Harmonisation of Insolvency Law in Europe

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1 Introduction

1. EU Insolvency Regulation, UNCITRAL Model Law on Cross-border Insolvency, Cross-border Group Insolvencies, Directives on the Reorganisation and Winding-Up of Credit Institutions and Insurance Undertakings, Consumer Bankruptcy Tourism, COMI: all these terms may ring a bell for those with a specific interest in general private law. For those (practitioners, scholars, judges, regulators) working in the field of insolvency law, these words reflect profound changes in the insolvency arena, especially over the last fifteen years. In addition, the recession following from the sub-prime mortgage crash in the USA, the ramifications from the fall of Lehman Brothers and the ongoing economic strains in the Eurozone have led many times to adaptation of existing legislation or the creation of new rules. Obviously, many of these changes have their influences on national law, most notably in the fields of private international law, procedural and substantive insolvency law or regulatory law regarding financial institutions. See for the Netherlands for instance as per 2003 the procedural rules to realise the Insolvency Regulation's full content and make "national" and "European" law compatible[1], in 2005 the result of the implementation of said Directives, with as a consequence some sixty new provisions in the Netherlands Bankruptcy Act of 1896 (*Faillissementswet* or *Fw*)[2] and the recent changes in legislation as a result of the policy to be able to intervene early when financial institutions are showing signs of financial weakening.[3]

1 See some fifteen articles in the Netherlands Bankruptcy Act (we are just mentioning Article 4(4), Article 5(3), Article 6(1) second sentence and Article 6(4) of the Netherlands Bankruptcy Act), altering especially the provisions in the Bankruptcy Act with regard to bankruptcy liquidation (*faillissement*). Some other ten provisions apply these same renewals by way of analogy to one of the other insolvency proceeding the Act contains: *surseance van betaling* (postponement of payment) and *schuldsaneringsregeling natuurlijke personen* (debt reorganization or rescheduling for natural persons, i.e. individuals, including those running a business or a trade), see Bob Wessels, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands, in: European Business Law Review 2004, 73 (also in: Bob Wessels, Current Topics of International Insolvency Law, Deventer: Kluwer 2004, 229), where it is observed that these countries use rather different methods (e.g. in France procedural changes by a Circulaire) and have introduced many different consequences (leading to different rules for publications, registrations, languages to use or a court's involvement).

2 See Articles 212g – 212nn and Articles 213 – 213kk Netherlands Bankruptcy Act (Fw).

3 See for the Netherlands the *Wet bijzondere maatregelen financiële ondernemingen* (Act specific measures financial undertakings, or "Intervention Act"), leading to changes in the *Wet financieel toezicht* (Act Financial Supervision) and some forty changes in the Netherlands Bankruptcy Act (Articles 212ha – 212hr and Articles 213aa – 213 aq), entering into force (with retroactive effect!) on 20 January 2012. See (in Dutch): Wessels Insolventierecht I, 3rd ed., 2012, par. 1515 et seq.

2. The Board of the *Vereniging voor Burgerlijk Recht* (the Association for Civil Law in the Netherlands) has invited the authors to submit reports on the topic of "cross-border and international insolvency law." The Board has realised that in this field of study the future of many European or international rules will ask for serious attention, but it has invited the reporters to provide their analysis and conclusions specifically related to matters of (Dutch) national civil law. The only wish that was expressed was that the Report should cover matters with a more international angle on the one hand and topics with a stronger influence for (Dutch) national civil law on the other. Additionally, the reporters themselves thought it wise not to (primarily) focus on those topics of law, which were a subject of the Reports of the Association for 2010, especially the law of obligations, the law of contracts and the laws on secured rights.[4]

3. The Board's remit seemed broad enough to concentrate on a rather recent development in Europe, namely proposals for harmonisation of insolvency law in Europe. The first of such proposals was initiated by the European Parliament at the end of 2011, and reflects a dramatic change in the method of creating and drafting insolvency law. The other proposal was published in June 2012 by INSOL Europe, one of the leading insolvency practitioners' associations in Europe.[5] INSOL Europe's recommendations obviously relate to amendments for revision of the EU Insolvency Regulation. However they also propose the incorporating of the UNCITRAL Model Law on Cross-border insolvency into the Insolvency Regulation. In the perspective of a century of history, the changes in cross-border and international insolvency law in the last decade have been dynamic and overwhelming, but the suggestion of harmonisation in this field of law indeed is a radical one.[6] It is only a few years ago, that from a collection of studies from authors from France and the UK in 2009 the final conclusion was drawn: "For now, we have to live with a harmonised system of private law and persisting differences in the substantive laws. If complete harmonisation were to become reality one day, this would certainly have significant impact on European business in general. This project seems unrealistic from today's perspective, but

