

# The Changing Landscape of International Insolvency Law in Europe

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# The Changing Landscape of International Insolvency Law in Europe

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## 1. Introduction

“After all our complaints of the frequency of bankruptcies, the unhappy men who fall into this misfortune make but a very small part of the whole number engaged in trade, and all other sorts of business; not much more perhaps than one in a thousand. Bankruptcy is perhaps the greatest and most humiliating calamity which can befall an innocent man. The greater part of men, therefore, are sufficiently careful to avoid it. Some, indeed, do not avoid it; as some do not avoid the gallows.” These are the words of Adam Smith in his famous “An Inquiry into the Nature and Causes of the Wealth of Nations” of 1779<sup>1</sup>. In his days regulation of insolvency was rare and sometimes contained criminal sanctions. Only a few bilateral treaties (within what now is the Netherlands and in Italy) existed.

Nowadays, the number of one in a thousand has become obsolete. During the calendar year 2004 the total of bankruptcies filed in the USA resulted in over 1.7 million, most of these non-business (personal) filings. Business filings then were around 35.000. In Western Europe in 2002 in the (then) 15 Member States these filings were around a quarter of a million; around 150 000 businesses went into bankruptcy. Sanctions today are not of a criminal nature. Legislation in general contains mechanisms for the orderly treatment of claims and for liquidation of the assets of the company and the company itself. In Europe furthermore, coming up since the 80s of last century, mechanisms to rescue businesses form a part of many Member State’s legislation. In the USA the Chapter 11 proceeding – in European eyes – has become a strategic business device, sheltering e.g. local airlines from the inevitable. No business is safe; even General Motors feels the cold wind.

The numbers have gone up as has the volume of legislation with regard to international insolvency law. It has grown tremendously. For European insolvency law the 21st century has started with a merry five some years. In 2000 birth was given to the EU Insolvency Regulation nr. 1346/2000, which entered into force 31 May 2002. For several financial institutions, falling outside the Regulation’s scope, 2001 produced

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<sup>1</sup> Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations, 1779, par. II. 3. 29.

Directive 2001/17 and Directive 2001/24 on the reorganization and winding-up of insurance undertakings and of credit institutions. Where a Regulation is a European Community law measure binding fully the EU Member States (except for Denmark), both Directives have to go through a legislative implementation process in each individual EEA (European Economic Area) Member State. The implementation date for Directive 2001/24 is 20 April 2003 and for Directive 2001/17 it is 5 May 2004 and the drafting process in all countries is nearing its final phase.

Regulation isn't limited to Europe though. With a focus on harmonization and basically containing 'soft law' drafters of insolvency legislation may be strongly assisted by a tool provided by the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL, sometimes known as the commercial arm of the UNITED NATIONS, has in several legal fields contributed to the harmonization of international commercial law, e.g. The Vienna Convention on International Sales of Goods (CISG) of 1980 and the Model Law on International Commercial Arbitration of 1985. A Model Law may be viewed as a (strong) recommendation to individual States to incorporate the literary text of the Model into national legislation. In 1997 the UNCITRAL Model Law on Cross-Border Insolvency was approved. It sets a world standard for national legislative provisions with regard to international insolvency, which Model was quite closely followed in drafting the new Chapter 15 of the U.S. Bankruptcy Code.<sup>2</sup> The Model law has been followed in countries like Mexico, Japan, South Africa, Spain and Rumania. In England a look-alike version of the Model Law will probably enter into force 1 April 2006. Canada will follow probably in Summer 2006, be it with a trimmed down version of the Model Law.<sup>3</sup> Other countries have followed their own approach to provide for rules on international insolvency law, e.g. Germany in 2003 and Belgium in 2004.

The legal community has witnessed an explosion of regulation and legislation with regard to international insolvency. In the USA since October 2005 the regulation of cross border insolvency cases in Chapter 15 evolves into a 32 articles chapter of provisions. In Europe rules with regard to cross-border insolvency came in effect as from 31 May 2002. Also in Europe insolvency is the doom of many companies: the Kirch group, Swissair, Landis, Fairchild Dornier, Philipp Holzmann, Parmalat, MG Rover, Collins & Aikman and a raft of other businesses.

For the ABA audience I would like to describe where Europe stands (as per the end of January 2006).

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<sup>2</sup> For an overview see Biery, Boland and Cornwell, A Look at Transnational Insolvencies and Chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, in: 67 Boston College Law Review, December 2005, 23ff.

<sup>3</sup> Rightly criticized by Bélanger and Peden, The Changing Framework Relating to the Recognition of Cross-Border Insolvencies in Canada and the United States, in: Annual Review of Insolvency Law (Canada) 2005, 203ff.

On the European level a Regulation has been introduced based on well known theories of private international law for dealing with cross-border insolvencies (see 2). This Regulation is referred to as the EU Insolvency Regulation (see 3), which carries its own legal concept (see 4). The Regulation should be seen in its procedural context, as it fills the gap, which had been left open by the introduction of (what then was) the 1968 Brussels Convention dealing with the international jurisdiction and recognition of judgments in civil and commercial matters. In the context of legal proceedings the latter (now known as the Brussels Regulation 2000) forms the general rule, the Regulation (for insolvency judgments) itself forms the special rule. As “financial institutions” are not covered by the Insolvency Regulation, the latter serves in its turn as a general rule with regard to credit institutions and insurance undertakings, for which entities Directives 2001/17 and 2001/24 have been issued (see 5). Both form the special rules; although this must be seen in the light of specific principles, which form the genes of the EU financial sector regulation (see 6). After demonstrating the gamut of divergences, it is time to highlight some communal tendencies.

## **2. Coordinated Universality as Basic Model**

“The activities of undertakings have more and more cross-border effects and are therefore increasingly being regulated by Community law. While the insolvency of such undertakings also affects the proper functioning of the internal market, there is a need for a Community act requiring coordination of the measures to be taken regarding an insolvent debtor’s assets”, see Recital 3 of the Insolvency Regulation. Which is the chosen approach to reach a proper functioning of the internal EU market when confronted with cross-border insolvency cases? These cases include instances where the insolvent debtor has assets in more than one Member State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place. These instances cause a great number of sometimes rather complex legal questions, such as the international jurisdiction of the court which is authorized to open insolvency proceedings, the law applicable to the insolvency proceedings and on the substantial and procedural effects of these proceedings, e.g. on the legal position of creditors from abroad and their rights to set-off or the termination of employment contracts, the issue of recognition of proceedings which have been opened abroad, the powers of a liquidator or administrator who has been appointed abroad, etcetera.

