

〈특집: Current Developments in International Economic Law〉

Taking Creditors for a Ride^{*}

- Insolvency Forum Shopping and the Abuse of EU Law -

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Abstract

In the course of the past ten years forum shopping in the vicinity of a financial crisis has become very popular among debtors located in the EU. Particularly by altering international jurisdiction parties seek to gain advantage by bringing a more favourable insolvency regime in place. The “EU insolvency law”-marketplace holds in stock a colorful menu of 26 different insolvency laws out of which debtors can choose. Even though there cannot perse be anything bad about making use of the legal framework to further one’s own ends, many commentators and courts face forum shopping in insolvency with some feeling of discomfort. The essay attempts to reveal the sources of the prevalent discomfort with forum shopping and analyses why and when forum shopping in the vicinity of insolvency may appear problematic. Furthermore, it determines whether a prohibition of abuse of EU law principle can be put in place to tackle problematic effects of forum shopping. The analysis shows, that forum shopping is not necessarily bad as it may bring about advantages that make an efficient resolution of financial distress of a debtor possible. Nevertheless, where forum shopping attempts prove to be detrimental to the single market goal (Art. 26 TFEU), they have to be avoided. A prohibition of abuse of EU law principle may only partly cope with these situations. Due to decisive limitations of the principle’s scope and structure (*ultima ratio* device; principle of mutual recognition and mutual trust, application

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on case-by-case basis), it is not suitable to be applied against detrimental forum shopping effects on a broad basis. The essay thus finally ends with some future prospects on the reform debate.

Keywords: international insolvency law, COMI, abuse of law, EU law, forum shopping, european insolvency regulation

A. Introduction

In the course of the past ten years forum shopping in the vicinity of a financial crisis has become very popular among debtors located in the EU.¹⁾ Particularly by altering international jurisdiction²⁾ parties seek to gain advantage by bringing a more favourable insolvency regime in place. The “EU insolvency law”-marketplace holds in stock a colorful menu of 26 different insolvency laws out of which debtors can choose.³⁾ The decisive product features debtors envisage are: quick and cheap restructuring instruments,⁴⁾ a favourable ranking of claims and, in the case of natural persons, a quick residual debt release.⁵⁾

1) However, there have been fewer attempts that one might have expected, see the study of Eidenmüller/Frobenius/Prusko, NZI 2010, 545.

2) This essay employs a broad conception of forum shopping comprising both a party’s choice between two or more applicable places of jurisdiction and any other alterations of international jurisdiction. See for a similar conception Eidenmüller, Wettbewerb der Insolvenzrechte, ZGR 2006, 467, 469. However, there is some weight in the German literature that conceives forum shopping in a more restricted way (including the former excluding the latter), see Schack, *Internationales Zivilverfahrensrecht*⁵, 2010 para 251.

3) The Regulation does not apply to Denmark.

4) Restructuring Periods: 1,45 years in the United Kingdom; 3,82 years in Germany, see Eidenmüller, ZGR 2006, 476, p.477. See also Beck, Insolvenz in England - Insolvenztourismus und “Mittelpunkt der hauptsächlichen Interessen” als Abgrenzung zwischen legitimem und illegitimem forum shopping, ZVI 2011, 355.

5) Period to achieve a residual debt release: 12 months in the United Kingdom; 24 months in France, see Creditreform, Studie: Insolvenzen in Europa 2006/2007, 9. See also Fletcher, *Insolvency in Private International Law*, 2005 para 2.52; Hergenröder, Entschuldung durch Restschuldbefreiungstourismus?, DZWIR 2009, 309; Koch, Europäisches Insolvenzrecht und Schuldbefreiungs-Tourismus, in *Festschrift Jayme*, 2004, 437;

Even though there cannot per se be anything bad about making use of the legal framework to further one's own ends,⁶⁾ many commentators and courts face forum shopping in insolvency with some feeling of discomfort.⁷⁾ To give just a few examples: In a rather long book that has been published in German language, Kourouvani speaks of the danger ("Gefahr") of forum shopping.⁸⁾ According to Mock and Knof debtors may be accused ("Vorwurf") of having forum shopped,⁹⁾ and finally, the Court of First Instance Hildesheim even equates forum shopping with the abuse of law in its 2009 decision.¹⁰⁾

Furthermore, the European Insolvency Regulation (EuInsReg)¹¹⁾ seems to mirror a skeptical attitude of the EU lawmaker towards forum shopping practices. Recital 4 accentuates that it is "necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position".

In the following, this essay attempts to reveal the sources of the prevalent discomfort with forum shopping and analyses why and when forum shopping in the vicinity of insolvency may appear problematic (B). Furthermore, it will be determined whether a prohibition of abuse of EU law principle can be put in place to tackle problematic effects of forum shopping (C). The essay ends with some future prospects touching the reform debate (D).

Delzant/Schütze, Die Restschuldbefreiung für Privatpersonen in den französischen Departements Bas-Rhin, Haut-Rhin und Moselle im Rahmen einer Privatinsolvenz (faillite civile), *ZInsO* 2008, 540; Geroldinger, *JAP* 2006/2007, 167; Knof, *ZInsO* 2005, 1017.

⁶⁾ This is covered by party autonomy, provided that one can speak of such (see Coester-Waltjen, Parteiautonomie in der internationalen Zuständigkeit, in *Festschrift Heldrich*, 2005, 549, 550). See also in greater detail Reuß, Forum shopping in der Insolvenz – missbräuchliche Dimension der Wahrnehmung unionsrechtlicher Gestaltungsmöglichkeiten, 2011, 9 et seq.

⁷⁾ Referring to forum shopping in general Kropholler, Das Unbehagen am forum shopping, in *Festschrift Firsching*, 1985, 165.

⁸⁾ Kourouvani, Autonome Auslegung des Art 3 Abs 1 Satz 2 EuInsVO, 2010.

⁹⁾ Knof/Mock, Innerstaatliches Forum Shopping in der Konzerninsolvenz-Cologne Calling?, *ZInsO* 2008, 253.

¹⁰⁾ Court of First Instance Hildesheim, 18.6.2009, 5 I IE 2/09 *ZInsO* 2009, 1544.

¹¹⁾ Council Regulation (EC) No 1346/2000 on insolvency proceedings, OJ 30.6.2000 L 160, pp.1 et seq.

