out of court or a company voluntary arrangement are outside the definition's scope.<sup>165</sup>

**(iii) Prevent forum shopping by introducing a minimum three-month period before the opening of main proceedings for a debtor to establish its COMI.**<sup>166</sup> A three-month looking-back period is also introduced to determine the existence of an "establishment."<sup>167</sup>

**(iv) Introduce a new class of proceedings for groups for companies ("group coordination proceedings").** These proceedings can be opened in any Member State where a member company, performing "crucial functions" within the group, has its COMI.<sup>168</sup>

In its Explanatory Statement, the EP still hold valid its observation that "there are certain areas of insolvency law where harmonization is worthwhile and achievable"<sup>169</sup> and that it cannot be neglected that "disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies."<sup>170</sup> It welcomes the Commission's suggestions on secondary proceedings, but suggests some changes and additions:

In addition, the draft report also formulates minimum criteria an undertaking given by an insolvency representative to local creditors needs to fulfil in order to be enforceable and binding. It also clarifies that any decision to postpone or refuse the opening of secondary proceedings can be challenged by local creditors. Last but not least, the draft report also addresses the important question of what happens if the insolvency

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Regulation also includes the administrator (*bewindvoerder*) in Dutch proceedings concerning reorganisation (*surseance van betaling*) and the natural person's debt discharge (*schuldsaneringsregeling natuurlijke personen*). The broad definition of "*curator*" may therefore create uncertainty in terms of its use in the Netherlands. The same could be said for Germany (*Verwalter*) and the United Kingdom (liquidator), but not for France, where the word "*syndic*" (a term currently employed in Article 2(b) to refer to any person acting in a national insolvency proceeding, although it does not appear in Annex C) is used. The disadvantage of using "insolvency representative" is that—in a Dutch context—it reopens a debate of several decades on the question whether the appointed insolvency office holders represents the creditors or the debtor. S/he represents nobody, s/he performs impartially a legal task taking into account the interests of the creditors but in certain circumstances also other interests, such as employment.

165. *Id.* amend. 4. In England the European Parliament's amendments have received a critical reception. See, e.g., Chris Loughton, *The European Insolvency Regulation: Amendment Proposals from the European Commission and the European Parliament—What Next?*, 55 EUROFINIX 20 (2014).

166. *EP Final Report*, *supra* note 162, amend. 27.

167. *Id.* amend. 21.

168. *Id.* amend. 60.

169. *Id.* Explanatory Statement.

170. *Id.* at 47.

representative is not complying with the undertaking. In such a case the local creditors should have the right to seek protection via a court order for instance by prohibiting removal from assets (Art. 29a (2b)).<sup>171</sup>

The EP's considerations have resulted in an amendment of Recital 19a, which relates to the EP's amendment of Article 18 in the proposal, and Recital 19b, which relates to the EP's amendment of Article 29a in the proposal. On February 5, 2014, the final text was adopted.<sup>172</sup> The EP's proposal, laid down in the resolution, will now be subject to discussions between the Parliament, the Council and the Commission. With European elections in May and new politicians replacing the existing Commissioners during the period of revising the proofs (October 2014), there should be no surprise that the next step will not be taken in 2014 anymore. As indicated above, the EP also introduces additional requirements for the undertaking a liquidator can make to avoid opening secondary insolvency proceedings in other Member States, including the possibility of appointing in that latter state a "trustee," with restricted powers, to ensure that the main liquidator will duly perform the undertaking.

These amendments are, in the Final Report EP, presented in the following way (see Table 1):

**Table 1.**

***Recital 19a***

*Text proposed by the Commission*

(19a) Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the liquidator, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the liquidator, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and

*Amendment by EP*

(19a) Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the insolvency representative, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the insolvency representative, by an undertaking binding on the estate, agrees to treat local creditors as if

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171. *Id.*

172. See European Parliament Legislative Resolution of 5 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No 1346/2000 on Insolvency Proceedings, COM (2012) 0744. The resolution was backed by 580 votes; 69 MEPs disagreed (19 abstentions).



to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the liquidator the possibility to give such undertakings.

*See justification for Article 18.*

***Recital 19b***

*Text proposed by the Commission*

(19b) In order to ensure an effective protection of local interests, the liquidator of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened.

*See justification for Article 29a.*

secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the insolvency representative the possibility to give such undertakings and to lay down objective criteria which such undertakings need to meet.