From way back, the issues to be solved concerning cross-border insolvencies are being approached from two points of departure: universality and territoriality. In the universality model insolvency proceedings are seen as a unique proceeding reflecting the unity of the estate of the debtor. The proceeding should

contain all of the debtor's assets, wherever in the world these assets are located. In this approach the whole estate will be administered and reorganized or liquidated based on the rules of the law of the country where the debtor has his domicile (or registered office or a similar reference location) and in which country the proceedings have been opened. The applicable law for the proceedings and its legal and procedural consequences is the law of the State in which the insolvency measure has been issued. This law is referred to as "*lex concursus*", "*lex forum concursus*" (or: forum law), being the law ("*lex*") of the country where a court ("*forum*") opened insolvency proceeding (dealing with concurring claims of creditors: "*conkursus*") and which court is (or has been) charged with hearing, conduct and closure of the proceedings. The liquidator (or administrator) in this approach is charged with the liquidation (or reorganization) of the debtor's assets all over the world of which the debtor himself (partly) has been divested respectively he is charged with the supervision of the administration of his affairs. The "*lex concursus*" determines all consequences of these proceedings, e.g. with regard to current contracts, the powers of an administrator and the bases and system of distributing dividends to creditors. The territoriality model on the other hand takes as a basic idea that the respective insolvency measure only will have legal effects within the jurisdiction of the State within the territory of which a court has opened the insolvency proceedings. The legal effects of these proceedings therefore will abruptly stop at this State's borders. The limitations these proceedings will bring to a debtor's legal authority to administer his assets are not applicable abroad. Assets in other countries will not be affected by these proceedings and the administrator who is appointed will not have any powers abroad. These points of departure form both ends on a scale and are discussed extensively and sometimes sharply in literature.<sup>4</sup> In practice, most countries modify or limit the sharp edges of these theories and have introduced modified or mixed models, mostly referred to as "modified", "limited" or "mitigated" universalism, as most of them in their core have a universality element. The EU Insolvency Regulation is based on a mixed model, referred to by me as "coordinated" universality.<sup>5</sup>

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4 See Wessels, *Internationaal insolventierecht* (International Insolvency Law), 2003. A second edition, translated into English and updated, is forthcoming. See too e.g. Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfiehlt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung* (Models of Cooperation in International Insolvency Law; Is a New Orientation to be Recommended for German International Insolvency Law)?, *Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht*, Bielefeld: Verlag Ernst und Werner Gieseking (2001); Westbrook, The Control of Wealth in Bankruptcy, in: *Texas Law Review*, Vol. 82, No. 4, March 2004, 795, and Pottow, Procedural Incrementalism. A Model For International Bankruptcy, January 2005, Paper#05-001 at <<[www.law.umich.edu](http://www.law.umich.edu)>>.

5 Coordination is to be found especially in the mutual duties for liquidators in insolvency proceedings, pending in different EU Member States, to communicate information and to cooperate, see Article 31 InsReg. See my editorial "It's Time to Cooperate", in: *2 International Corporate Rescue*, 2005, 291 ff.

### 3. The EU Insolvency Regulation

On 31 May 2002 Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings entered into force. The Regulation applied entirely and directly to the ten Member States, which joined the EU as of 1 May 2004.<sup>6</sup> A Regulation is a European Community law measure, which is binding and directly applicable in Member States.<sup>7</sup> The Regulation does not apply to Denmark, as it opted out in accordance with the Treaty of Amsterdam. In the light of the introduction above it should be mentioned that the Regulation acknowledges the fact that as a result of widely differing substantive laws in the Member States “.... it is not practical to introduce insolvency proceedings with universal scope in the entire Community” (Recital 11). The differences mainly lie in the widely differing laws on security interests to be found in the Community and the very different preferential rights enjoyed by some creditors in the insolvency proceedings.<sup>8</sup> The goals of the Regulation, with 47 Articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor’s assets and to avoid forum shopping. The Regulation, therefore, provides rules for the international jurisdiction of courts in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States and the powers of the “liquidator” in the other Member States. The Regulation also deals with important choice of law (or: private international law) provisions. These contain special rules on applicable law in the case of particularly significant rights and legal relationships (e.g. rights in rem and contracts of employment). On the other hand, national proceedings covering only assets situated in the State of opening are allowed alongside main insolvency proceedings with universal scope. The following provides a quick scan of the contents of the Insolvency Regulation.

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<sup>6</sup> Some smaller changes, based on Article 20 of the Act of Accession (O.J. L 236 of 23 September 2003), have led to a consolidated version of the Insolvency Regulation, see [http://europa.eu.int/eur-lex/en/consleg/reg/en\\_register\\_1920.html](http://europa.eu.int/eur-lex/en/consleg/reg/en_register_1920.html). See Appendix A to this Article. The Annexes have been amended by Council Regulation (EC) No. 603/2005, see O.J. L 100/1 of 20 April 2005. See Appendix B to this Article.

<sup>7</sup> A Regulation does not allow “implementation” as it binds Member States directly. In several countries though, national legislation is (or should be) adopted in order to make the Insolvency Regulation compatible with national procedural law, see for Germany, France and the Netherlands: Wessels, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands, Current Topics of International Insolvency Law, Kluwer, 2004, 229.

<sup>8</sup> For empirical background material with regard to the execution of creditor’s rights, see Claessens/Klapper, Bankruptcy around the World: Explanations of its Relative Use, in: 7 American Law and Economics Review 2005, 253.

The general provisions establish the area of application of the Regulation. It is confined to “proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”, see Article 1(1) InsReg. As far as the jurisdiction is concerned the Regulation is based on the general principle that “the courts of the Member State within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings”, see Article 3(1). For a company or legal person, the presumption is that the centre of the debtor’s main interests is the place of its registered office, but this presumption may be rebutted (Art. 3(1) last line). The debate whether indeed a debtor (natural persons, legal persons, except financial institutions) has its centre of main interest (in jargon: COMI) in a certain jurisdiction has been heard in some 70 courts in 10 odd countries, since May 2002.

The opened insolvency proceeding is called main proceedings. Its most important consequence is that the law applicable to insolvency proceedings under the Regulation is that “of the Member State within the territory of which such proceedings are opened”, see Article 4(1), thus: *lex concursus*, and that this consequence shall be recognised automatically in all other Member States (Article 16). In addition, the court of another Member State than the State of opening main proceedings shall only have jurisdiction, if “the debtor possesses an establishment within the territory of that other Member State” (Article 3(2)).<sup>9</sup> The effects of the latter proceedings – referred to as secondary proceedings – are however restricted to the assets of the debtor situated in the territory of the other Member State (Article 3(2) last line) and this proceeding may only be a winding-up proceeding. In the framework of main proceedings and secondary proceedings one notes the combination of universality and territoriality, as referred to above.

The “centre of main interests” (COMI) should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, as Recital 13 provides. In some 80 percent of all court cases from the mid 02s<sup>10</sup> until now the determination of COMI is the principle point of legal conflict, with highly debated cases like *Daisytek* (involving sixteen subsidiaries in UK, Germany and France)<sup>11</sup> and *Parmalat* (involving Italy, Ireland, the Netherlands and Luxembourg). The outcome of the question “where is the centre of main interest?” in these decisions is based on many facts and circumstances, amongst (very many) others the fact that:

- (i) The day to day administration is conducted in the forum State (Ireland),<sup>12</sup>

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<sup>9</sup> Article 2(h) provides that for the purposes of the EU Insolvency Regulation an “establishment” shall mean “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”.

<sup>10</sup> Sources or extracts of some 60 court cases can be found at <<[www.eir-database.com](http://www.eir-database.com)>>.