B. Forum Shopping in EU Insolvency Law & Related Concerns

Why is forum shopping in insolvency considered a problematic practice?

The law of international civil procedure in general is concerned with balancing a close-meshed net of state, court, party and other regulatory interests.¹²⁾ Most prominent for this essay's considerations is the vital concern of parties to cross-border relationships of having the ability to foresee the applicable law governing their relationship *ex ante* and to ascertain the court which will be competent in the event of a legal dispute arising.¹³⁾ Otherwise parties would not be able to calculate their risks properly and to direct their actions on international level in a reasonable way.

If, however, the circumstances are such that a dispute has already materialised and it is more likely that the parties will bring it to court than not, further aspects become relevant. Each party may be interested in having the case tried before a court located at the party's place of business, a court which is well known to the party and has the expertise to find a satisfactory solution, particularly because it is closely connected to the factual setting and the relevant evidence of the matter. Costs incurred by taking part in foreign proceedings (e.g. for transport, translation and professional advice on foreign law) are thus avoided.

Interests are manifold and it goes without saying that giving effect to them is not always free of conflict. Thus, international civil procedure law has to undertake an equilibrating exercise to achieve a just balance of interests. This exercise already begins on abstract level by framing the relevant provisions of international jurisdiction in a sophisticated way. In European insolvency law the debtor's centre

¹²⁾ Schack, IZVR⁵ para 230 et seq.; see also Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit*, 1995, pp. 13 et seq., pp. 199 et seq. (procedural justice; „Zuständigkeitsgerechtigkeit“); see also Schröder, *Internationale Zuständigkeit*, 1971. For parallel considerations in the conflict of laws see Heldrich, *Internationale Zuständigkeit und anwendbares Recht*, 1969, pp.109 et seq.

¹³⁾ English courts have highlighted this concern in EU cross-border insolvency matters but in fact only paid lip service to it for a long time, see for a detailed discussion Reuß, *Forum shopping*, pp.123-144.

of main interests (COMI) and the concept of an establishment¹⁴⁾ attempt to be such sophisticated solutions.¹⁵⁾ E.g. the connecting factor COMI, which was specially designed for insolvency purposes,¹⁶⁾ is determined by running a two-filter test:¹⁷⁾ The court firstly identifies objective factors of the debtor's administration of interests (filter 1) and secondly evaluates them according to their ascertainability by third parties, i.e. in particular creditors, (filter 2) to locate the debtor's centre of gravity because this is the place where creditors generally will deem the debtor to be based and where they will try to reclaim their money. This emphasis on third party interests mirrors what insolvency law endeavours in general, protecting those whose money, jobs etc. are at stake when it comes to financial distress of the debtor.¹⁸⁾

Forum shopping in the vicinity of insolvency may impair this carefully found

¹⁴⁾ See for a detailed discussion and a comparison to the Brussels I-Regulation Riedemann, in Pannen, *Europäische Insolvenzverordnung, 2007 Art 2 EuInsVO* para 47; ECJ, 9.12.1987, 218/86, *Schotte/Parfums Rothschild SARL*, ECR 1987, 4905; Albers, *Die Begriffe der Niederlassung und der Hauptniederlassung im internationalen Privat- und Zivilverfahrensrecht*, 2010.

¹⁵⁾ Huber, *Internationales Insolvenzrecht in Europa*, ZZP 114 (2001) 134; Leible/Staudinger, *Die europäische Verordnung über Insolvenzverfahren*, KTS 2000, 533, 537; Mäsch in Rauscher, *Europäisches Zivilprozeß- und Kollisionsrecht: Kommentar II*³, 2010, *Einl EG-InsVO* paras 1, 3; Moss/Fletcher/Isaacs, *The EC Regulation on Insolvency Proceedings*, 2002 para 3.10.

¹⁶⁾ The origins of the COMI-concept can be traced back to the European Convention on Certain International Aspects of Bankruptcy 1990 (Istanbul Convention), ETS Nr 136, which will presumably not enter into force, see Mäsch in Rauscher, *EuZPR II*³ *Einl EG-InsVO* para 16, and the 1980 revised draft of the EEC Draft Bankruptcy Convention, see ZIP 1980, 582, in Art 3 No 1, 2.

¹⁷⁾ This tells us Recital 13 of the Regulation and the interpretation of the COMI-concept through the ECJ. See in great detail Reuß, *Forum shopping*, p.83 et seq.; The latest ECJ judgments on the matter confirm this all embracing approach to the determination of the COMI, see ECJ, 20.10.2011, C-396/09, *Interedil*, EuZW 2011, 912 paras 48-51 and ECJ, 15.12.2011, C-191/10, *Rastelli Davide*, NZG 2012, 150. However, there is still great disagreement amongst the commentators of how to conceive the COMI, see for a detailed analysis Reuß, *Forum shopping*, pp.123-144 and Wessels, *COMI: past, present and future*, *Insolvency Intelligence* 2011, 17.

¹⁸⁾ The determination of the relevant interests insolvency law attempts or shall attempt to protect is controversially perceived in the literature, see for a detailed discussion Finch, *Corporate insolvency law*, 2009, p.27 et seq.

balance of interests. If the situation is such that factually only one of the involved parties has the ability to forum shop – and this is true for EU insolvency matters – this party finds herself in an advantageous position.¹⁹⁾ The shopper will generally use this advantage for his own ends consequently leaving the other parties with a legal regime they have not been able to ascertain beforehand and thus with the inability to direct their actions properly, e.g. by demanding additional collateral due to the changing circumstances. In European insolvency law, it is the debtor that has been awarded this competitive edge. He decides where he administers the interests relevant for the determination of the COMI or where he holds an establishment. Thus, even though the European lawmaker has put decisive emphasis on them, creditors' interests may be frustrated when the debtor undertakes a forum shopping attempt.

Leaving third parties' rights aside in cross-border insolvency cases is to be considered problematic, particularly with regard to the core of European integration,²⁰⁾ the single market goal (Art 26 TFEU). Financial failure has strong monetary impact on the proper functioning of the internal market and thus on Europe's economic strength. E.g. in 2006, German authorities registered a total of 30.357 corporate insolvencies in Germany²¹⁾ resulting in a total loss of €31.1 bn.²²⁾ In 2009 nearly the same number of insolvencies²³⁾ lead – partly influenced by the financial crisis – to a total loss of €48,6 bn.²⁴⁾ Bringing these numbers in relation

¹⁹⁾ Schack, IZVR⁵ para 251 („Startvorteil“). See also Geimer, *Internationales Zivilprozeßrecht*⁶, 2009 paras 1105 et seq.