*Amendment by EP*

(19b) In order to ensure an effective protection of local interests, the insolvency representative of the main proceedings should not be able to realise or re-locate the assets situated in the Member State where an establishment is located in an abusive manner, in particular, with the purpose of frustrating the possibility that such interests be effectively satisfied if afterwards secondary proceedings were opened. Local creditors should also be entitled to seek protective measures from a court in cases where an insolvency representative appears to be unable to honour the undertakings.

I leave aside the recommendation of the EP to rename the “liquidator.” On the matter of the “undertaking” that can be given by the liquidator in the main insolvency proceedings, the amendments suggested for the text of the Regulation by the EP are the most far-reaching (see Table 2).

**Table 2.**

**Article 18(1)**

*Text proposed by the Commission*

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. Subject to Articles 5 and 7, he may in particular remove the debtor’s assets from the territory of the Member State in which they are situated. He may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall be subject to the form requirements, if any, of the State of the opening of the main proceedings and shall be enforceable and binding on the estate.”

*Amendment by the EP*

1. The insolvency representative appointed by a court which has jurisdiction pursuant to Article 3(1) or, in the case of a debtor in possession proceedings in accordance with that jurisdiction, either the insolvency representative or the debtor 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. Subject to Articles 5 and 7, he may in particular remove the debtor’s assets from the territory of the Member State in which they are situated. He may also give an enforceable and binding undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall specify the factual assumptions upon which it is based, in particular with respect to the distribution of local claims over the priority and ranking system under the law governing

the secondary proceedings, the value of distributable assets within the secondary proceedings, the options available to realise such value, the proportion of creditors in the main proceedings participating in the secondary proceedings and the costs that would have to be incurred by the opening of secondary proceedings. Requirements concerning the form which the undertaking is to take, if any, shall be laid down by the laws of the State of the opening of the main proceedings.”

*The Regulation itself shall lay down the minimum criteria an undertaking needs to fulfil in order to not only serve legal clarity but also provide minimum protection to local creditors.*

In Article 29 (“Right to request the opening of proceedings”) several changes have been suggested with the view on secondary proceedings (see Table 3 and Table 4).

**Table 3.**

**Article 29(a)(2)**

*Text proposed by the Commission*

2. Upon request by the liquidator in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if the opening of such proceedings is not necessary to protect the interests of local creditors, in particular, when the liquidator in the main proceedings has given the undertaking referred to in Article 18(1) and complies with its terms.

*Amendment by the EP*

2. Upon request by the insolvency representative in the main proceedings, the court referred to in paragraph 1 shall postpone the decision of opening or refuse to open secondary proceedings if the insolvency representative in the main proceedings provides sufficient evidence that the opening of such proceedings is not necessary to protect the interests of local creditors, in particular, when the insolvency representative in the main proceedings has given the undertaking referred to in Article 18(1) and complies with its terms.

*Clarification with regard to burden of proof.*

The EP suggests three paragraphs in addition to Article 29a, as proposed in the Commission's proposal:

2a. Local creditors shall have the right to challenge the decision to postpone or to refuse the opening of secondary proceedings within three weeks of the decision having been made available to the public under point (a) of Article 20a.

2b. Local creditors shall have the right to petition the court conducting the main proceedings to require the insolvency representative in the main proceedings to take suitable measures necessary to protect the interests of the local creditors. Such requirement may include a prohibition against a removal of assets from the Member State in which the opening of secondary proceedings has been postponed or refused, a postponement of the distribution of proceeds in the main proceedings or an obligation on the insolvency representative in the main proceedings to provide security for the performance of the undertakings.

2c. The court referred to in paragraph 1 (i.e. the court that has jurisdiction to open secondary proceedings) may appoint a trustee whose powers are restricted. The trustee shall ensure that the undertaking is duly performed and shall participate in its implementation if this is necessary for the protection of the interests of local creditors. The trustee shall have the right to petition in accordance with paragraph 2b.<sup>173</sup>

Finally the EP suggests amending Article 29a(4) (see Table 4).

**Table 4.**

***Article 29a(4)***

*Text proposed by the Commission*

4. The liquidator in the main proceedings shall be notified of the decision to open secondary proceedings and shall have the right to challenge that decision.”