<sup>11</sup> These European subsidiaries were left out of a filing of a Chapter 11 case in the USA (Dallas, Texas) for the overall holding of *Daisytek International, Inc.*

<sup>12</sup> Court of Dublin 23 March 2004 in *Re Eurofood IFSC Limited* (Irish company, part of the Parmalat group).

- (ii) The directors possessed the forum's nationality (Italy),<sup>13</sup>
- (iii) The (Delaware incorporated) company had presented itself to its most substantial creditor as having its principle executive offices in the forum State (England),<sup>14</sup>
- (iv) The debtor (natural person) has maintained, with regard to the substantial interests in a large number of companies established in the forum State, to administer these commercial interest in the forum State (the Netherlands),<sup>15</sup>
- (v) The director (of an Irish incorporated company, being a wholly owned subsidiary of a UK company) was based in the UK and was solely responsible for the companies business,<sup>16</sup>
- (vi) Some remaining contractual works (conducted by a company incorporated in Finland) were still in progress in the forum State (Sweden),<sup>17</sup>
- (vii) The group's parent company (of an Austrian company with its seat in Innsbruck) is located in the forum State (Germany),<sup>18</sup>
- (viii) The company (registered in the UK with a postal address in Spain) is a partner in a Swedish limited partnership ("kommanditbolag") (Sweden),<sup>19</sup> and even
- (ix) The codes to the computer programmes of the debtor company (registered in the UK, postal address in the UK, premises in Sweden) are stored in the forum State (Sweden).<sup>20</sup>

The Regulation provides for several exceptions to the application of the "*lex concursus*", see Articles 5–15 InsReg. These exceptions include third parties' rights in rem and reservation of title (Articles 5 and 7) and set-off rights (Article 6). These rights (under certain conditions) are not affected by the legal consequences (*lex concursus*) of the opening of main proceedings. In other instances an exclusion is made in that another choice of law (instead of the *lex concursus*) has been made. Important examples are contracts relating to immovable property (Article 8: effects of insolvency proceedings shall be governed by the law of the Member State within the territory of which the immovable property is situated) and contracts of employment (Article 10: governed by the law of the Member State applicable to the contract of employment). Insolvency proceedings opened in the opening State where the debtor has his centre of main

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13 Court of Parma 19 February 2004 in *Re Eurofood IFSC Limited*.

14 Court of Leeds (Ch. D) 20 May 2004 *Re Ci4net.com Inc* and *Re DBP Holdings Limited*.

15 Netherlands Supreme Court 9 January 2004, JOR 2004/87, with my commentary.

16 High Court London (Ch. D) 2 July 2004 in *Re Aim Underwriting Agencies (Ireland) Ltd*.

17 Svea Court of Appeal 30 May 2003 (No. Ö 4105-03; on file with author).

18 Court of Munich 4 May 2004 in *Re Hettlage KgaA*.

19 Court of Appeal Skåne and Blekinge 3 February 2005 (Ö 21-05).

20 Court of Stockholm 21 January 2005 (K 17664-04).

interests will be (automatically, Article 16) recognized in all the other Member States. Nevertheless, such recognition does not prohibit the opening of secondary proceedings in a State where the debtor owns an establishment, Article 16(2). The Regulation describes furthermore, amongst others, the powers of a liquidator, the publication of the opening judgement in another Member State or in public registers. Any creditor has the right to lodge claims in writing, if his residence is located in a Member State other than the State of the opening of proceedings. This provision is meant also for the tax authorities and social security authorities (Article 39).<sup>21</sup> The Regulation further provides for a duty to inform known creditors in the other Member State and the language to be used in the specific notice.<sup>22</sup>

In general, the EU Insolvency Regulation only applies to intra-Community relations; in cross-border insolvency cases relating to non-EU states the rules of general private international law or specific legislation of a country in this field apply.<sup>23</sup>

#### **4. COMI: Contact with Creditors Approach or the Mind of Management Theory?**

It may follow from the above that courts determine on COMI following the interpretation of a super abundance of facts. In general, I would submit, in these court cases one sees the confrontation of two concepts. The first one is a “Contact with Creditors” approach: through the eyes of creditors a debtor’s COMI has to be determined. After all, Recital 13 provides that COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis “*and is therefore ascertainable by third parties*” (my italics). A simple example is the case decided by the District Court Dordrecht (The Netherlands) 23 November 2005, LJN: AU7353. A creditor has filed for insolvency proceedings concerning a debtor on 13 September 2005. The request is dealt with by the Court on 23 november 2005. Debtor, though appropriately summoned, did not appear. The Court bases its

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<sup>21</sup> High Court of Ireland of 8 March 2005 in *Re Cedarlease Ltd* considers that the Insolvency Regulation does not expressly provide that a creditor located in another Member State (i.e. the Commissioners of Customs & Excise for the UK) shall have the right to initiate insolvency proceedings, but in the court’s view, it would defeat the purpose of the Insolvency Regulation if that were not the case.

<sup>22</sup> I will refer to literature later.

<sup>23</sup> See Marquette and Barbé, Council Regulation (EC) No. 1346/2000. Insolvency Proceedings In Europe and Third Countries. Status and Prospects, in: Nuyts & Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Bruylant, Bruxelles, 2005, 419. Here one will meet a growing concern with regard to the functionality of conflict of law rules, as the private international law of the EU seems to one-sidedly focus on its supportive role as an instrument for the proper functioning of the internal market.

international jurisdiction on Article 3(1) in the light of Recital 13. It turns out from the public municipal records that the debtor prior to the date of filing, namely 4 May 2005, has left for Belgium. Therefore, according to the Court, Belgium is the debtor's COMI unless it is proven that his COMI is in the Netherlands. It is not enough that debtor's small business registration in the Trade Register was crossed out on 11 October 2005, ex officio by the keeper of the register. It has not been proven that the debtor still continues to display activities and the fact that he still has several debts towards the filing creditor is insufficient to assume that his COMI is in the Netherlands. Therefore the Dutch courts do not have jurisdiction to open main insolvency proceedings.

The other view is the "Mind of Management" approach (sometimes "Head Quarters" approach). An example is the following case of High Court of Justice (Chancery Division Companies Court) 15 July 2005, [2005] EWHC 1754 (Ch) (*Collins & Aikman Europe SA*). In the UK an application for administration orders is made concerning 24 companies in the Collins & Aikman Corporation Group, of which one is incorporated in Luxembourg, six in England, one in Spain, one in Austria, four in Germany, two in Sweden, three in Italy, one in Belgium, four in The Netherlands and one in the Czech Republic. The Collins & Aikman Group has its headquarters in Michigan. It is a leading global supplier of automotive component systems and modules to the world's largest vehicle manufacturers, including Daimler, Ford, General Motors, Honda, Nissan, Porsche, Renault, Toyota and Volkswagen. It has a combined workforce of approximately 23,000 employees and a network of more than 100 technical centres, sales offices and manufacturing sites in 17 countries throughout the world. In Europe it operates 24 facilities in 10 countries with 4,500 staff. Its largest customers are Daimler, Daimler Chrysler, General Motors and Ford. But Ford accounts for approximately 60% of the business of the European operations. The Group has in recent years grown considerably, primarily from acquisitions, but it has got into financial difficulties by virtue of its liquidity position and as a result the US operations of the Group went into Chapter 11 proceedings in the United States in May 2005.