²⁰⁾ Streinz in Streinz, EUV/EGV (2003) Art 2 para 40 („Kernstrück“).

²¹⁾ See Statistisches Bundesamt: <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Publikationen/Querschnittsveroeffentlichungen/WirtschaftStatistik/UnternehmenGewerbeanzeigen/Insolvenzen06.property=file.pdf> (9.8.2010).

²²⁾ Creditreform, *study*, p.20.

²³⁾ 32.687 corporate insolvencies, see Statistisches Bundesamt: <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/UnternehmenGewerbeInsolvenzen/Insolvenzen/Tabellen/Content50/UnternehmenSchuldner.templateId=renderPrint.phtml> (9.8.2010).

²⁴⁾ http://www.creditreform.de/Deutsch/Creditreform/Presse/Archiv/Insolvenzen_Neugruendungen_Loeschungen_DE/2009_-_Jahr/2009-12-02_Insolvenzen_Neugruendungen_Loeschungen.pdf (2.8.2012).

to the German price-adjusted gross domestic product (GDP), the damage caused by corporate failures amounts to approximately 5,55% (2006) respectively 8,41% (2009) of the German GDP in the first quarter.²⁵⁾

Forum shopping seriously threatens to further worsen this situation. Enabling debtors to forum shop to a debtor-friendly regime may cause higher loss to creditors. As a consequence, creditors will be tempted to compensate for this higher risk, either by being much more reluctant to lend money to EU companies or by pricing in the risk *via* raised interest rates or demanding higher collateral. This in turn increases the cost of bonded capital and thus further weakens the internal market.

Having in mind what was just said, the prevalent discomfort with forum shopping practices can be well understood. But what does this mean for forum shopping in insolvency in general? Influencing international jurisdiction is not necessarily bad. It may well lead to positive effects.²⁶⁾ Nevertheless, where forum shopping proves to impair third parties' interests in an unjust way or where it proves to be otherwise detrimental to the single market goal, it should be avoided.

C. Prohibition of Abuse of EU Law - A Solution?

Now that the problematic constellations of insolvency forum shopping have been identified, we can go on to consider whether a prohibition of abuse of EU law principle is a feasible instrument to tackle the described negative effects. However, existence and structure of such an instrument are heavily disputed.

²⁵⁾ In the 1st quarter the German GDP amounted to €560,2 bn. (2006), €577,9 bn. (2009), see <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Statistiken/Zeitreihen/WirtschaftAktuell/VolkswirtschaftlicheGesamtrechnungen/Content75/vgr111ga,templateId=renderPrint.psml> (9.8.2010).

²⁶⁾ E.g. by making an efficient reorganisation of the debtor company possible, see Duursma-Kepplinger, Aktuelle Entwicklungen zur internationalen Zuständigkeit für Hauptinsolvenzverfahren, ZIP 2007, 896, 901 Eidenmüller, ZGR 2006, 476.

I.

With the publication of Neville Brown's 1994 essay on the principle of the abuse of rights in EC law the author carefully launched a "clay pigeon"²⁷⁾ to spark an academic discussion on the existence of the abuse of law principle in EC law. In the course of the following 20 years a great deal of consideration on the matter flooded the academic landscape. Thus, the "academic big guns" Neville Brown wanted to attract fired their shot.²⁸⁾ Nevertheless, the discussion is still in progress. The ECJ's case-law now has reached the decisive amount that makes a first and sound evaluation possible and allows for drawing conclusions.

Each and every legal order has a toolbox full of corrective instruments which allow giving effect to the very purpose of the law in a specific case. The prohibition of abuse of law principle is such teleological instrument. By its very nature the principle is inherently related to justice and is thus to be considered a legal-ethical principle.²⁹⁾ Although its existence in EU law is still partly negated³⁰⁾ it must be regarded as an "indispensable safety-value"³¹⁾ inherent in EU law.³²⁾ This follows from the multiple references the ECJ made to the principle³³⁾ and the

27) Brown, Is there a General Principle of Abuse of Rights in European Community Law?, in Essays in Hon. of Schermers, 1994, 511, Fn 31.

28) Brown in Essays in Hon. of Schermers, 1994, 511.

29) As opposed to legal-technical principles, a distinction drawn by Larenz in Methodenlehre der Rechtswissenschaft, 1991, 421, see for a greater detailed discussion Reuß, *Forum shopping*, p.204 et seq.

30) Opposing the principle's existence: AG Tesauro, Opinion in C-367/96, Kefalas, ECR 1998, I-2843 paras 21-23; Metzger, Abuse of Law in EC Private Law, in de la Feria/Vogenauer, Prohibition of Abuse of Law: A New General Principle of EC Law?, 2011; Arnulf, What is a General Principle of EC law?, in de la Feria/Vogenauer, Prohibition, 2011; Lackum, Die Gesetzesumgehung im Europarecht, 2009, 247; Ottersbach, Rechtsmißbrauch bei den Grundfreiheiten des europäischen Binnenmarktes, 2001, 186.

31) AG Maduro, Opinion in C-255/02, Halifax, ECR 2006, I-1609 para 74.

32) For a more detailed discussion of the matter see Reuß, *Forum shopping*, p.231 et seq.

33) First reference in ECJ, 33/74, van Binsbergen, ECR 1974, 1299; see also ECJ 5.7.2007, C-321/05, Kofoed, ECR 2007, I-5795 where the ECJ recognized the principle as a general principle of EU law. See for detailed analysis of the case law Reuß, *Forum shopping*, p.240 et seq.

manifold instances of the prohibition of abuse of law throughout all fields of primary³⁴⁾ and secondary³⁵⁾ EU law. Finally, the ECJ has recognised the principle in its 2007 *Kofoed*-decision as a general principle of EU law.³⁶⁾

³⁴⁾ E.g. Art108 (2) TFEU; Art54 Charter of Fundamental Rights, which has binding effect since the entry into force of the Lisbon treaty on 1.12.2009. The Charter ranks equal to primary Union law, see Art6 (1) EU, see for a historical overview Streinz/Ohler/Herrmann *et. al.*, *Der Vertrag von Lissabon zur Reform der EU*, 2010, 119.