4 See A.L.M. Keirse and P.M. Veder, *Europeanisering van vermogensrecht*, Preadviezen 2010 uitgebracht voor de Vereniging voor Burgerlijk Recht. For a review, see J. Smits, Nederlands Tijdschrift voor Burgerlijk Recht December 2010, 428ff. For a report of the conference discussions, see R. Lubbers and I. van der Zalm, Nederlands Tijdschrift voor Burgerlijk Recht October 2011, 443ff.

5 Until 1999 INSOL Europe was named: '*Association Européenne des Practiciens des Procédures Collectives*', or 'the European Insolvency Practitioners Association, EIPA'). It has has around 900 members. For the past seven years or so the Academic Forum of INSOL Europe has been promoting the further development of insolvency law as an academic discipline throughout Europe. See www.insol-europe.org.

6 Regarding the European Parliament's initiative: "In conclusion, the H-word is out!", according to Bob Wessels, Harmonization of Insolvency Law in Europe, European Company Law 8, no. 1 (2011), 27ff. See also Christoph G. Paulus, *EuInsVO: Änderungen am Horizont und ihre Auswirkungen*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2012, 297ff., qualifying the proposals of the European Parliament as carrying a *recht radikales Vereinheitlichungsbestreben* (a clear ambition for radical unification).

if it is worth working towards in contract and company law, why not in insolvency?".[7]

4. In the following paragraphs we will further explain the background of both proposals, the way we will treat the theme of harmonisation, including some remarks of what we will not cover.

5. On 15 November 2011 the European Parliament (EP) approved a "Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law". In its motion the EP requests the Commission to submit to Parliament, on the basis of Article 50, Article 81(2) or Article 114 of the Treaty on the Functioning of the European Union (TFEU), one or more legislative proposals "relating to an EU corporate insolvency framework, following the detailed recommendations set out in the Annex hereto, in order to ensure a level playing field, based on a profound analysis of all viable alternatives."[8] The European Parliament takes into account[9] three specific legal sources: (i) having regard to Article 225 TFEU, (ii) having regard to the EU Insolvency Regulation[10], and (iii) having regard to three judgments of the Court of Justice of the European Union (CJEU), namely *Eurofood, Akzo Nobel & Ors v. Commission* and *Probud Gdynia*.[11]

7 Thus Wolf-Georg Ringe and Louise Gullifer, Summary, in: Wolf-Georg Ringe, Louise Gullifer and Philippe Théry, Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK, Studies of the Oxford Institute of European and Comparative Law, Vol. 11, Hart Publishing, 2009, 211ff. The question posed as been answered positively by Felix Steffek in his review of this book, in: 12 European Business Organisation Law Review 2011, 509ff.

8 See Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI). In the motion the EP confirms "that the recommendations respect the principle of subsidiarity and the fundamental rights of citizens". For all related documents, see http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&format=XML&language=EN. According to Wikipedia (visited 30 August 2012) a level playing field is "…. a concept about fairness, not that each player has an equal chance to succeed, but that they all play by the same set of rules. A metaphorical playing field is said to be level if no external interference affects the ability of the players to compete fairly. Government regulations tend to provide such fairness, since all participants must abide by the same rules. Examples of such regulation: building codes, material specifications and zoning restrictions, which create a starting point/ a minimum standard — a 'level playing field'."

9 In addition to having regard to Rules 42 and 48 of its Rules of Procedure and to the report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs (A7-0355/2011).

10 See Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30 June 2000. It should be mentioned that the Insolvency Regulation (InsReg) itself and its accompanying Annexes have been changed or amended six times. The present consolidated version is available via www.bobwessels.nl, weblog, document 2011-09-doc1. Denmark is not bound by the Insolvency Regulation.