The Court pays attention to Recital 13 and several English court decisions on the centre of main interests.<sup>24</sup> The norm "the place where the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties" has to be applied and the Court finds its guidance in literature (Dicey & Morris, Conflict of Laws supplement S30, 158), according to which in order to rebut the presumption that the relevant place is the place of incorporation, it will be necessary to show that 'the head office functions' are carried out in a member state other than the state in which the registered office

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<sup>24</sup> Including *BRAC Rent-A-Car International Inc* [2003] 1 WLR 40 1421, and *Re Daisytek-ISA Ltd* [2004] BPIR 30.

is situated. The Court assesses the evidence from the companies and considers that the main administrative functions relating to the European operations have since 17th May 2005 been carried out as follows:

“1. All cash co-ordination functions principally centering on daily cash calls by which individual plants seek approval for payments are now based in England. This process is managed by Mr. Kesterton based in Coleshill, who decides whether such payments could be made.

2. The pooling bank accounts for the European operations are held with JP Morgan Chase in London. Mr. Kesterton is authorised to deal directly with the bank and is the sole signatory.

3. Human resources for Europe are co-ordinated from England from Coleshill under Mr. Keyte, who is the Vice President for Human Resources. He oversees the 4,500 staff across Europe. This includes hiring and dismissal of staff, oversight and management of litigation relating to employees and former employees and pension issues.

4. Information systems for Europe are run from England under Mr. Graveney who is the information systems director for Europe and the information systems operations are based at Fen End at Warwick.

5. The engineering design function for Europe is based in England at two design offices at Fen End and Southfields, Essex under Mr. Burns, Director of Engineering Design, and each site has about 50 permanent and retracted staff.

6. The majority of the sales functions in relation to the European operations are dealt with from England, in particular, as I have said, the principal customer in Europe is Ford, accounting for approximately 60% of revenue. All sales to Ford are handled by the Ford Business Unit in Fen End. In addition there are certain Ford sales staff in Sweden who report to the Ford Business Unit in England. The director of sales for Ford in Europe is Mr. Bottrill who is based in England.

(.....)

The submission and evidence is that the registered office of each of those companies is in England and there is no material which would rebut the presumption that England and Wales is the centre of main interests of each of those companies.

(.....)

The objectives of the proposed administrations are to rescue the companies as going concerns and/or to achieve a better result for the companies’ creditors as a whole than would be likely if the companies were wound up without first being in administration. And the proposed strategy is to seek to dispose of the European operations either as a whole or on a piecemeal basis. The strategy is the same as that previously determined by the Strategy Committee, though any disposals will take place in the context of administration proceedings. It is envisaged that this might lead to the sale of particular companies or a particular plant. It is thought that the likeliest purchaser is one more of the major customers of the

European operations such as Ford, and Lazars are to be instructed by the administrators to advise in relation to this process.

(....)

I am satisfied on the evidence that the centre of main interests of each of the companies, apart from the English companies, were not related to the location of their respective registered offices.

(.....)

I am also satisfied, following Mr. Justice Mann in the *Shierson* case that the relevant time for establishing the jurisdiction of the English court is the time when the order is made, and I am therefore satisfied on the evidence that the centre of main interests of each of the companies is in England at the date of this application.”

From the questions this judgement raises I only mention now the nature of the approach. With due respect to the authors mentioned, nor from the history, nor from the recitals or the text of the regulation, it follows that the carrying out of head office functions has weight and meaning in the context of deciding the issue of international jurisdiction of a court. Another question is whether this should be the most desirable approach, but to follow it, the text of the Regulation should be changed or the European Court of Justice may provide such an interpretation, which I doubt will be the case.<sup>25</sup> The insolvency in-crowd is eagerly looking forward to the European Court of Justice’s decision with regard to the questions referred to it by the Irish Supreme Court in *Eurofood* on 27 July 2004 (147/04).<sup>26</sup> In September 2005 the Attorney General has given his views on these questions, in summary arguing:

- (1) The appointment of a provisional liquidator will, in combination with the presentation of a winding up petition, constitute a judgment opening insolvency proceedings within Article 16 of the Regulation.
- (2) Where a Court in a Member State opens main proceedings in respect of a company which has its registered office in that jurisdiction and which conducts the administration of its interests on a regular basis in a manner ascertainable by third parties within that Member State, the courts of another Member State do not have jurisdiction to open main proceedings under Article 3(1) of the Regulation.

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25 For literature, see my article “International Jurisdiction To Open Insolvency Proceedings In Europe, In Particular Against (Groups Of) Companies”, in: Wessels, *Current Topic of International Insolvency Law*, Kluwer, 2004, 155; Huber, *Inländische Insolvenzverfahren über Auslandsgesellschaften nach der Europäischen Insolvenzverordnung (Domestic Insolvency Proceedings concerning non-German companies according to the European Insolvency Regulation)*, in: Schilken, Eberhard et al, ed., *Festschrift für Walter Gerhardt*, RWS Verlag Kommunikationsforum 2004, 397, and in a broader context: Bufford, *Global Venue Controls Are Coming: A Reply to Professor LoPucki*, *American Bankruptcy Law Journal* (forthcoming).

26 The request to have the case – Case C-341/04; see <http://curia.eu.int/jurisp> – treated according to the accelerated procedure (Art. 104a Rules of Procedure) has been rejected by the President of the ECJ (Order of 15 September 2004).

(3) The mere fact that the company is a subsidiary of a parent company whose registered office is in a different Member State does not rebut the presumption in

Article 3(1) of the Regulation that the COMI of the subsidiary company is in the Member State of its registered office, notwithstanding that the parent company is in a position to control and does in fact control the policy of the subsidiary where the fact of such control is not ascertainable by third parties.

(4) Where, however, it is manifestly contrary to the public policy of a Member State to give legal effect to a decision of another Member State on the opening of main proceedings, there is no obligation to give the decision any legal effect.

The European Court of Justice's judgement is expected early 2006.

## **5. Coordination of Proceedings**

It seems quite robust that a secondary proceeding only can have a winding-up character (Article 27). The model of main proceedings and concurring secondary proceedings, having this nature, has been criticized. It is submitted however that this limitation flows from the clear desire "to achieve a system of international cooperation that is simple and easy to understand", see Virgós.<sup>27</sup> At the same time, during the preparation of (what now is) the Regulation the predominating thought was that "the rules of mandatory coordination and the influence rights given to the main trustee would provide enough means to protect the rescue efforts in the main forum. This line of reasoning explains the rule adopted: secondary proceedings are possible, provided they are of the winding-up type, but they are subject to the ..... main-secondary scheme of coordination".<sup>28</sup> It is mainly in the power of the liquidator in the main insolvency proceedings to exercise measures for coordination, e.g. he may request opening of secondary proceedings in other Member States (Article 29), participate in secondary proceedings (Article 32(3)), request a stay of the process of liquidation of secondary proceedings (Article 33(1)), request termination of this stay (Article 33(2)), propose a rescue plan in the context of these secondary proceedings or he may disagree with finalizing liquidation in secondary proceedings (Article 34(2)). He shall furthermore lodge all claims in the secondary proceedings which have been lodged in the main proceedings (Article 32(2)), he is duty bound to communicate information (Article 31(1)) and to cooperate (Article 31(2)). Both latter obligations are duties for liquidators in secondary proceedings too. The mutual duty between liquidators to

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27 See Virgós, The 1995 European Community Convention on Insolvency Proceedings: an Insider's View, in: *Forum Internationale*, No. 25, March 1998, 11.