³⁵⁾ E.g., amongst others, Art 6 No 2 Brussels I-Regulation; Recital 22 European Maintenance Regulation; Art 4 (3) Reg (EC) No 2988/95, OJ (EC) 23.12.1995, L 312, 1; Art 3 (1) Directive No 93/13/EEC, OJ (EC) 5.4.1993, L 95, 29.

³⁶⁾ ECJ, 5.7.2007, C-321/05, *Kofoed*, ECR 2007, I-5795 confirmed in ECJ, 10.11.2011, C-126/10, *Foggia*, ECR 2011, I-0000 see exemplarily for the affirmative literature: Basedow, *Der Europäische Gerichtshof und das Privatrecht*, AcP 210 (2010) 157, 182; Brown, *Is there a General Principle of Abuse of Rights in European Community Law?*, in Curtin/Heukels, *Institutional Dynamics of European Integration*, 1994, 511, p.522 et seq.; Fleischer, *Der Rechtsmißbrauch zwischen Gemeineuropäischem Privatrecht und Gemeinschaftsprivatrecht*, JZ 2003, 865, 871; Leible/Röder, *Missbrauchskontrolle von Gerichtsstandsvereinbarungen im Europäischen Zivilprozeßrecht*, RIW 2007, 481, pp.482 and 486 et seq.; Nuyts, *The Enforcement of Jurisdiction Agreements Further to Gasser and the Community Principle of Abuse of Right*, in de Vareilles-Sommières, *Forum shopping in the European Judicial Area*, 2007, 55, pp.58, 64; Sørensen, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?*, CMLR 43 (2006) 423, pp. 440, 443; Thole, *Missbrauchskontrolle im Europäischen Zivilverfahrensrecht*, ZZP 122 (2009) 423, 434; Eidenmüller, *Rechtsmissbrauch im Europäischen Insolvenzrecht*, KTS 2009, 137, pp.138 et seq.; Klink, *Europäisches Unternehmensrecht und EuGH*, ZGR 2002, 163, 169; Shammo, *Arbitrage and abuse of Rights in the EC Legal System*, ELJ 14 (2008) 351, p.376; Simon/Rigaux, *La technique de consécration d'un nouveau principe général du droit communautaire: l'exemple de l'abus de droit*, in *Festschrift Isaac*, 2004, 559, p.578 et seq.; Pistone, *Abuse of Law in the Context of Indirect Taxation: from (before) Emsland-Stärke (1) to Halifax (and beyond)*, in de la Feria/Vogenauer, *Prohibition*, 2011; Ziegler, *Evolution of Abuse of Law Issues in the Context of the Free Movement of Workers*, in de la Feria/Vogenauer, *Prohibition*, 2011; Moss/Fletcher/Isaacs, *Regulation para 3.12 („estoppel-like principles“)*; de la Feria, CMLR 45 (2008) 395, p. 439; Zimmermann, *Das Rechtsmißbrauchsverbot im Recht der Europäischen Gemeinschaften* (2002) 180, 186, 230; see also Kjellgren, *On the Border of Abuse - the Jurisprudence of the European Court of Justice on circumvention, Fraud and Other Misuses of Community Law*, EBLR 2000, 179, pp.190, 192; AG Stix-Hackl, *Opinion in C-452/04, Fidium Finanz AG*, ECR 2006, I-9521 paras 81, 82; AG Darmon, *Opinion in C-8/92, General Milk Products*, ECR 1993, I-779 paras 47, 48; see AG Darmon, *Opinion in 130/88, van de Bijl*, ECR 1989, 3039 paras 10 et seq.

The principle, however, has to be contrasted with fraud. Whereas in the case of fraud, unlawful means are used to achieve illegitimate ends, abuse always involves the use of legitimate means for unlawful purposes.³⁷⁾ Although the distinction is well drawn in the wording of the ECJ's reasoning the court does not take it too serious in substance.³⁸⁾

II.

The EuInsReg does not provide for a specific provision on the abuse of EU law,³⁹⁾ thus the general principle also applies in EU insolvency law. But what then constitutes an abuse in insolvency settings?

It is quite obvious that merely making use of the rights awarded by EU law cannot be considered abusive.⁴⁰⁾ So far is common ground. However, the details of how the abuse of law test shall be framed are controversially perceived in the literature.

There is a strong line of argument that endeavours to employ an efficiency-related abuse of law test in insolvency matters.⁴¹⁾ According to this approach forum shopping attempts are considered abusive when they apparently inhibit the maximisation of the insolvency estate. The primary goal of the EuInsReg, so the

³⁷⁾ See Schön, Der "Rechtsmissbrauch" im Europäischen Gesellschaftsrecht, in *Festschrift Wiedemann*, 2002, 1271, pp.1277 et seq.; similar Eidenmüller, KTS 2009, 143; Weller, GmbH-Bestattung im Ausland, ZIP 2009, 2033.

³⁸⁾ For a detailed analysis see Reuß, *Forum shopping*, pp.255 et seq.

³⁹⁾ Art.26 EuInsReg (*ordre public*) refers to a national public policy standard and thus is not applicable. Cf. for the opposing opinion Duursma-Kepplinger, ZIP 2007, 901 and Weller, Die Verlegung des Center of Main Interest von Deutschland nach England, ZGR 2008, 835. See for a detailed analysis of Art.26 EuInsReg Mankowski, KTS 2011, 185.

⁴⁰⁾ Cf. the settled case-law of the ECJ, 9.3.1999, C-212/97, Centros, ECR 1999, I-1459; ECJ, 21.11.2002, C-436/00, X und Y, ECR 2002, I-11779; ECJ, 11.3.2004, C-9/02, Lasteyrie du Saillant, ECR 2004, I-2409; ECJ, 12.9.2006, C-196/04, Cadbury Schweppes, ECR 2006, I-7995; ECJ, 16.7.1998, C-264/96, ICI, ECR 1998, I-4695; confirmed by ECJ, 8.3.2001, C-397/98 and C-410/98, Metallgesellschaft Ltd, ECR 2001, I-1727; Rotstegge, ZIP 2008, 955, p. 958 In opposition to this Court of First Instance Hildesheim 18.6.2009, 5 I IE 2/09, ZInsO 2009, 1544.