11 Case C-341/04 (*Eurofood IFSC Ltd*); Case C-97/08 (*Akzo Nobel and others v Commission*); Case C-444/07 (*MG Probud Gdynia sp. z o.o.*). The reference to the case of CJEU 10 September 2009, C-97/08 [Dismissing appeal *Akzo Nobel and others v Commission* (Case T-112/05)] is odd in this trio, as it is a decision on a core topic of EU competition law, although the EP may have meant that the relationship between a parent company and a subsidiary should be seen from an economic (and not just a purely legal) angle. The CJEU's considerations are as follows:

"The Commission is able to address a decision imposing a fine for breach of the competition rules by a subsidiary to the parent company of a group of companies not because of a relationship

The motion then lists no less then 31 recitals in which the background and necessity of the topics mentioned in the motion are explained. These recitals can be categorised in the following way:

1. matters related to harmonisation of national insolvency law (recitals A – D);
2. matters related to the improvement of the EU Insolvency Regulation (recitals E – G); especially in relation to (cross-border) groups of companies (recitals P and Q);
3. the introduction of "corporate rescue as an alternative to liquidation", whereas "insolvency law should be a tool for the rescue of companies at Union level" (recitals H – O);
4. the creation of a "generally accessible and comprehensive EU database of insolvency proceedings" (recital R);
5. matters related to measures regarding (cross-border groups of) financial institutions, such as credit institutions and insurance undertakings (recitals S – X)
6. matters related to employment (recitals Y, Z and AA – AF).

6. In an Annex to the motion for a resolution, detailed recommendations are set out with regard to the content of the proposal(s) requested. These are divided in four parts, sometimes including subparts:

Part 1: Recommendations regarding the harmonisation of specific aspects of insolvency and company law. Five topics are the subject of a recommendation for harmonisation, namely:

1.1. Certain aspects of the opening of insolvency proceedings;

1.2. Certain aspects of the filing of claims;

1.3. Aspects of avoidance actions;

1.4. General aspects of the requirements for the qualification and work of liquidators;

1.5. Aspects of restructuring plans.

Part 2: Recommendations regarding the revision of the EU Insolvency Regulation:

2.1. Recommendation on the scope of the Insolvency Regulation;

2.2. Recommendation on the definition of 'centre of main interests';

2.3. Recommendation on the definition of 'establishment' in the context of secondary proceedings;

between the parent and its subsidiary in instigating the infringement or, a fortiori, because the parent company is involved in the infringement, but because those companies constitute an economic entity and therefore a single undertaking within the meaning of Articles 81 EC and 82 EC if they do not independently determine their own conduct on the market.

In the specific case of a parent company holding 100% of the capital of a subsidiary which has committed an infringement, there is a simple presumption that the parent company exercises decisive influence over the conduct of its subsidiary, and that they therefore constitute a single undertaking within the sense above. It is thus for a parent company which disputes before the Community judicature a Commission decision fining it for the conduct of its subsidiary to rebut that presumption by adducing evidence to establish that its subsidiary was independent."

2.4. Recommendation on cooperation between courts;
2.5. Recommendation on certain aspects of avoidance actions;
Part 3: Recommendations on the insolvency of groups of companies.
Part 4: Recommendation on the creation of an EU insolvency register.

A selection of the topics mentioned under Part 1 is the subject of our Report.

7. The recitals expressed should not be passed without comment. In the context of this Report we will be brief. As a legislative basis for the Commission's proposals the EP suggests Article 50, Article 81(2) or Article 114 TFEU. Briefly, these articles relate to the principle of freedom of establishment, judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and the power to adopt measures "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market", see Article 114(1) TFEU. The recitals that cover matters related to measures regarding (cross-border groups of) financial institutions or employment (recitals S – Z and AA – AF) are basically the ones suggested by the Committee on Economic and Monetary Affairs and the Committee on Employment and Social Affairs. These recitals merely are symbolic, as hardly any specific recommendation of the EP can be supported by either of them.