28 See Virgós, *o.c.*, 11.

communicate and to cooperate symbolizes the bridging of the still existing deficit of uniform law". The performance of the obligations to communicate and to cooperate is necessary in order to voice, with regard to all claims, the principle of equal treatment of *pari passu* ranked creditors. In a dozen or so separate provisions the Insolvency Regulation gives shape to the idea of "unity of estate" (there is after all one debtor), with regard to which he who has the most dominant role (the main liquidator) in principle directs the completion of the insolvency process, under the supervision of a national court. In this process the main liquidator has, with regard to the secondary proceedings, a set of controlling or coordinating (procedural and substantive) powers which he can exert. It is for this reason that for the model of international insolvency law in the system of the EU I use the description of "coordinated universalism".

#### **6. European Court of Justice 17 January 2006 (*Susanne Staubitz-Schreiber*)**

In the beginning of 2006 the first full case concerning the application of the Insolvency Regulation has been given by the European Court of Justice (ECJ), on 17 January 2006. The applicant is Susanne Staubitz-Schreiber, a resident in Germany where she operated a telecommunications equipment and accessories business as a sole trader. She ceased to operate that business in 2001 and requested, on 6 December 2001, the opening of main insolvency proceedings regarding her assets before the Court in Wuppertal. On 1 April 2002, she moved to Spain in order to live and work there. By judgement of 10 April 2002, the Wuppertal Court refused to open the insolvency proceedings applied for on the ground that there were no assets. The appeal brought by the applicant in the main proceedings against that order was dismissed in appeal, on the ground that the German courts did not have jurisdiction to open insolvency proceedings in accordance with Article 3(1) of the Regulation, since the centre of the main interests of the applicant in the main proceedings was situated in Spain. Susanne brought an appeal before the German Supreme Court (*Bundesgerichtshof*) in order to have the latter order set aside and the case referred back to the Court in Wuppertal. She submits that the question of jurisdiction should be examined in the light of the situation at the time when the request to open insolvency proceedings was lodged, or, in this case, by taking account of her domicile in Germany in December 2001. The German Supreme Court refers the following question to the ECJ for a preliminary ruling:

"Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?"

The European Court of Justice first has to deal with the transitional provision of Article 43 of the Regulation laying down the principle governing the temporal conditions for application of that regulation: “That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. That is in fact the case here, since the request by the applicant in the main proceedings was lodged on 6 December 2001 and no judgment opening insolvency proceedings was delivered before 31 May 2002.”

Then the question: where is Susanne’s COMI? It follows that, in the case in the main proceedings, the national court must determine whether it has jurisdiction in the light of Article 3(1) of the Regulation. The ECJ indicates that that provision does not specify whether the court originally seised retains jurisdiction if the debtor moves the centre of his main interests after submitting the request to open proceedings but before the judgment is delivered. The ECJ considers:

“(.....)”

24. However, a transfer of jurisdiction from the court originally seised to a court of another Member State on that basis would be contrary to the objectives pursued by the Regulation.

25. In the fourth recital in the preamble to the Regulation, the Community legislature records its intention 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. That objective would not be achieved if the debtor could move the centre of his main interests to another Member State between the time when the request to open insolvency proceedings was lodged and the time when the judgment opening the proceedings was delivered and thus determine the court having jurisdiction and the applicable law.

26. Such a transfer of jurisdiction would also be contrary to the objective, stated in the second and eighth recitals in the preamble to the Regulation, of efficient and effective cross-border proceedings, as it would oblige creditors to be in continual pursuit of the debtor wherever he chose to establish himself more or less permanently and would often mean in practice that the proceedings would be prolonged.

27. Furthermore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor’s insolvency with regard to the place where the centre of his main interests was situated when they entered into a legal relationship with him.

28. The universal scope of the main insolvency proceedings, the opening, where appropriate, of secondary proceedings and the possibility for the temporary administrator appointed by the court first seised to request measures to secure and preserve any of the debtor’s assets situated in another Member State

constitute, moreover, important guarantees for creditors, which ensure the widest possible coverage of the debtor's assets, particularly where he has moved the centre of his main interests after the request to open proceedings but before the proceedings are opened.

29. The answer to be given to the national court must therefore be that Article 3(1) of the Regulation must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.”

The answer to the question referred by the German Supreme Court to the European Court of Justice is therefore: “Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.”

It is interesting to note that in the ECJ's approach to the aims and objectives of the Insolvency Regulation are pivotal. Furthermore, in both consideration 27 and 28 emphasis is laid on the interests and the protection of creditors. It is to be awaited whether this is a signal that the ECJ in the *Eurofood* case will opt for the “Contact with Creditors” approach.<sup>29</sup>

## **7. The procedural context**

The formal insolvency proceedings form the point of view of the Communities' approach to tackle certain problems in cross-border insolvencies, as the Insolvency Regulation is part of a more comprehensive framework with regard to cross-border effects of legal proceedings. The general rule here was already laid down in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention, which itself has been transformed into a Regulation too as of 1

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<sup>29</sup> See further my comments regarding ECJ 17 January 2006, in JOR February 2006.

March 2002.<sup>30</sup> The EU Insolvency Regulation aims to fill this gap. Not all debtors, though, are covered by the Insolvency Regulation. Insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties and collective investment undertakings are excluded from the scope of the Insolvency Regulation, see Article 1(2) InsReg. The entities and undertakings which fall under the definitions given by the relevant Community Regulations and Directives are excluded from the Insolvency Regulation since they are subject to special arrangements and, to some degree, national supervisory authorities have extremely wide-ranging powers of intervention, see Recital 9 of the Insolvency Regulation. Both for insurance undertakings and credit institutions Directives have been defined, with final implementation dates in 2003 and 2004, because opposite to a Regulation a Directive will go through a legislative implementation process in each individual Member State.<sup>31</sup>

## **8. The other “beddings”**

The model of the Insolvency Regulation consists of four building blocks: (i) main proceedings, the law of which (*lex concursus*) has universal (within the EU) effect, (ii) special rules on applicable law (in contrast of a choice of law for *lex concursus*) in the case of particularly significant rights and legal relationships (e.g. rights *in rem* and contracts of employment), (iii) special “territorial” proceedings (covering only assets situated in the State of opening) to run alongside main insolvency proceedings with universal scope, and (iv) coordination between these proceedings. The model, as indicated and expressed in Recital 12, acknowledges the existence of widely differing substantive laws, mainly (but not exclusively) the widely differing laws on security interests and the preferential rights enjoyed by some creditors in the insolvency proceedings to be found in the Community. Is there no alignment between elements of national insolvency law systems whatsoever?