⁴¹⁾ Eidenmüller, KTS 2009, 150.

argument goes, is to achieve an efficient and effective resolution of transnational insolvencies⁴²⁾ because this furthers the maximal satisfaction of the creditors. Consequently, maneuvers that clearly contradict this goal are in conflict with the purpose of the regulation and thus are to be considered abusive.

This argument basically faces two major objections. First, considering the efficiency-goal to be primary objective of the EuInsReg understates the very purpose of the regulation. The EuInsReg is an instrument of international civil procedure. It is thus concerned with procedural justice in the first place. To that end, the regulation has to balance numerous potentially conflicting interests. These are, as I have pointed out before, in particular to frame a jurisdictional system that is ascertainable by third parties and to install a system that ensures a close connection of the competent court to the facts of the case.⁴³⁾ Otherwise the parties would not be able to estimate the risk of cross-border interaction *ex ante*. Thus, framing the abuse of law test only in relation to the efficiency-goal seems wrongly weighted.

Second, the practical appeal of the approach may well be questioned. To apply the described abuse-test to an individual case, the task of the deciding judge would be to determine whether the forum shopping attempt has negative impact on the maximisation of the insolvent's assets. Thus, the judge would have to assess the value of the insolvency estate under the applicable law and compare it with the equally determined value it would have achieved under the law that would otherwise have applied. A proper evaluation would necessarily involve taking into account all instruments present in each insolvency regime to increase the assets of the insolvency estate, e.g. claims to set aside transactions etc. Consequently, running the abuse-test will involve seeking expert advice on foreign law which is both: costly and time-consuming; factors that themselves have negative impact on the efficient course of the proceedings.

These weaknesses cannot be cured by restricting the abuse-test to the detection

⁴²⁾ See Recitals 2, 8, 16, 19, 20.

⁴³⁾ See Franken, Three Principles of Transnational Corporate Bankruptcy Law: A Review, ELJ 11 (2005) 232, p.251; Mäsch in Rauscher, EuZPR II³ Einl EG-InsVO paras 1, 3.

of effects that are clearly negative. Most insolvency laws of this century are highly developed, differences in the outcome of a case are difficult to predict. If this is holds true, then it is highly unlikely that a court will ever consider the abuse-test to be met because there will never be effects that are clearly negative.

To develop a coherent and practically applicable abuse-concept for EU insolvency law, it is much more promising to analyse the jurisprudence of the ECJ and the instances of abuse provisions in primary and secondary EU law in detail and to apply the so determined abuse of law categories on insolvency matters *mutatis mutandis*.⁴⁴⁾ I have undertaken this work in a book that has been published in German language in 2011.⁴⁵⁾ The results of this analysis are partly presented in the following.

Contrary to the present opinion in the literature⁴⁶⁾ the ECJ's case-law has proved to be not without any sufficient stringency. The prohibition of abuse of EU law principle appears in various forms; the most important (sub-) categories are: (1) the prohibition of abuse by current conduct such as chicanery,⁴⁷⁾ abuse of a dominant market position according to Art. 102 TFEU,⁴⁸⁾ abuse by market foreclosure,⁴⁹⁾ abuse of procedure;⁵⁰⁾ abuse by violation of good faith⁵¹⁾ or violation of the cartel ban according to Art. 101 TFEU;⁵²⁾ (2) prohibition of abuse by inconsistency of present and past conduct, e.g. venire contra factum proprium⁵³⁾ and (3) the

⁴⁴⁾ Cf. on the ECJ's role in private international law and international civil procedure in general Coester-Waltjen, *Die Rolle des EuGH im internationalen Privat- und Verfahrensrecht*, in Kieninger/Remien (Eds.), *Europäische Kollisionsrechtsvereinheitlichung*, pp.77 et seq.

⁴⁵⁾ see in great detail Reuß, *Forum shopping*, pp.248 et seq.

⁴⁶⁾ see Eidenmüller, KTS 2009, 143; Briggs, *The Rejection of Abuse in International Civil Procedure*, in de la Feria/Vogenauer, *Prohibition*, 2011 Klinker, ZGR 2002, 186; Ringe, *Sparking regulatory competition in European Company Law*, <http://ssrn.com/abstract=1326964> (4.10.2010) p.12.

⁴⁷⁾ ECJ, 1.3.1983, 250/78, DEKA Getreideprodukte GmbH, ECR 1983, 421. See for a detailed analysis Reuß, *Forum shopping*, pp.294 et seq.

⁴⁸⁾ See for a detailed analysis Reuß, *Forum shopping*, pp.288 et seq.

⁴⁹⁾ *Id.* at pp.292 et seq.

⁵⁰⁾ *Id.* at pp.297 et seq.

⁵¹⁾ *Id.* at pp.300 et seq.

⁵²⁾ *Id.* at p.291.

prohibition of law evasion.⁵⁴⁾

Category (3) is of the greatest relevance for insolvency forum shopping cases, because the shopper generally influences jurisdiction to further his own ends, i.e. by availing himself of positive provisions otherwise not applicable or by circumventing negative effects of provisions that otherwise would apply to the case. It is in turn not very likely, that a debtor takes the burden of forum shopping in order to harm someone else. The sub-category of chicanery, thus, will be relevant in forum shopping cases only in very limited settings.

The ECJ generally considers law evasion cases as a sub-category of the general principle of prohibition of abuse of EU law.⁵⁵⁾ Regardless whether EU law or national law is intended to be circumvented and irrespective whether the evasion falls within the scope of primary or secondary EU law, according to the ECJ's case-law the abuse-test is satisfied when three⁵⁶⁾ prerequisites are cumulatively fulfilled.⁵⁷⁾ These can be well derived from a passage of the *Centros*-judgment:⁵⁸⁾

„... a Member State is entitled to take measures designed to prevent certain of its nationals *from attempting, under cover of the rights created by the Treaty, improperly*

⁵³⁾ *Id.* at p.304.

⁵⁴⁾ *Id.* at pp.259-288.