8. Furthermore, it is most noticeable that the EP formulates considerations in relation to (cross-border) groups of companies (category 2) without giving evidence of taking into account developments in the field of the creation of and the future of European Company Law. The first steps towards the development of an EC (now: EU) company law date from the 60s of last century, with the European Company Law Action Plan of 2003 in the centre of corporate law discussions in Europe during the last decade, in which the key topics are: legal capital, corporate governance, one share/one vote, financial reporting, and corporate mobility.[12] The High Level Group of Company Law Experts, in its report of 2002 on the modernisation of company law in the EU, observed[13] that an area of possible intervention with regard to the proper functioning of groups is the law applicable to insolvent groups: "When groups become insolvent, the separate treatment of individual group companies' bankruptcies causes both procedural and substantive problems, which are exacerbated when an insolvent group operates in different jurisdictions. In some Member States, a consolidated approach to group bankruptcies is possible under certain circumstances. We acknowledge that these problems are difficult to solve but this does not make a

12 For a thorough sketch of this development, see G.-J. Vossestein, Modernisation of European Company Law and Corporate Governance, Doct. Thesis Leiden, 2008, 29ff.
13 Report of 4 November 2002, Chapter V(3). The report is available via http://ec.europa.eu/internal_market/.

solution less desirable. Therefore, we recommend that the Commission takes the initiative to review the possibilities to introduce procedural and substantive consolidations of bankruptcies of group companies in Member States." As far as we can see, the Commission has been silent since. We however agree with the German scholar Hopt that there is a firm relationship between company law and insolvency law. Hopt writes in 2010: "The German MoMiG statute proves the point. The long-standing company law rules on shareholders' loans to the company have been replaced by rules on voidability in insolvency, and have been moved from the German GmbH statute to the Insolvency Statute. Of course, one reason for this might also have been the hope to escape the consequences of the company case law of the European Court of Justice, a hope which, however, might very well prove to be fallacious. What is really needed is a certain degree of European harmonization of insolvency law. This harmonization should include inter alia directors' liability in the proximity of insolvency and, as the financial crisis has shown, a better system for early rescue of failing companies. After all, company law is not only about the birth and the growth of the company, but also about its decline and rescue."[14] Although the place of "insolvency" in the context of the future development of EU company law does not seem a priority, the theme "groups of companies and cross-border insolvency" should as a ramification of EU company law not be developed in isolation, whereas initiatives that are born in the discourse of insolvency, should not be ignored when discussing the future of EU company law.[15]

9. A last observation in this context is that the claim of the EP (category 3) that "insolvency law should be a tool for the rescue of companies at Union level" is

14 Klaus J. Hopt, The European Company Law Action Plan revisited: An Introduction, in: Koen Geens, Klaus J. Hopt (eds.), The European Action Plan Revisited. Reassessment of the 2003 Priorities of the European Commission, Universitaire Pers Leuven, 2010, 13ff. (footnotes omitted). In 2007 Wessels submitted that the European Commission's policies for small and medium sized enterprises (SMEs) at that time were focusing nearly only on educating for entrepreneurship, improving access to finance, ensuring fair competition and supporting research and development and assisting SMEs to go international, however that these policies lack "attention for a logical, but a bit darker side of business life: assistance in getting things right when business is in trouble and an efficient and supervised exit from the market when necessary", see Bob Wessels, Europe Deserves A New Approach To Insolvency Proceedings, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 267 et seq. For a critical appraisal of the EP's recommendations in this respect, see Karsten Schmidt, *Flexibilität und Praktikabilität im Konzerninsolvenzrecht – Die Zuständigkeitsfrage als Beispiel*, Zeitschrift für Insolvenz und Wirtschaftsrecht (ZIP), 2012, 1053ff.

15 It is noted that the European Commission's Consultation on the future of European company law, of February 2012 (see http://ec.europa.eu/internal_market/consultations/2012/company_law_en.htm), makes no reference to insolvency or bankruptcy. The views of the European Company Law Experts on the Commission's consultation can be found in a response paper of May 2012, which is available via http://ssrn.com/abstract=2075034. In literature it has been submitted that creditor protection (as an alternative for capital maintenance as foreseen in the Second Company Directive) should result in a minimum harmonisation of insolvency law (introducing uniform concepts for wrongful trading and fraudulent conveyance) and harmonisation of distribution requirements for private limited companies (which are outside the scope of the Second Directive), based on a "solvency" and a "liquidity" test, see Nelissen Grade and Jan Wauters, Harmonisation of Fragmentation of Creditor Protection, in: Koen Geens, Klaus J. Hopt (eds.), The European Action Plan Revisited. Reassessment of the 2003 Priorities of the European Commission, Universitaire Pers Leuven, 2010, 25ff.