One may detect a number of general tendencies, which in my opinion reflect that those who are involved in insolvency law (States, insolvency practitioners, courts, academics) are not thrown back fully on their

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30 Council Regulation No. 44/2001 of 22 December 2000, O.J. L 12 of 22 December 2001.

31 See Directive 2001/17 of the European Parliament and the Council of 19 March 2001 on the reorganization and winding-up of insurance undertakings (O.J. L 110 of 20 April 2001) and Directive 2001/24 of the European Parliament and the Council of 4<sup>th</sup> April 2001 on the reorganization and winding-up of credit institutions (O.J. L 125 of 5 May 2001). Implementation dates: 20 April 2003 and 5 May 2004 respectively. See: Gabriel Moss and Bob Wessels (eds.), *EU Banking and Insurance Insolvency*, Oxford University Press (forthcoming).

own national sets of legislation and rules. Some main stream of alignment or even containing elements of harmonizing can be seen in certain features or topics of (international) insolvency law. Let me just name a few of these. In Europe many countries have revised and amended their legislation on insolvency law in the last two decades. Here one may observe two tendencies. Since the 1980s in over ten EU countries specific legislation has been introduced to deal with consumer debt. The Netherlands, Belgium and Germany followed in the late 1990s.<sup>32</sup> Another main stream in the domestic legislative domain is the inclusion of corporate rescue type of proceedings. Since the 1980s substantial revision has taken place in countries like England and Scotland, France and Belgium and in 1999 Germany and Italy. Poland and Romania followed in 2003, Spain in 2004, while in France (again) and in the Netherlands a substantial revision is underway. In many of these countries the US Chapter 11 procedure has served as a model for legislators.<sup>33</sup> A more recent observation is the enactment or renewal of rules dealing with cross-border insolvency cases in relation to non-EU countries (Germany 2003; Poland, Spain and Belgium in 2004), although remarkably the initiatives seem to progress in an uncoordinated manner.

Soft law is another tendency. In 1995 the *Cross-Border Insolvency Concordat* was adopted, which was drafted by the International Bar Association's Committee J on Insolvency, Restructuring and Creditors' Rights. The Concordat contains a design for the approach and harmonization of cross-border insolvency proceedings, aimed at a better collaboration and "equity". The idea of a cross-border concordat (or: protocol) was realized in practice, during ongoing international insolvency cases, such as *Re Maxwell Communication Corporation plc*<sup>34</sup> and *Re Olympia & York Developments Ltd. v. Royal Trust Co.*<sup>35</sup> The experiences gained during these cases were shared with others, discussed and finally described in the Concordat. A "protocol" has since been used in over twenty large cases, some of them also involving European insolvency proceedings.<sup>36</sup> Under the auspices of INSOL International, the worldwide federation

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<sup>32</sup> Insolvency regulation for natural persons is (still) rare in Central and Eastern Europe, see Balcerowicz *et al*, The Development of Insolvency Procedures in Transition Economies: A Comparative Analyses, in: Lowitzsch (ed.), Das Insolvenzrecht Mittel- und Osteuropas – Acht Länderanalysen sowie das internationale Insolvenzrecht im Vergleich, Berliner Wissenschaftsverlag, Berlin, 2004.

<sup>33</sup> Gromek Broc and Parry (eds.), Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe, Kluwer Law International, 2004.

<sup>34</sup> [1992] B.C.L.C. 465.

<sup>35</sup> (1993), 20 C.B.R. (3d) 165.

<sup>36</sup> On the subject: Wittinghofer, Der Nationale und Internationale Insolvenzverwaltungsvertrag. Koordination Paralleler Insolvenzverfahren durch Ad Hoc-Vereinbarungen, diss. Münster, 2003. Schriften zum Deutschen, europäischen und vergleichenden Zivil-, Handels- und Prozessrecht, Gieseking Verlag, Bielefeld, 2004. In *Re Stonington Partners Inc. v. Lernout & Hauspie Speech Products N.V.* (310 F.3d 118 (3<sup>rd</sup> Cir. 2002)) the court notes it has a "Herculean task" to "accommodate conflicting mutuality inconsistent national regulatory policies while minimizing the amount of interference with the judicial

of national organizations of accountants and lawyers, specializing in the broad field of insolvency (law), *Principles for A Global Approach to Multi-Creditor Workouts* were issued in 2000. These are eight principles indicating “best practice” on how to act when a company, with a larger number of (foreign) creditors, is in financial trouble. The Principles are jurisdiction-neutral and therefore can be made in principle applicable, indifferent of the legal system in that specific country. The publication demonstrates that the Principles are being endorsed by the World Bank, the Bank of England and the British Bankers Association and in several jurisdictions (e.g. Korea, Indonesia, Turkey) this approach is followed<sup>37</sup> or suggested.<sup>38</sup>

The Insolvency Regulation may be seen as a major step in improving the lacuna of cross-border insolvency within the major part of Europe. For others, though, it symbolizes especially the great diversity of national insolvency laws, where it aims to coordinate over 80 types of insolvency proceedings in 24 countries. In this respect two developments deserve attention. A group, designating itself as the “International Working Group on European Insolvency Law” (founded in 1999, representing ten Member States) has studied the question of how these differences can be reconciled with the ongoing economic integration of Europe, especially where the activities of companies that transgress national borders are regulated by European legislation. After thorough study it concluded that aforementioned diversities do not mean that national insolvency laws do not share common characteristics. These common elements were captured in the *Principles of European Insolvency Law*, fourteen in number, being presented in 2003 as reflecting “the essence of insolvency proceedings in Europe as they reflect, on a more abstract level, the

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processes of other nations”, quoting *Laker Airways Ltd. v. Sabena* (731 F.2d 909, 914 (D.C. Cir. 1984)). After several considerations, the court submits that a “[s]ituation such as this call for coordination of two plenary proceedings”, and, having noted that parties had not been able to agree upon an amicable resolution by way of an understanding or a “protocol”, the Court uttered a heartfelt cry: “We strongly recommend, in a situation such as this, that an actual dialog occur or be attempted between the court of different jurisdictions in an effort to reach an agreement as how to proceed or, at the very least, an understanding as to the policy considerations underpinning salient aspects of the foreign laws. .... Even if cooperation could not be achieved, it would be valuable to communicate regarding the policies animating a certain law so as to be better able to perform a choice-of-law analyses. While not required by our case precedent or any principle of law, we urge that, in situations as this, communication from one court to the other regarding cooperation or the drafting of a protocol could be advantageous to the orderly administration of justice”.

37 Pomerleano/Shaw, *Corporate Restructuring: International Best Practices*, World Bank, 2005.

38 Adriaanse, *Restructuring in the shadow of the law. Informal reorganisation in the Netherlands*, Doct. Thesis, Leiden, 2005 (forthcoming).

common characteristics of the insolvency laws of the European Member States.”<sup>39</sup> The Principles do not deal with subjects like corporate groupings as an insolvent debtor or liability of directors or shareholders. First steps in some general alignment of legal systems, application of (contracted) approaches, first signs of willingness to look for communalities in stead of stressing the differences may demonstrate, in the longer run, a development towards tuning and harmony. Within the EU, with ideas to support fresh start mechanisms, one may even recognize signs of a desire to implement consistent economic policy.