⁵⁵⁾ AG Maduro, Opinion in C-255/02, Halifax, ECR 2006, I-1609 para68; *Schön in Festschrift Wiedemann*, p.1275; Shammo, ELJ 14 (2008) 353, 369; Zimmermann, *Rechtsmißbrauchsverbot*, p.186; Eidenmüller, KTS 2009, 144; Klinke, ZGR 2002, 170; Bicker, *Gläubigerschutz*, pp.65 et seq.; Lackum, *Gesetzesumgehung*, pp.64, 96; see as well the jurisprudence of the ECJ: ECJ, 9.3.1999, C-212/97, *Centros*, ECR 1999, I-1459; For the opposing view: not entirely clear AG Tesouro, Opinion in C-148/91, Veronica Omroep Organisatie, ECR 1993, I-487 para 6, AG Tesouro, Opinion in C-367/96, Kefalas, ECR 1998, I-2843 paras 21-23.

⁵⁶⁾ Often the abuse-test is considered twofold: AG Stix-Hackl, Opinion in C-452/04, Fidium Finanz AG, ECR 2006, I-9521 paras, 18 95; AG Maduro, Opinion in C-255/02, Halifax, Slg 2006, I-1609 para 63; Metzger in de la Feria/Vogenauer, *Prohibition*, 2011; Shammo, ELJ 14 (2008) 351.

⁵⁷⁾ Cf. ECJ, 23.10.2008, C-286/06, *Kommission/Spanien*, ECR 2008, I-8025; ECJ, 12.9.2006, C-196/04, *Cadbury Schweppes*, ECR 2006, I-7995; *so auch Schön in Festschrift Wiedemann*, p.1273.

⁵⁸⁾ ECJ 9.3.1999, C-212/97, *Centros*, ECR 1999, I-01459 (language of the original proceeding was Danish).

to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law...

25. However, although, in such circumstances, the national courts may, case by case, take account - on the basis of *objective evidence - of abuse or fraudulent conduct* on the part of the persons concerned in order, where appropriate, to *deny them the benefit of the provisions of Community law* on which they seek to rely, they must nevertheless *assess such conduct in the light of the objectives pursued by those provisions.*"

[Emphasis added]

According to the ECJ, the prerequisites of the abuse-test are the following: There has to be (1) a factual activity (to contrast abuse with fraud) which is (2) undertaken with the intent (subjective element; to be deducted from objective factors)⁵⁹⁾ to evade applicable law or to make law applicable and (3) this factual activity impairs the rationale of the relevant EU law.⁶⁰⁾

The test shall now exemplarily be applied to a case decided by the German Federal Court of Justice in 2007 (Cf. German Federal Court of Justice, IX ZB 238/06, IPRspr 2007, 722);⁶¹⁾

The debtor GmbH & Co. KG (henceforth D) maintained a construction undertaking in Germany. By decision of D's partners the board of directors of the complementary company (GmbH) was replaced by a person resident in Spain. Furthermore, D's real seat was transferred to Spain. Both change of address and change of the

⁵⁹⁾ The necessity of a subjective element has always been subject to criticism in the abuse of law theory. The ECJ presupposes such element, see ECJ, 11.7.1985, 229/83, Leclerc/Au blé vert, ECR 1985, 1; ECJ 11.7.1985, 299/83, Leclerc/Syndicat des libraires de Loire-Océan, ECR 1985, 2515; ECJ, 10.7.1986, 95/84, Boriello, ECR 1986, 2253; ECJ 21.6.1988, 39/86, Lair, ECR 1988, 3161; ECJ, 14.12.2000, C-110/99, Emsland-Stärke, ECR 2000, I-11569; ECJ 13.7.2006, C-103/05, Reisch/Kiesel, ECR 2006, I-6827; ECJ, 8.11.2007, C-251/06, ING. AUER, ECR2007, I-9689. See in detail Reuß, *Forum shopping*, pp.224 et seq. and 308 et seq.

⁶⁰⁾ See ECOSOC, OJ (EC) 31.3.2009, C 139, 140, and Thole, ZZZP 122 (2009) 428.

⁶¹⁾ For further examples see Reuß, *Forum Shopping*, pp.320-323 (chicanery); 326-336 (law evasion).

management were communicated to D's creditors and published in the commercial register (Handelsregister). D stopped its business activity immediately after the publication of the respective information. The whole factual setting seemed to be solely intended to "bury"⁶²⁾ the German company in Spain and to burden the recovery of the claims owed to the German creditors because no real activity was pursued from Spain. D's creditors thus petitioned for the opening of insolvency proceedings in Germany.

The abuse-test is satisfied in this case. (1) The transfer of the COMI (effected by the transfer of management, real seat and communication to the creditors) constitutes a factual activity. (2) D's partners had conducted this alteration of facts with the intent to evade a strict liability under German law without really intending to pursue any commercial activity from Spain. This can be deduced *inter alia* from the quick cessation of business activity. (3) Furthermore, this activity contradicts the purpose of Art 3 Para 1 EuInsReg. The provision has to be read in light of the Regulation's goal to further the proper functioning of the single market. The ECJ has postulated several times that the single market principle, Art 26 TFEU, only covers real integrative activities on the market. Artificial arrangements that, although being constructed cross-border, only envisage the homeland-effect of such construction are to be considered outside the very purpose of the single market principle⁶³⁾ (so called u-turn constructions⁶⁴⁾). The COMI-shift to Spain is to be considered a wholly artificial arrangement because the alteration was mainly intended to circumvent provisions of German law. It was in no way intended to unfold some real activity in or from Spain.

The German insolvency court thus rightly considered the COMI-shift abusive and opened insolvency proceedings in Germany.

This, however, does not mean that it is not possible to make use of positive effects of different Member State laws. If D had shifted the COMI for the purpose

⁶²⁾ For general remarks on burying a company see Kleindiek, Ordnungswidrige Liquidation durch organisierte „Firmenbestattung“, ZGR 2007, 276; Oelschlegel, Die transnationale GmbH-Bestattung, 2010; Weller, ZGR 2008, 844 ff.

⁶³⁾ See ECJ, 21.2.2008, C-425/06, Part Service Srl, ECR 2008, I-897.