wholly unsubstantiated. Traditionally, the interests of creditors (to have satisfaction of their claims to the fullest extent possible) are at the core of insolvency law. In Europe, originally the laws of, for instance, Austria, Germany, the Netherlands and Switzerland have been designed on this basis. Insolvency law, however, also can reach for other goals, such as the possibility to allow an insolvent debtor a fresh start or a business rehabilitation (with the USA's Chapter 11 as an example), to save enterprises and as many of the workforce as possible (France) or to ensure that certain credits given by the state to the debtor will be paid back (Italy). It means that different interests can be at stake. It means too that it is vague, to say the least, to speak of "the rescue of companies at Union level" without clarifying what "rescue" means, which companies are addressed (only those with cross-border subsidiaries?), which interests are reflected in that desideratum, what their relation is to the interests of the creditors or other presently acknowledged "national" goals of insolvency law and in which way insolvency law should serve as a "tool".[16]

10. The second and last theme related to harmonisation of insolvency law in Europe which we would like to raise has an international angle, that is to say it has a dimension of private international law, conflict of laws or international private law as some countries are using to describe this area of law. Not by the European Parliament, but in a recently published report from INSOL Europe, another proposal for harmonisation has been made, namely the incorporation of the UNCITRAL Model Law on Cross-border Insolvency into the Insolvency Regulation.[17] In their explanatory notes the drafters submit that as to the recognition of insolvency proceedings opened outside the European Union, the UNCITRAL Model Law on Cross-border Insolvency ("UNCITRAL Model Law" or "Model Law") provides a system which is supported "by the global community which created it", and that "[c]ontrary to the Regulation, it is not based on a similar principle to that of the community trust and therefore the effect of foreign proceedings within the receiving state is much less pronounced and there are more elaborate reviews than under the Regulation." After briefly explaining that the Regulation contains a system of automatic recognition of judgments opening insolvency systems and judicial decisions which are closely related to these proceedings, the drafters favour the Model Law's staged system of recognition of such decisions in which the courts can investigate whether the interests of all parties concerned are adequately protected. INSOL Europe wishes the Model Law provisions be incorporated within the EU Insolvency Regulation: "A unified approach to insolvency proceedings opened outside the European

16 We will return to the theme of "rescue" in the concluding chapter.
17 Revision of the European Insolvency Regulation. Proposals by INSOL Europe, Drafting Committee chaired by Robert van Galen, Nottingham: INSOL Europe, 2012, 109ff. Generally on all proposals: David Marks, EC Insolvency Regulation: Is it Reform Time?, 9 International Corporate Rescue 2012, 227ff.

Union will enhance the proper functioning of the internal market and support a unified external trade policy." Words to that effect have been laid down in a proposed new recital to the Insolvency Regulation: "(32) In the interest of enhancement of the proper functioning of the internal market and support of the unified external trade policy the Regulation should contain uniform rules on the recognition of and assistance to insolvency proceedings which have been opened outside the European Union." The suggestion is creative and challenging. The intention of the drafters of the UNCITRAL Model Law however has been to offer individual states the choice for an international insolvency regime: "Thus, the Model Law offers to States members of the European Union a complementary regime."[18] On the other hand, the completion of the Insolvency Regulation with the Model Law has met favourable reception.[19]

In this Report we will analyse and review this proposal.

11. We have limited ourselves in our study. In this Report the focus will be on harmonisation of specific aspects of insolvency law for businesses and their insolvency, sometimes also referred to as the theme of "corporate insolvency". Apart from practical aspects such as limitations of space, it must be acknowledged that certain categories or types of debtors will possess characteristics which mark them out for distinctive treatment in the event of insolvency. These debtors include natural persons, financial institutions and States (or: sovereign debtors).

12. Regarding natural persons (sometimes also "consumers", "non-merchants" or "non-traders"), in recent years several states have adopted specific insolvency regimes[20], whilst such rules still are lacking in many countries, including – in Europe – e.g. in Italy, Hungary, Lithuania and Croatia, the last one being the 28th EU Member State as of July 1, 2013. In the area of natural persons many times some other purposes in legislation have a primary attention, such as the protection of a certain minimum of assets and income, available for an individual natural person (and his household) or the specific goal of "financial rehabilitation of over-indebted individuals and families and their reintegration into society".[21] The Council of Europe's latter goal is the active component of the more passive EU's "…. view to guaranteeing a decent life to the poorest debtors (as a principle

18 See Guide to Enactment (1997), nr. 19.

19 See e.g. Jernej Sekolec, UNCITRAL Model Law on Cross-Border Insolvency: An indispensable complement to the EU Insolvency Regulation, in: Tijdschrift voor Insolventierecht (TvI) 2002/ Special – Insolventieverordening, 147.; Bob Wessels, Unilateral Regimes Concerning International Insolvency in Modern Europe, in: 6 International Corporate Rescue 2009, Issue 2, 90ff, observing that in Europe instead of individual Member States' responses, one would expect "….. that (certain) countries would discuss the challenge of creating international insolvency provision collectively and as best possible align their approaches together."