*Amendment by the EP*

4. The insolvency representative in the main proceedings shall be immediately notified of the decision to open secondary proceedings and shall have the right to challenge that decision within three weeks after receipt of that notification. In justified cases the court opening secondary proceedings may shorten that period to not less than one week after receipt of the notification.”

*In order to ensure legal certainty a time limit is introduced.*

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173. EP Final Report, *supra* note 162, amend. 44–46.

## VII. THE MAIN ELEMENTS OF AN “AS IF” UNDERTAKING

The provided text in the proposal of the European Commission and the amendments suggested by the European Parliament fall—if I understand correctly—into two categories: (i) queries and remarks regarding the draft text (to the constituent (or lacking) elements of an “as if” undertaking); and (ii) queries about the law applicable in such “as if” undertakings (matters of conflict of laws).<sup>174</sup> For the latter subject, see Part VIII.

Below I will first pose a few questions related to the first category, leaving aside for the moment a discussion about the premise of “synthetic secondaries.”<sup>175</sup>

### A. “AS IF” UNDERTAKING IN ARTICLE 18

The EP suggests for Article 18(1) that the insolvency representative (liquidator) may “also give an enforceable and binding undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings.”<sup>176</sup> The word “also” serves to add a “Union” power of substantial nature to the “domestic” powers a main liquidator may exercise beyond the Member State within which he is appointed. The place in the provision is therefore not very logical.

In the EP’s proposal it may be questioned, but in the Commission’s text the answer is clear: the undertaking shall be enforceable and binding on the estate.<sup>177</sup>

### B. LEGAL NATURE OF AN “AS IF” UNDERTAKING; WHO ARE “LOCAL CREDITORS”?

On first sight, an “as if” undertaking can be regarded as a unilateral promise. Article 18(1) in both text-versions are, however, silent on the question of to whom the addressed party of such a promise is. Logically, given its nature and context, the addressees of the undertaking are “local creditors” in another Member State. But, who are they? There is no definition of “local.” InsReg Article 32 provides that any creditor may lodge his claim in the main and in any secondary proceedings. Will “local creditors” include creditors of claims already lodged in the main proceedings (seemingly Westbrook’s first objection) or for instance, should these creditors be creditors having their COMI outside the Member State where the main proceedings have been opened? I suggest to include a

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174. *EP Final Report*, *supra* note 162.

175. I am leaving aside also the broader context of such an undertaking, e.g., will it function in those cases in which in the secondary Member State the majority of the assets is located (example: main proceedings opened against a holding company in Member State A, possibility of opening secondary proceedings in Member State B where the largest subsidiary is located)?

176. *EP Final Report*, *supra* note 162, amend. 35 (emphasis omitted).

177. *Id.*

localization rule, probably to add to the list of definitions in Article 2(g). For instance, a “local creditor” in the meaning of Article 18(1) is the holder of a claim, able to prove that if secondary proceedings would have been opened in the other Member State, he would have a distribution or priority right, etc. Another possibility would be to use the concept from InsReg Article 3(4), so that a “local creditor” is 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.”<sup>178</sup>

### C. CONTENTS OF THE “AS IF” UNDERTAKING

The undertaking relates to “the distribution and priority rights which local creditors would have had if secondary proceedings had been opened.”<sup>179</sup> These “rights” are to be determined by the *lex concursus* of the Member State where fictionally secondary proceedings are not opened. Regarding new Recital 19a, the Commission proposes,

Secondary proceedings may also hamper the efficient administration of the estate. Therefore, the court opening secondary proceedings should be able, on request of the liquidator, to postpone or refuse the opening if these proceedings are not necessary to protect the interests of local creditors. This should notably be the case if the liquidator, by an undertaking binding on the estate, agrees to treat local creditors as if secondary proceedings had been opened and to apply the rules of ranking of the Member State where the opening of secondary proceedings has been requested when distributing the assets located in that Member State. This Regulation should confer on the liquidator the possibility to give such undertakings.<sup>180</sup>

Applying that Member State’s “rules of ranking” may not lead to the same outcome in cases where there may be two or more Member States that could have opened secondary proceedings, whilst it is unclear whether terms like “distribution,” “priority rights,” or “ranking” should be

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178. EU Insolvency Regulation, *supra* note 1, art. 3(4) provides:

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.

179. *EP Final Report*, *supra* note 162, art. 18(1).

180. *Id.* recital 19a.

interpreted on the basis of the *lex concursus* of the main proceedings or the *lex concursus secondary*.