## 9. The next five years

During the first five years of this century in Europe nearly all the legislative framework of cross-border insolvency has been enacted. These first five years also bear a rich harvest of literature. Alphabetically, and without any attempt to be complete, I refer to the following authors from Austria,<sup>40</sup> Belgium,<sup>41</sup> Denmark,<sup>42</sup> England,<sup>43</sup> France,<sup>44</sup> Germany,<sup>45</sup> the Netherlands,<sup>46</sup> Spain<sup>47</sup> and Sweden.<sup>48</sup> In addition, a new

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39 Principles of European Insolvency Law, see McBryde, Flessner, Kortmann (eds.), in: Law of Business and Finance, Vol. 4, Deventer: Kluwer Legal Publishers, 2003. For a short review: Wessels, American Bankruptcy Institute Journal September 2003, 28ff.

40 Duursma-Kepplinger, Duursma, Chalupsky, *Europäische Insolvenzverordnung*. Kommentar, Springer, Wien New York, 2002.

41 Torremans, Cross Border Insolvencies in EU, English and Belgian Law, European Monographs No. 39, The Hague/London/Boston, Kluwer Law International, 2002.

42 Rammeskov Bang-Pedersen, *Internationale aspekter af insolvens- og tingsretten*, København: Thomson, 2002.

43 Moss/Fletcher/Isaacs (eds.), *The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide*, Oxford University Press, 2002; Omar, *European Insolvency Law*, Ashgate, Aldershot, England, 2004; Marshall (ed.), *European Cross Border Insolvency*, London, Sweet & Maxwell, 2004.

44 Mélin, *La faillite internationale*, Librairie Générale de Droit et de Jurisprudence, L.G.D.J., Paris, 2004.

45 Several (chapters in) books, but most recently Haubold, *Europäische Insolvenzverordnung*, Kapitel 30, in: Gebauer/Wiedmann (eds.), *Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Erläuterung der wichtigsten EG-Verordnungen*, Richard Boorberg Verlag, 2005, 1427; Pannen, in: Runkel, (ed.), *Anwalts-Handbuch Insolvenzrecht*, § 16 *Internationales Insolvenzrecht*, Verlag Dr. Otto Schmidt, Köln, 2005, 1649.

46 Wessels, *Internationaal insolventierecht*, Polak-Wessels X, Kluwer, Deventer, 2003 (English revision forthcoming in 2006); Israël, *European Cross-Border Insolvency Regulation. A Critical Appraisal of Council Regulation 1346/2000 on Insolvency proceedings in the Light of a Paradigm of Cooperation and a Comitatus Europaea*, Doctoral Thesis, European University Institute, Florence, 2004; Veder, *Cross-Border Insolvency Proceedings and Security Rights. A comparison of Dutch and German law, the EC Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency*, Doct. Thesis Nijmegen 2004, in: Series Law of Business and Finance, Vol. 8, Kluwer, Legal Publishers, 2004; Berends, *Insolventie in het internationaal privaatrecht*, Doct. Thesis Vrije Universiteit, Amsterdam, 2005.

47 Virgós/Garcimartín, *The EC Regulation on Insolvency Proceedings: Law and Practice*, Kluwer Law International, 2004.

48 Mellqvist, *EU:s insolvensförordning m.m. – En kommentar*, Norstedts Juridik AB, Stockholm, 2002.

legal magazine has seen light in 2004.<sup>49</sup> What can be expected for the coming five years? Two brief remarks, one for Europe and one for the USA.<sup>50</sup>

In the field of companies and insolvency, where will insolvency law and corporate law (further) meet?<sup>51</sup> A theme for the future seems to be how to best gear, align or integrate matters of European company law and corporate insolvency. EU Directives or Regulations on company law only haphazardly touch on insolvency,<sup>52</sup> where the effectiveness of a credible corporate insolvency regime is only achievable with e.g. an efficient framework of creditor protection.<sup>53</sup> In literature these more recent topics of corporate law seldom include insolvency.<sup>54</sup> After Enron, WorldCom and Parmalat, should corporate behaviour not be addressed in a well considered coordinated way, within which corporate debt or corporate insolvency as a whole is an integral part of the overall tuning of EU measures with regard to corporate governance? Included, after all, will be questions regarding conflicts of interest, e.g. between directors and creditors concerning a rule on wrongful trading or between shareholders and creditors concerning the rules applicable to the ranking of (subordinated) shareholders' loans.<sup>55</sup> Included too, in my opinion, is the issue of legal characterization of certain "hybrid" legal situations, such as – to mention only one – the question whether the legal duty to request an insolvency proceeding is a matter of company law or of insolvency law, see e.g. Germany's "*Insolvenzverschleppungshaftung*".<sup>56</sup> An enquiry to assist the mapping of different patterns in corporate law according to general criteria presented in insolvency law has been issued<sup>57</sup> and the topic of insolvency of corporate groups is already vividly in debate.<sup>58</sup>

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49 International Corporate Rescue (Kluwer Law International).

50 Generally on current and future trends in comparative and international insolvency law research *see*: Wessels, Comparative Insolvency Law, in: Encyclopedia of Comparative Law, Edgar Elgar, London, 2006 (forthcoming).

51 Some particular issues regarding international effects of the insolvency of companies are dealt with by Virgós/Garcimartín, o.c., para. 122ff.

52 Issues of insolvency are in general integrated in: Werlauf, EU-Company Law. Common business law of 28 states, 2<sup>nd</sup> ed., DJØF Publishing, Copenhagen, Denmark, 2003.

53 Kraakman, *et al.*, The Anatomy of Corporate Law. A Company and Functional Approach, Oxford University Press, 2004.

54 There will be of course exceptions, *see* e.g. Ebert, The law applicable to groups of companies involving European Companies (Societas Europaea), in: The Company Lawyer Vol. 25, No. 4, 2004, 108.

55 Scherer/Schimmelpenninck, Equitable subordination of shareholders loans: going Dutch or the American way?, in: Insolvency Law & Practice, Vol. 20, No. 2, 2004, 54.