20 The Netherlands in 1998, see Articles 284 – 362 Fw (*Schuldsaneringsregeling natuurlijke personen*).

21 See recommendation 4(f) of the Council of Ministers of the Council of Europe (20 June 2007) to its (over 40) member states " [to] introduce mechanisms necessary to facilitate rehabilitation of over-indebted individuals and families and their reintegration into society in particular by: …. f.

of social justice)."[22] From another angle it has been submitted that "..... consumer insolvency poses a systemic risk to global financial stability", for which reason the World Bank presently is conducting a critical comparative study of existing legal regimes to help nations design, modernise or revise insolvency law systems applicable to natural persons.[23] While some of the themes addressed in this Report could provide guidance in certain matters (the European Parliament's motion of November 2011 refers only once to "natural persons"), the Report in hand does not primarily address such natural persons as insolvent debtors.[24]

13. With regard to financial institutions (credit institutions, insurance undertakings, (collective) investment undertakings, etc.) several international standard setting organizations or national and regional legislatures have developed or are in the process of developing rules or recommendations which – in a variety of ways – stress the paramount importance of the stability of the (international) financial markets, including the protection of financial interests of a large number of individuals concerned, and the prevention of systemic risks. These goals often result in specific regulatory regimes and in specific aims of the respective legislation or recommendations, including swift and targeted actions of authorities and specific international rules regarding cooperation, given the public nature of supervisory institutions involved. Banks, for instance, have been found to be special because they have a specific function in the economy (including a monetary role), provide fundamental financial services (a break down of a payment system creates economic damage and social unrest) and have a specific "liquidity" position (the core position of a bank is "borrowing short, lending long").[25] A more recent peculiarity is that most banks are in a myriad of inter-bank contracts for matters of finance, transactions effected by regulated

encouraging effective financial and social inclusion of over-indebted individuals and families, in particular by promoting their access to the labour market", Recommendation CM/Rec(2007)8, with a follow up Resolution 294 (2009), https://wcd.coe.int. See Jason J. Kilborn, Expert recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984-2010, see http://ssrn.com/abstract=1663108.

22 See page 2 of the Terms of Reference for the EU Group of Experts on Cross-border Insolvency http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf

23 See http://siteresources.worldbank.org/EXTGILD/Resources/WB_TF_2011_Consumer_Insolvency.pdf.

24 See Johanna Niemi, Iain Ramsey and William C. Whitford (eds.), Consumer Credit, Debt & Bankruptcy. Comparative and International Perspectives, Hart Publishing, Oxford and Portland, Oregon, 2009; Nick Huls, Consumer Bankruptcy: A Third Way Between Autonomy and Paternalism in Private Law, Erasmus Law Review, Vol. 3, issue 1 (2010) (www.erasmuslawreview.nl). See also J. Israël, *Shopping voor een schone lei*, Nederlands Tijdschrift voor Burgerlijk Recht 2012/19, observing that in Europe no harmonisation of legislation is on the agenda, given the differences in domestic proceedings, the claims that are affected by such proceedings, the length of proceedings and the duties of the debtor. With Israël we concur (referring at Kilborn's research) that certain topics are converging. Recent examples of the tendency to limit the length of such proceedings are Ireland, Germany and Greece.