#### D. RIGHTS TO BE RESPECTED IN THE MAIN PROCEEDINGS

These “rights”—so the text in both versions—“will be respected in the main proceedings.”<sup>181</sup> In simpler terms, it is possible that an employee in another Member State is much better off than an employee in the main proceedings. This result may be tolerable to a certain extent, but it may be regarded as against the imputation-rule of InsReg Article 20(2) or the enforcements of a judgment of this nature may be regarded as manifestly contrary to a Member State’s public policy (InsReg Article 26). For that reason, I suggest that words to the effect that in such a situation *paritas creditorum*/equal treatment is not breached, should be included.

#### E. MINIMUM CRITERIA OF AN “AS IF” UNDERTAKING

The EP sets—in its own words—minimum criteria for an undertaking. It shall specify:

(i) the factual assumptions upon which it is based, in particular with respect to the distribution of local claims over the priority and ranking system under the law governing the secondary proceedings; (ii) the value of distributable assets within the secondary proceedings; (iii) the options available to realize such value; (iv) the proportion of creditors in the main proceedings participating in the secondary proceedings; and (v) the costs that would have to be incurred by the opening of secondary proceedings.<sup>182</sup>

In as far as these specified criteria are mandatory (“shall”), it is uncertain what the consequences will be when one or more of these criteria are not, or just vaguely, taken into account. In addition, it may be the case that under certain circumstances other facts may be of relevance too, such as the rescue of a debtor with cross-border operations, the additional value such a rescue may have as the total enterprise can be sold (without disturbing secondary proceedings) to a third party, and the value the rescue would have for maintaining employment and operational activities forming a base for corporate tax in the other Member State.

The criteria mentioned differ in nature: the assumptions may be formed in a shorter period, while the valuation will take time. In practice, all these situations will differ, and therefore, it calls for a more flexible rule in which the undertaking contains the sufficient information for a reasonable local creditor to be able to decide to accept the offer made, or similar words,

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181. *Id.* art. 18(1).

182. *Id.* amend. 35.

seems to suffice. What has now been presented by the EP in the text could be worded in a recital.

#### **F. A “NO WORSE OFF” RULE IN AN “AS IF” UNDERTAKING?**

Enhanced net value of assets available for distributions in the main proceedings and the “as if” proceeding invokes the idea of creditor protection, in which, at minimum, local creditors will be treated no worse than creditors in the main proceedings.

#### **G. A CONDITIONAL “AS IF” UNDERTAKING?**

If the unilateral promise should lead to an acceptance by local creditors, several questions arise. Is the main liquidator allowed to include conditions to its undertaking? For instance, my undertaking should be accepted by 80% of the local creditors, or, my undertaking is ready for acceptance only when third-party X offers an amount of \$Y for all or certain described assets. In this area, it is also important to assess whether the main liquidator only makes the undertaking once, or whether he is allowed—when the initial undertaking is rejected—to present a second or third undertaking. The latter creates the danger of “undertaking shopping,” or bargaining. Honest dealing suggests the undertaking should be unconditional and made for a period of x days (e.g., five working days), without the possibility of revocation.<sup>183</sup>

#### **H. AGREEMENT BY THE LOCAL CREDITORS; HOLD OUT CREDITORS?**

Because there is no rule on how to treat hold out creditors, “getting-to-yes” ends up a cumbersome negotiation process that is complicated, time-consuming, costly, and ultimately against the goal of efficient administration of a debtor’s estate. Professor Fletcher and I have suggested, in our June 2012 Global Principles Report,<sup>184</sup> an efficacious rule—albeit one that involves an element of steamrolling over principles of due process—in Global Principles 36 (Plan Binding on Participant) and Global Principles 37 (Plan Binding: Personal Jurisdiction):

36.1. If a Plan of Reorganization is adopted in a main proceeding pending in a court with international jurisdiction with respect to the debtor . . . and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon the debtor and the creditors who participate in the main proceeding.

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183. For form requirements, see *infra* Part VII.I.

184. TRANSNATIONAL INSOLVENCY: GLOBAL PRINCIPLES FOR COOPERATION IN INTERNATIONAL INSOLVENCY CASES, *supra* note 130.



36.2. For this purpose, participation includes (i) filing a claim; (ii) voting on the Plan; or (iii) accepting a distribution of money or property under the Plan.