⁶⁴⁾ See ECJ, 11.7.1985, 229/83, Leclerc/Au blé vert, ECR 1985, 1.

of making applicable a specific insolvency regime that allows a quick reorganisation of the debtor and had further conducted real business activity from the new COMI, the COMI-shift would not have been outside the purpose of the single market principle because then a real integrative activity would have been present. This has happened e.g. in the cases of *Schefenacker*, *Deutsche Nickel*⁶⁵⁾ and the PIN group.⁶⁶⁾

III.

However, the prohibition of abuse of EU law principle faces decisive limitations that may have negative impact on the feasibility of tackling detrimental forum shopping effects.

Under the regime of the Brussels I-Regulation the ECJ has decided in the cases *Turner/Grovit* and *Gasser*⁶⁷⁾ that the prohibition of abuse of law does not trump the principle of mutual recognition and mutual trust. The principles also apply under the EuInsReg.⁶⁸⁾ Thus, a court that is seized later may not declare itself competent to open primary proceedings because of an abusive COMI-shift having taken place unless the court seized first has denied its jurisdiction.⁶⁹⁾ If in the aforementioned example, a petition to open insolvency proceedings had already been presented to the Spanish courts, the German court thus would not have been able to declare itself competent. This decisively restricts the scope of the principle as the ECJ declares that it is the matter of the court first seized to apply the abuse of law prohibition accordingly and to deny jurisdiction.

Furthermore, the abuse of law prohibition is a sharp sword. Giving effect to it enormously interferes with the rights of the individuals concerned, as it entirely

⁶⁵⁾ See Hickmott, Forum shopping is dead: long live migration!, BJIBFL 2007, 272.

⁶⁶⁾ Court of First Instance Köln, 19.2.2008, 73 IE 1/08, PIN II, NZI 2008, 257 = ZInsO 2008, 388 (abuse declined), affirming the decision Eidenmüller, KTS 2009, 151.

⁶⁷⁾ ECJ, 9.12.2003, C-116/02, Gasser, ECR 2003, I-14693; ECJ, 27.4.2004, C-150/02, Turner/Grovit, ECR 2004, I-3565.

⁶⁸⁾ ECJ, 2.5.2006, C-341/04, Eurofood, ECR 2006, I-3813; ECJ 21.1.2010, C-444/07, MG Probud, BB 2010, 529; Moss/Fletcher/Isaacs, Regulation para 3.17; Paulus, EuInsVO Einl para 19.

⁶⁹⁾ ECJ, 2.5.2006, C-341/04, Eurofood, ECR 2006, I-3813.

quashes the effect of the activity just pursued (e.g. a COMI-shift). Thus, the principle can only be applied under exceptional⁷⁰⁾ circumstances on a case-by-case basis (*ultima ratio* character).⁷¹⁾

With respect to the limitations just depicted, the feasibility of the prohibition of abuse of EU law principle in tackling detrimental forum shopping effects must not be overstated. Although the principle prohibits all activities that contradict the rationale of EU law, its proper application is always dependent on the competent court. Without an increased awareness of the relevant legal practitioners a uniform application of the prohibition of abuse of EU law principle is not realistic. Furthermore, the principle is *ultima ratio* in character and has to be determined on a case-by-case basis. Thus, not every forum shopping attempt that has negative effects on the single market will fall under the prohibition.⁷²⁾ In consequence, the principle is not an instrument to tackle forum shopping on a broad basis.

D. Future Prospects

This brings me to my concluding remarks. This analysis has shown, that forum shopping is not necessarily bad as it may bring about advantages that make an efficient resolution of financial distress of a debtor possible. Nevertheless, where forum shopping attempts prove to be detrimental to the single market, they have to be avoided. A prohibition of abuse of EU law principle may only partly cope with these situations. Due to decisive limitations of the principle's scope and structure (*ultima ratio* device; principle of mutual recognition and mutual trust, application on case-by-case basis), it is not suitable to be applied against detrimental forum

⁷⁰⁾ Sandrock, Centros: ein Etappensieg für die Überlagerungstheorie, BB 1999, 1343; *Schön in Festschrift Wiedemann*, p.1276.

⁷¹⁾ see exemplarily for the ECJ's case-law ECJ, 16.12.1992, C-211/91, Kommission/Belgien, ECR 1992, I-6757; ECJ 26.9.2000, C-478/98, Kommission/Belgien, ECR 2000, I-7587; ECJ, 21.11.2002, C-436/00, X und Y, ECR 2002, I-11779; ECJ 7.7.2005, C147/03, Kommission/Österreich, ECR 2005, I-5969.

⁷²⁾ For a rather broad approach KOM (2009) 262 final, p.12.

shopping effects on a broad basis.

As the reform process is currently in progress,⁷³⁾ it is worth thinking about possible changes to the Regulation that cure the deficiencies which have led to detrimental forum shopping attempts in the past.⁷⁴⁾

Many Member State courts have shown considerable weakness in the handling of the COMI-concept leading to a great deal of forum shopping as it can be seen in the case *Enron Directo SA*.⁷⁵⁾ Right after the start of such practices academics have proposed to amend the Regulation's provisions on jurisdiction accordingly.⁷⁶⁾ Most of them attempt to change the COMI into different connecting factors. I also think that an amendment of the regulation is necessary. However, in opposition to most of the commentators, I am of the opinion that the European lawmaker should stick to the COMI-concept. The COMI is by its structure to be considered a sensitive approach towards international procedure in insolvency matters⁷⁷⁾ as it mirrors best the interests that are at stake in insolvency, i.e. those of third parties. The COMI-concept thus decisively differs from other connecting factors as e.g. the real seat. Nevertheless, the concept needs a clearer structure to enable courts to apply the connecting factor more smoothly.

Therefore, the lawmaker should firstly transform Recital 13 into a definition of the COMI which should be inserted into Art. 2 of the Regulation. This *de facto* is the present function of Recital 13⁷⁸⁾ and it also was the proposed function in the legislative process.⁷⁹⁾ A new Art. 2 lit. I EuInsReg should thus read as follows:

⁷³⁾ See some newer work on the matter Paulus, NZI 2012, 297; Reinhart, NZI 2012, 304; European Parliament, The Revision of the EU Insolvency Regulation, PE.432.770. See on approaches towards harmonisation of the substantive insolvency laws of the Member States European Parliament, Harmonisation of insolvency law at EU level, PE.419.633.