25 Eva H. G. Hüpkes, The Legal Aspects of Bank Insolvency. A Comparative Analysis of Western Europe, the United States and Canada, Studies in Comparative Corporate and Financial law, Volume 10, The Hague/ London/Boston: Kluwer Law International 2000, 8ff.

markets, netting and settlements of all types. It seems likely that in case one bank fails, it automatically will be the weakest in the link or a web of links, endangering many of the other banks in the chain (although many of these contracts will provide their own protection mechanisms). Recently Campbell added another specific characterisation of the special position of banks: "Political dimension of allowing banks to fail", referring to London & Scottish Bank in the UK, which went into administration, as the government most probably took the position that no deposit-taking bank would fail unless it was so small as to have little or no impact on the general public.[26]

14. In Europe (the EU and the countries forming the European Economic Area) a specific legal regulatory framework has been created (and is in further development) related to these financial institutions. The EU Insolvency Regulation applies to a debtor, being a natural person or a company (or legal person). However, Article 1(2) EU Insolvency Regulation excludes from its scope "insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings." For these financial institutions that fall outside the Regulation's scope, Directive 2001/17 and Directive 2001/24 were produced in 2002 on the reorganization and winding up of insurance undertakings and of credit institutions. The EU Insolvency Regulation itself has its roots in Title V, Chapter 3 ("Judicial Cooperation in Civil Matters") Article 81 TFEU (ex Article 65 ECT), which says: "1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States....". Therefore the Regulation's main focus is judicial cooperation between Member States (rules for recognition of judgments; cooperation between liquidators), whereas the Directives find their basis in Title IV ("Free Movement of Persons, Services and Capital"), especially Article 49 TFEU (ex Article 43 ECT) concerning the "Right of Establishment". Directive 2001/24, in its recitals, refers to Article 47 ECT (now: Article 53 TFEU): "....the harmonious and balanced development of economic activities throughout the Community should be promoted through the elimination of any obstacles to the freedom of establishment and the freedom to provide services within the Community", see Recital 2 Directive 2001/24. It goes without saying that this rationale rather differs from "judicial cooperation", the overarching principle of the Insolvency Regulation. Although in clarifying certain matters we will touch

26 Andrew Campbell, Large-Scale Bank Insolvencies: The Challenge, in: Bob Wessels and Paul Omar (eds.), Insolvency Law in the United Kingdom: The Cork Report at 30 Years, INSOL Europe, Nottingham-Paris, 2010, 85ff.

on the issue of crisis-management and insolvency of financial institutions, our deliberations make no claim to critically deal with these institutions.[27]

15. Debts of sovereign states have existed throughout history. Here the "insolvency" angle is that one can not imagine that a state will go bust (at least not in a way similar as a corporate business), whilst a state is a "public" entity and typically has specific creditors (bondholders). Since 2001 discussions have been ongoing with regard to the idea of creating formal proceedings, aimed at the orderly and expedited restructuring of State debts. The core of the matter is the establishment of a regime of (international) resolution and insolvency law for a certain group of debtors, being (sovereign) countries. These countries are debtors of credit-loans or (international) bond loans and are technically in a (nearly) insolvent position. Argentina has been a prime example since 2002. Nowadays Iraq, Afghanistan or several Northern African States may also be included plus various other States following the devastating tsunami at the end of 2004, and countries such as Greece or even Spain as a result of the 2008 financial crisis. Our Report does not deal with this type of debtor.[28]

16. We further have to limit the scope of our remarks. Our Report will not discuss those topics mentioned in the EP's motion under Part 2 (Recommendations regarding the revision of the EU Insolvency Regulation), Part 3 (Recommendations on the insolvency of groups of companies) and Part 4 (Recommendation on the creation of an EU insolvency register). Through the years authors from various countries have made suggestions for improvement of the Regulation, including uncovered topics which should be included, such as the insolvency of groups of companies: see for instance the comments of Moss and Paulus,[29] Wessels,[30] Omar[31] and Vallens,[32] whilst recently an additional

27 See Almudena de la Mata Muñoz, The Future of Cross-Border Banking after the Crisis: facing the Challenges through Regulation and Supervision, 11 European Business Organization Law Review, December 2010/04; Jay Lawrence Westbrook, The elements of Coordination in International Corporate Insolvencies: What Cross-border Bank Insolvency Can Learn from Corporate Insolvency, in: Rosa M. Lastra (ed.), Cross-border Bank Insolvency, Oxford University Press 2011, 185ff.; Bob Wessels, Towards a European Bank Company Law?, in: F.G.B. Graaf / W.A.K. Rank, Financiële sector en international privaatrecht, Financieel Juridische Reeks 3, NIBE-SVV, Amsterdam, 2011, p. 139ff; Bob Wessels, The Future European Union Legislative framework on Cross-Border Crisis management in the Banking sector: A Legal Stress Test, in: Bob Wessels and Paul Omar (eds.), Cross-Border Management in the Banking Sector, Nottingham, 2011, p. 49ff.