37. If a Plan of Reorganization is adopted in a main proceeding in a court with international jurisdiction with respect to the debtor. . . and there is no parallel proceeding pending with respect to the debtor, the Plan should be final and binding upon an unsecured creditor who received adequate individual notice and over whom the court has jurisdiction in ordinary commercial matters under the local law.<sup>185</sup>

### I. FORM REQUIREMENTS FOR THE “AS IF” UNDERTAKING

The EP recommends that “requirements concerning the form which the undertaking is to take, if any, shall be laid down by the laws of the State of the opening of the main proceedings.”<sup>186</sup> The recommendation results in 27 different systems of form requirements, as it may be the case that main insolvency proceedings for instance could take place in the UK, but they also can be opened in Croatia, Italy or Belgium. The “undertaking” is a “Union” power and the form requirements should not be ‘national’ (in the form and the language requirements of the four member States mentioned), but should be harmonized in a European set of rules, which evidently also a benefits local creditors.

In suggesting “European” rules, I propose: (i) the undertaking should be in writing; (ii) the undertaking should be in English as well as in the language of jurisdiction of the secondary proceeding; (iii) “known” creditors should be informed by individual notice;<sup>187</sup> and (iv) the undertaking should be published in a “European” register and/or a register in the other Member State.<sup>188</sup> More consideration is due regarding the question of whether registration, as noted in (iv), binds the hold out creditors or creditors that are silent, either deliberately or because the undertaking has not reached them. I suggest “European” rules would take the text of Global Principles 36 and 37 (mentioned above) into account.

### J. APPOINTMENT OF A LOCAL TRUSTEE

The EP indicates that the court that has jurisdiction to open secondary proceedings may appoint a trustee.<sup>189</sup> This “synthetic” trustee is a hybrid

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185. *Id.* at 151. The underlying rationale is the UK provision for binding dissenting or non-responding creditors, including unknown creditors under a CVA. *See* Insolvency Act, 1986, § 5(2)(b) (Eng.). A decision approving a CVA taken in accordance with § 4A “binds every person who in accordance with the rules (i) was entitled to vote at that meeting (whether or not he was present or represented at it), or (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement.” *Id.* § 4A.

186. *EP Final Report, supra* note 162, amend. 35.

187. *See* EU Insolvency Regulation, *supra* note 1, art. 40(1).

188. *See id.* art. 21(1).

189. *EP Final Report, supra* note 162, amend. 46.

beast. The court may appoint such a trustee—but its discretion seems broad, as there is no indication of what circumstances would warrant an appointment. Which person is to be appointed? There is no Annex D, listing trustees with their national names. This is obvious, as such a ‘trustee’ is a new concept, but the Commission’s proposal does not provide for such an Annex D. Therefore, under the present proposals, a trustee can be anyone unlike a liquidator, whose appointment is restricted as listed in Annex C. The trustee has the job to “control” the due performance of the main liquidator’s undertaking. Where automatic recognition of insolvency judgments by Member States’ courts is based on mutual trust,<sup>190</sup> there seems to be suspicion towards the performance of a “Union” power by the main liquidator. The task of the trustee is, to “ensure that the undertaking is duly performed and shall participate in its implementation if this is necessary for the protection of the interests of local creditors.”<sup>191</sup> It is unclear which reasons led to the suggested amendment. Is the main liquidator mistrusted? Or is it generally the weak way in which liquidators are professionally and ethically regulated, as seen in some Member States with limited or even absent rules? And if “secondary” jurisdictions are reluctant to trust the main liquidator, is appointing a trustee the best solution?

In cross-border cases, it is rather standard that the main liquidator retains local counsel to assist him. Decisive here are the knowledge of the local procedural rules and the local language. I am not aware of a study related to the way “local” creditors have assessed the requirement of local assistance with filing claims, such as through the main liquidator’s local lawyer. The trustee does seem to be acting in the interest of local creditors. Will they be asked by the court whether they feel it necessary to appoint a trustee? Who will bear the costs? The appointment itself is at the court’s discretion. It seems obvious to assume that the court will take into account—when weighing against the cost of having a fully empowered main liquidator involved at the local level—the contents of the undertaking and the explanations given by the main liquidator as well as the delay and costs of a trustee.<sup>192</sup>

Proposed Recital 20 expresses the following: “In their cooperation, liquidators and courts should take into account best practices for cooperation in cross-border insolvency cases as set out in principles and guidelines on communication and cooperation adopted by European and

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190. EU Insolvency Regulation, *supra* note 1, recital 22 (“Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust . . .”).