⁷⁴⁾ See in detail Reuß, *Forum shopping*, Chapter 5.

⁷⁵⁾ High Court of England and Wales (Ch), 04.07.2002 (unreported).

⁷⁶⁾ See for example Eidenmüller, ZGR 2006, 467, p.470; Ringe, 9 EBOR (2008) 579, p.614; Moss/Paulus, *Insolvency Intelligency* 2006, 1.

⁷⁷⁾ See Reuß, *Forum shopping*, pp.343 et seq.

⁷⁸⁾ See ECJ, C-341/04, ECR 2006, I-3813 para 33 – Eurofood.

⁷⁹⁾ See Lechner-Report, European Parliament, A5-0039/2000, p.18.

- i) The “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and which is therefore ascertainable by third parties.

Secondly, a new set of Recitals⁸⁰⁾ should flank the definition and provide a clearer explanation of the concept of the COMI. The Recitals should stress in the first place that the concept of the COMI is of particular importance in the system of the regulation as it determines international jurisdiction and applicable law in primary insolvency proceedings. It shall be stated that this important function demands the COMI to be carefully determined. It shall further be stressed that the very purpose of the connecting factor is to locate jurisdiction at the debtor’s centre of gravity as this is the place where creditors will deem the debtor to be situated; decisive emphasis shall be put on the fact that it is particularly the creditors’ interest that has to be taken into account and that the COMI, originally created for insolvency purposes, thus mirrors the balance of interests of substantive insolvency law. Furthermore, the Recitals shall include an explanation of how the courts shall proceed when determining the COMI, i.e. the above described two filter test. This description needs to be flanked by stressing that the COMI-test is fact sensitive and has to take into account all given facts of the case. The court must not restrict itself to detecting just a limited number of facts as e.g. the head office functions of the debtor.

Thirdly, Art. 3 Para 1 EuInsReg shall also be altered. To provide the courts with a guideline of hard facts they can use to assess the location of the COMI in a concrete case, the European lawmaker should introduce some examples of facts that may be relevant for the determination of the COMI. A new Art. 3 Para 1 could read as follows:

■ Art. 3. International jurisdiction

- (1) The courts of the Member State within the territory of which the centre of a

⁸⁰⁾ I have proposed to introduce Recitals 13-13b the German text can be found in Reuß, *Forum Shopping*, pp.348 et seq.

debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. The determination of the debtor's centre of main interests may involve the following:

- a) in the case of the debtor being a natural person:
 - the place where the commercial establishment is located, or if such does not exist the centre of the debtor's business activity, as long as the debtor is self-employed;
 - the place of work, as long as the debtor is an employee;
 - the place of the debtor's habitual residence;
 - the location of the debtor's main domicile and other places of domicile;
 - the use of a corresponding address and contact details on Email, internet etc.;
 - the location of property (real estate, movables, bank accounts).

- b) in the case of the debtor being a company or legal person:
 - the location of real business activity;
 - the use of a corresponding address and contact details on Email, internet etc.;
 - the location of property (real estate, movables, bank accounts);
 - the place from where the customer support is operated;
 - the location of the treasury, from where creditor relations were operated;
 - the location of production facilities;
 - the location of the effective control of the debtor;
 - the place where the debtor employs workforce;
 - the statutory seat of a company or legal person and if such does not exist, the place where the legal personality arose or the place under which law the company or legal person was incorporated.

It shall further be clarified in a new Art. 3 Para 1a that the presumption which currently can be found in Art. 3 Para 1 only applies when there is more than one place that may be regarded as the debtor's centre of main interests (*non liquet*).⁸¹⁾

If this is the case, then the statutory seat shall be regarded as the COMI. Also a provision on *lis pendens* shall be inserted.⁸²⁾

Finally, there have been some sound approaches to spark a closer and more efficient communication and co-operation of the internationally involved courts.⁸³⁾ These are to be welcomed as they make it possible to uncover detrimental forum shopping attempts more easily and to run cross-border insolvency proceedings in a more efficient way. In some cases international co-operation has already successfully taken place.⁸⁴⁾ Until now, the Regulation does not contain any provisions on international communication or co-operation except those on primary and secondary proceedings.⁸⁵⁾ The European lawmaker should make use of these instruments.⁸⁶⁾

⁸¹⁾ See for a proposed text- alteration Reuß, *Forum shopping*, pp.351 et seq.

⁸²⁾ See in detail Reuß, *Forum shopping*, p.353.

⁸³⁾ See for the affirmative Paulus, NZI 2008, 6; Vallender, Gerichtliche Kommunikation und Kooperation bei grenzüberschreitenden Insolvenzverfahren im Anwendungsbereich der EuInsVO: eine neue Herausforderung für Insolvenzgerichte, KTS 2008, 61. Such cannot presently be found in Art 31 EuInsReg, which only applies to the administrator, see aswell Geroldinger, *Verfahrenskoordination im europäischen Insolvenzrecht*, 2010, 394; see also Art 25-27 UNCITRAL Model Law; the common principles of the NAFTA Countries, The American Law Institute, *Principles of Cooperation Among the NAFTA Countries*, 2003, 23, 27, 57. See for a good analysis on the matter in English language Wessels, *Insolvency Intelligence* 2011, 65.

⁸⁴⁾ See High Court of England and Wales (Ch) 15.8.2006, *Hans Brochier Holdings Ltd/Exner*, BCC 2007, 127 = EWHC 2006, 2594; Court of First Instance Köln 19.2.2008, 73 IE 1/08 NZI 2008, 257 = ZInsO 2008, 388 (between the Court of First Instance Köln and the Tribunal d'Arrondissement de Luxembourg, Tribunal de Commerce); see also High Court of England and Wales (Ch) 11.2.2009, *Nortel Group*, EWHC 2009, 206 = IILR 2010, 47; see Konecny, *Insolvenz-Forum* 2007, 131. See for a tax law perspective ECJ, 12.9.2006, C-196/04, *Cadbury Schweppes*, ECR 2006, I-7995 (Directive 77/799/EEC, 19.12.1977, OJ (EG) 27.12.1977, L 336, 15).

⁸⁵⁾ See Geroldinger, *Verfahrenskoordination*.

⁸⁶⁾ See for a possible draft Reuß, *Forum shopping*, pp.355 et seq.

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