56 Hirte / Mock, Wohin mit der Insolvenzantragspflicht?, ZIP 11/2005, 474.

57 Wood, World corporate law – mapping the real differences, The Company Lawyer Vol. 24, No. 2, 2003, 34.

58 Keutchen/Dubois, *Les Procédures Collectives Face Aux Groupes de Sociétés*, In: Faillite et Concordat Judiciaire: Un Droit aux Contours Incertains et aux Interférences Multiples, Journées d'études, Avril 2002, Collection du Centre d'études Jean Renault, volume 9, Bruylant, Bruxelles, 2002, 1; Van Galen, The European Insolvency Regulation and Groups of Companies, 23rd Insol

The essential design of the Regulation is, as explained, to establish a hierarchical scheme of primary (main) and subsidiary (secondary) jurisdictional competence in relation to a debtor. The court where the “centre of the debtor’s main interests” (COMI) is situated, so within the territory of a Member State, will have the primacy to open the proceedings. The principle of subordination between main and secondary proceedings is set forth by Articles 3(2)-(4): where the centre of the debtor’s main interests is situated within the territory of a Member State, the courts of another Member State have a jurisdiction to open insolvency proceedings only if the debtor possesses an ‘establishment’ in the territory of that other State. In cases where the debtor’s centre of main interests is located in a Member State, the courts of other Member States have no power to open a main insolvency. Opening is allowed of a secondary proceeding, if the debtor has an “establishment”, which is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods” (Article 2(h)). In an American audience now these words should sound familiar. Section 1502 of the U.S. Bankruptcy Code provides several definitions, amongst others “establishment” in section 1502(2) and “foreign main proceeding” in section 1502(4). With minor language varieties these definitions derive from Article 2 of the UNCITRAL Model Law on Cross-Border Insolvency. The definition in section 1502(2) of “establishment” takes the wording of the Model Law, but omits the last words “with human means and goods or services”, because adding these unusual words would possibly lead to unintended results, according to Westbrook.<sup>59</sup> The Model Law, in its turn, took its inspiration from the (now) EU Insolvency Regulation. In section 1502(4) the definition of “foreign main proceeding” includes a reference to “the center of its main interest”. Although a more usual wording was suggested by several North-American commentators, the decision to follow Model Law language – like in several other places – was taken, because it was felt “more important to have a uniform worldwide phrase (at least in English) for such a central point”, thus Westbrook. Here again word-tracing brings us to Europe. The Guide to Enactment of the Model Law (nr. 72), is surprisingly short in its elucidation of “the center of main interest”, which wording is so central to determine the proper jurisdiction. The Guide just refers for the expression “centre of main interests”, used in Article 2(b), to the wording as used in the (now) EU Insolvency Regulation.

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Europe Congress, Cork, Ireland, October 2003 (<<[www.insol-europe.org](http://www.insol-europe.org)>>), reprinted in: Tijdschrift voor Insolventierecht 2004/1, 13; Henry, Insolvency in A Group of Companies: Substantive and Procedural Consolidation: When and How?, [www.unige.ch/droit/insolvency-symposium2004/](http://www.unige.ch/droit/insolvency-symposium2004/); Mevorach, The road to a suitable and comprehensive global approach to insolvencies within multinational corporate groups, 2005 ([www.iiiglobal.org](http://www.iiiglobal.org)).

<sup>59</sup> Westbrook, Universal Participation in Transnational Bankruptcies, in: Ross Cranston (ed.), Making Commercial Law. Essays in Honour of Roy Goode, Oxford: Clarendon Press 1997, 419ff.

I am convinced<sup>60</sup> that the EU Insolvency Regulation will provide guidance for the future development of U.S. international bankruptcy law, as I hope will be the case the other way around. It will be a challenge to align the basic elements that in an alike way build international jurisdiction of courts. Generally, this will enhance alignment and harmonisation between the Model Law (and indirectly, countries enacting these norms) and the EU Insolvency Regulation.

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<sup>60</sup> See already my article “The European Union Insolvency Regulation: An Overview with Trans-Atlantic Elaborations”, in: 2003 Annual Survey of Bankruptcy Law, 481ff.

## Summary CV Bob Wessels

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- Professor of Commercial Law, Vrije University Amsterdam
- Deputy Justice at the Court of Appeal, The Hague
- Master of Law Degree in 1974 as well as in 1977; Ph.D, Vrije University Amsterdam, 1988.

Professor Bob Wessels (1949) has a private practice as advisor of corporate clients, as advisor to governments and institutions and as an arbitrator. Many of my clients since the mid 70s always have been and still are lawyers from other law firms (in the Netherlands and abroad) or court appointed insolvency administrators seeking my advice and opinion in matters of contract law, corporate law, financial law, (international) arbitration law and (international) insolvency law.

I served as Special Technical Consultant to the IMF and the World Bank advising the Ministry of Justice of Indonesia (Jakarta) and Georgia (Tbilisi) on implementing their new insolvency laws.

My teaching focuses on commercial contract law and insolvency law at Vrije University of Amsterdam, in the final phase (fourth year) of the legal education. Since 2000 I conduct an eight week programme “*International Insolvency Law*” for non-Dutch students, as part of their one year LL.M ‘International Business Law’, Vrije University Amsterdam. In the academic year 2003 – 2004 I served as “Commerzbank Foundation” Visiting Professor of International Insolvency Law, Institute for Law and Finance, Johann Wolfgang Goethe-Universität, Frankfurt Germany. In 2004 – 2005 I was Adjunct Professor and Visiting Scholar, St. John’s University School of Law, New York, USA. For this academic year 2005 – 2006 I hold a Special Chair (*Chair polyvalente*) of the University of Liège Belgium.

Founder and first chief-editor (1995-1997) of “Tijdschrift voor Insolventierecht” (*Insolvency Law Review*), published by Kluwer, The Netherlands. Published hundreds of articles in Dutch in leading legal journals and some twenty-five books.

Author of Wessels, “Insolventierecht” (*Insolvency Law*), a 10 Volume series, which has been published between 1995 – 2003, by Kluwer, The Netherlands.

Lecturing, training and teaching on topics of (international) commercial law and (international) insolvency law at universities, meetings of National Bars, Insol International, Insol Europe, International Insolvency Institute (III) and International Bar Association in Athens (Greece), Barcelona (Spain), Brisbane (Australia), Brussels (Belgium), Calgary (Canada), Cancun (Mexico), Cape Town (South Africa), Copenhagen (Denmark), Chicago (US), Frankfurt (Germany), Jakarta (Indonesia), Liège (Belgium), London (UK), New York (US), Paris (France), Pretoria (South Africa), Santiago (Chile), Sidney (Australia), Singapore, Stockholm (Sweden), Vancouver (Canada), Vienna (Austria) and Willemstad (Curaçao).

A selection of my English language publications since 1994 is published in:

Bob Wessels, *Business and Bankruptcy Law in the Netherlands; Selected Essays*, Kluwer Law International, The Hague-London-Boston, 1999, 268 pp,

and in:

Bob Wessels, '*Current Topics in International Insolvency Law*', Kluwer Law Publishers, Deventer, 2004, 626 pp.

Presently I am finalising the translation of my Dutch book of 2003 on (working title) '*International Insolvency Law*' (Kluwer, forthcoming 2006), some 700 pp.

Forthcoming (Spring 2006) is: Gabriel Moss and Bob Wessels (eds.), *EU Banking and Insurance Insolvency. An Annotated Guide and comments on the implementation of EC Directives 17/2001 and 24/2001 in EU Member State* Oxford University Press.

Several other functions/memberships include:

- Member of the Netherlands Royal Committee on Renewal of the Dutch Insolvency Act.
- Member Academic Forum of INSOL Europe
- Director of the Board of the International Insolvency Institute (III)
- International Fellow of the American College of Bankruptcy
- Member of the American Law Institute.