191. *EP Final Report*, *supra* note 162, amend. 46.

192. This additional layer of non-judicial supervision not only adds costs and complexity, but flies in the face of the principle that all insolvency office holders act in the interests of all the debtor’s creditors. See Laughton, *supra* note 165, at 23.

international associations active in the area of insolvency law.”<sup>193</sup> It fits in the system of the present proposal to widen the guidance by best practices to support a reasonable, impartial and independent exercise of the power to give an undertaking by best practices which have their focus on professional/ethical rules for the liquidator, such as the European Bank for Reconstruction and Development’s Insolvency Office Holder Principles.<sup>194</sup>

### VIII. THE LAW APPLICABLE

As indicated previously, the second group of legal matters are related to issues of conflict of laws, queries about the law applicable to such “as if” undertakings. I will—very briefly—set out the EU system for determining applicable law in cross-border legal matters.

Since December 17, 2009, the European Union has two regulations in force on the subject of determining the law applicable to contractual obligations and to non-contractual obligations (Rome I and Rome II).<sup>195</sup> Rome I applies “in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.”<sup>196</sup> However, in Article 1(2) of Rome I, some ten matters are excluded from its scope, including:

- (a) questions involving the status or legal capacity of natural persons;...
- (e) arbitration agreements and agreements on the choice of court;...
- (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;... [or] (i) obligations arising out of dealings prior to the conclusion of a contract...<sup>197</sup>

At first glance, it seems that legal disputes concerning an “as if” undertaking given prior to the acceptance by (local) creditors is outside the scope of Rome I. Article 12 of Rome I set out the scope of the law applicable.<sup>198</sup>

193. *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, recital 20.

194. Or the Insolvency Office Holders’ principles and best practices, presently being drafted by Leiden Law School and discussed within INSOL Europe, the largest insolvency practitioners organization. See TURNAROUND, RESCUE, & INSOLVENCY LEIDEN, [www.tri-leiden.eu](http://www.tri-leiden.eu).

195. Council Regulation 593/2008, *On the Law Applicable to Contractual Obligations (Rome I)*, O.J. (L 177) 6 (EC) [hereinafter *Rome I*]; Council Regulation 864/2007, *On the Law Applicable to Non-Contractual Obligations (Rome II)*, O.J. (L 199) 40 (EC) [hereinafter *Rome II*].

196. *Rome I*, *supra* note 195, art. 1(1).

197. *Id.* art. 1(2).

198. *Id.* art. 12 (Scope of the Law Applicable) provides:

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
  - (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract.

Rome I is based on the principle of freedom of choice.<sup>199</sup> Parties to a contract are to choose the governing law. It may be applied to only a part or the whole of the contract.<sup>200</sup> Article 10 (Consent and material validity) provides in paragraph 1 that “[t]he existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.”<sup>201</sup> Article 10(2) of Rome I, however, says that

Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.<sup>202</sup>

Provided that all the parties agree, the applicable law may be changed at any time. If the law chosen is that of a country other than that relating most closely to the contract, the provisions of the latter law still need to be respected. If the contract relates to one or more Member States, the applicable law chosen, other than that of a Member State, must not contradict the provisions of Union law.<sup>203</sup>

In the absence of a choice, specific rules exist which are determined by the nature of the contract. Article 4(1) of Rome I provides that the law governing the contract shall be determined as set out in eight rules.<sup>204</sup> Primarily, the law will be determined as follows: “(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence . . . .”<sup>205</sup>

For contracts concerning immovable property, the law of the country where the property is located is applied, except in the cases of temporary and private tenancy, a maximum six consecutive months.<sup>206</sup> In such cases, the applicable law is that of the country of residence of the landlord. A sale of goods by auction is subject to the law of the country of the auction. There are two general back-up rules in Rome I, Article 4(3) and Article 4(4). Article 4(3) provides that “where it is clear from all the circumstances

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2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

199. *Id.* art. 3.

200. *Id.* art. 3(1).

201. *Id.* art. 10(1).

202. *Id.* art. 10(2).

203. *Id.* art. 3(4).

204. *Id.* art. 4(1).

205. *Id.* arts. 4(1)(a), (b).

206. *Id.* art. 4(1)(d).

of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.”<sup>207</sup> The other one is Article 4(4): “Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.”<sup>208</sup>

Rome II applies in a situation “involving a conflict of laws, to non-contractual obligations in civil and commercial matters.”<sup>209</sup> It is the intention that Rome I and Rome II dovetail. Rome II shall not apply to “the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).”<sup>210</sup> “Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.”<sup>211</sup> A query therefore is whether this exclusion applies to the main liquidator and the “synthetic” trustee if these are to be regarded as “public officers.”

Rome II Article 4(1) provides the general rule that unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of (i) the country in which the event giving rise to the damage occurred; and irrespective of the country or countries in which the indirect consequences of that event occur. For cases in which certain exchange of information between the main liquidator and “local” creditors and/or the “synthetic” trustee can be expected, as it is also possible that the undertaking will be subject of further negotiations. Under European jurisdictions the question might arise that expectations have been raised, leading to a reliance by a third party, but that nevertheless the contract is not concluded. In that case, Rome II Article 12 (*Culpa in contrahendo*) may apply. It provides:

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
  - (a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and

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207. *Id.* art. 4(3).

208. *Id.* art. 4(4).

209. *Rome II*, *supra* note 195, art. 1(1).

210. *Id.*

211. *Id.* recital 9.

irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.<sup>212</sup>

In the recitals to Rome II it is stated:

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, negotiorum gestio and culpa in contrahendo.

(30) Culpa in contrahendo for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.<sup>213</sup>

Not only Rome I and Rome II may have their influence. They are both influential pieces of regulation on the substance of the law. Other regulation may have their influence in matters of procedure. Which court will have jurisdiction to decide a certain legal dispute related to the given “as if” undertaking? Will it be the court in charge of the main insolvency proceedings, the court in the secondary jurisdiction, or the court based on the rules of the Brussels I Regulation? The present division in these matters is that “actions which derive directly from those [main insolvency] proceedings and which are closely connected to them” will be heard and

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212. *Id.* art. 12.

213. *Id.* recitals 29–31.

determined by the court having jurisdiction based on the EU Insolvency Regulation.<sup>214</sup>

It follows from the above summarized, the present European system on private international law (or: conflicts-of-law) does not suit well on the “as if” undertaking. The insolvency office holder giving the undertaking may be, in its domestic system, either a “private” or a “public” officer, the legal nature of the undertaking itself may be regarded as “private” or “public”. Under certain circumstances Rome I may apply, in slightly different circumstances certain matters will be qualified as falling under the scope of Rome II. It goes without saying that the myriad of rules creates uncertainties and is not a system that is conducive to rescue and insolvency matters, which require timely action, efficiency, and few unnecessary costs. For this reason, I submit that the proposal to amend the EU Regulation should create its own rules for the law applicable for an “as if” undertaking and should exclude this figure from the scope of both Rome I as well as Rome II.

When creating rules for an “as if” undertaking, it is tempting to choose as a starting point the *lex concursus*, or the law of the Member State in which the main insolvency proceeding is opened, as the liquidator appointed in such a proceeding conduct the undertaking (Article 18 of the Proposal, as cited above). The undertaking should be seen as an “autonomous” legal concept, and the law applicable to related matters should be a mix of legal rules that support the legal expectations of creditors in another Member State. To supplement these rules guaranteeing the effective performance of the undertaking, any disputes between the liquidator, the addressee of an “as if” undertaking, or a third party claiming an interest in the case disputes should in principle be decided by the court of the Member State where secondary proceedings were opened without the presence of an “as if” undertaking.

## CONCLUSION

In this article, a new mechanism to be included in the EU Insolvency Regulation is analyzed. It was proposed by the European Commission on December 12, 2012 as part of a general amendment to the European Insolvency Regulation. The proposal provides that the insolvency office holder (or liquidator), appointed in the main insolvency proceedings “may also give the undertaking that the distribution and priority rights which local creditors would have had if secondary proceedings had been opened will be respected in the main proceedings. Such an undertaking shall be subject to

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214. Case C-339/07, *Seagon v. Deko Marty*, <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2c30d582b712cc0f6642029140b449009f253f.e34KaxiLc3qMb40Rch0SaxuObNr0?text=&docid=76240&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9614> (2009).

the form requirements, if any, of the State of the opening of the main proceedings and shall be enforceable and binding on the estate.”<sup>215</sup> In this article, this mechanism also is referred to as an “as if” undertaking. The words “as if” express that the undertaking treats its addressees, creditors located in another Member State, “as if” secondary insolvency proceedings had been opened when in fact these proceedings have not. The concept is also known in American legal literature as “synthetic secondary proceedings.” It has been the subject of recent debate by Professors Janger, Westbrook, and Pottow, but the article has demonstrated that the idea has its origin in German literature, dating over fifteen years ago.

Having generally explained the system of the European Insolvency Regulation, now twelve years in legal force, I discussed the powers held by a liquidator appointed in main insolvency proceedings, including their effects outside the Member State where these proceedings are pending. The fundamental foundation of the EU Insolvency Regulation is provided in InsReg Articles 31(1) and (2)—the coordination of main insolvency proceedings and secondary insolvency proceedings in which the liquidator in the main proceedings and the liquidators in the secondary proceedings are duty bound to communicate information to each other and to cooperate with each other. On the other hand, InsReg Article 31(3) reflects the dominant role of the main proceedings: 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 nature and function of secondary insolvency proceedings was explained in Part III with a focus on the coordination of main insolvency proceedings and secondary insolvency proceedings, and clarified aspects of the so-called “dominant” role of the main insolvency proceedings. Part IV gave a short overview of cross-border insolvency court practice in Europe, which serves as the cradle on the European Commission’s proposal regarding the “as if” undertaking by a main liquidator. In Part V, stressed the Court of Justice of the European Union’s emphasis on cross-border cooperation and indicates an answer on the question of how to combine and align main and secondary proceedings, which have different or even contrasting aims. After describing the core of the European Commission’s proposals from December 2012 to amend the EU Insolvency Regulation, along with the additional amendments by the European Parliament (EP) in February 2014, I critically analyze the so called “as if” undertaking. The remarks made relate to the draft text of proposed Article 18 as well as to the question which is the law applicable if such an “as if” undertakings takes place.

To clarify the “as if” undertaking under InsReg Article 18 (as proposed) a distinction should be made between powers a main liquidator derives

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215. See *Proposal to Amend the EU Insolvency Regulation*, *supra* note 3, art. 18(1).



from its own national legal system and those which have their basis in the Insolvency Regulation. The “as if” undertaking has the latter basis and therefore, the legal figure must be interpreted autonomously, unrelated to the main proceeding. Suggestions are made to solve the question of who the “local creditors” are, as the addressees of an “as if” undertaking; what the contents of such an undertaking should be (and whether it should at least contain minimum requirements, including a “no worse off” rule); and under which circumstances “rights” of these local creditors will be respected in the main proceedings. Other uncertainties in the proposal are touched upon, such as how hold-out creditors should be treated. Here, the ALI-III Global Principles 2012 can provide a solution. An additional question concerns form requirements applicable to an “as if” undertaking. Contrary to what the European Commission has suggested, I proposed to establish a set of European form requirements.

Finally, the European Parliament’s suggestion that the court that has jurisdiction to open secondary proceedings may appoint a trustee is criticized. Furthermore, it is submitted that European rules on the law applicable to contractual and non-contractual obligation are inadequate to deal with the “as if” undertaking. These rules leave too many uncertainties and are not geared to the needs of rescue and insolvency matters which require timely action, efficiency, and fewer costs. Regarding matters of substantial Law I submit that the proposal to amend the EU Regulation creates its own rules for the law applicable for an “as if” undertaking, for which I made some suggestions. To avoid unnecessary uncertainties regarding the scope of my submission, a change to exclude this figure from the scope of both Rome I and Rome II should be made as well.<sup>216</sup>

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216. On Thursday, December 4, 2014 in the European Union the Council of Justice Ministers adopted a political agreement on the renewed text of the Insolvency Regulation which has been agreed with the European Parliament. It is directly clear that the new Regulation is nearly twice the size of Regulation 1346/2000, now with 83 recitals (coming from 33), and 91 articles (coming from 47), including around 20 articles relating to group insolvencies. The “undertaking” analyzed in this article has found its way to Article 36 (recast) (“Right to give an undertaking in order to avoid secondary proceedings”), including eleven paragraphs (some of which address the concerns expressed in my contribution). See for its text, <http://bobwessels.nl/2014/12/2014-12-doc4-text-new-eu-insolvency-regulation-available/>.