28 See Rodrigo Olivares-Caminal, Rodrigo, Legal Aspects of Sovereign Debt Restructuring, Sweet & Maxwell, 2010, and the report "State insolvency: options for the way forward", International Law Association, The Hague Conference (2010), Sovereign Insolvency Study Group.

29 Gabriel Moss and Christoph Paulus, The European Insolvency Regulation – The Case for Urgent Reform, in: 19 Insolvency Intelligence 2006,1ff. See also Christoph G. Paulus, *EuInsVO: Änderungen am Horizont und ihre Auswirkungen*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2012, 297ff.

30 See Bob Wessels, Twenty Suggestion for a Makeover of the EU Insolvency Regulation, available via www.bobwessels.nl, weblog document 2006-09-doc4; Bob Wessels, EU Insolvency Regulation: Where to go from here?, International Insolvency Law Review 3/2011, p. 298ff.

31 Paul J. Omar, Addressing the Reform of the European Insolvency Regulation: Wishlist or Fancies?, in: 20 Insolvency Intelligence January 2007, 7ff.

32 Jean-Luc Vallens, *Réviser le règlement communautaire CE 1346/2000 sur les procédures d'insolvabilité*, Revue des Procédures Collectives, Mai-Juin 2010, 25ff.

layer of proposals have been suggested, e.g. during an April 2011 conference in Amsterdam,[33] by Mevorach,[34] Garcimartín and Lennarts,[35] Reinhardt,[36] Mélin[37], Bufford[38] and the proposals of INSOL Europe, mentioned earlier.[39] At the time of writing the Reports in hand, the Insolvency Regulation – by 31 May 2012 the Regulation had been in force for 10 years – is the subject of a large review process. Article 46 of the Insolvency Regulation provides that the Commission will submit at the latest on 1 June 2012 a report concerning the application of the Regulation accompanied, if necessary, by a proposal for amending it. The deadline mentioned has expired. A public consultation has been conducted.[40] Since April 2012 an evaluation study is being conducted (awarded to a consortium of the Universities of Heidelberg and Vienna) as well as a Study for an impact assessment of a revision of the Regulation, in which identified policy options in terms of their economic, social and fundamental rights impacts as well as the impacts on Member States' judicial systems are assessed (awarded to a multi-disciplinary consultancy, based in Brussels).[41] A "Group of Experts on Cross-border Insolvency" shall assist the Commission in the preparation of a legislative proposal for a revision of the Insolvency Regulation and the adoption of this proposal is foreseen (as indicated in the Commission Work Programme 2012) for December 2012.[42] We thought it of less value to devote much of our attention in this Report to matters that, on the day of the presentation and discussion of our Report (14 December 2012), are in a state of flux.

17. Having generally introduced the background of the themes the reporters aim to cover, it is evident that many topics, which fall under the umbrella of

33 Papers available via www.eir-reform.eu. These have been published too in International Insolvency Law Review 3/2011. For an overview of the conference discussions, see Rufus F. Abeln and Tom G. Abeln, The Future of the European Insolvency Regulation, European Review of Private Law 5-2011, 697ff.

34 Irit Mevorach, European Insolvency in a Global Context, 2011 Journal of Business Law, Issue 7, 666ff.

35 Francisco J. Garcimartín, The Review of the EU Insolvency Regulation: Some General Considerations and Two Selected Issues (Hybrid Procedures and Netting Arrangements) and Loes Lennarts, The Review of the EU Insolvency Regulation – Time to Recognize the Ties that Bind Company Law and Insolvency Law?, Reports of the Netherlands Association for Comparative en International Insolvency Law 2011 (these reports are available via www.nvrii.org). For a review of the conference discussion, see N.B. Pannevis, *Een betere Insolventieverordening*, Tijdschrift voor Financiering, Zekerheden en Insolventiepraktijk (FIP) 2012, 152ff. This author also provided for a review of the conference discussions in English, see the website mentioned.

36 Stefan Reinhart, *Die Überarbeitung der EuInsVo*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2012, 304ff.

37 François Mélin, *Le réforme du règlement du 29 mai 2000 relatif aux procedures d'insolvabilité*, Revue Lamy Droit des Affaires, Avril 2012, No. 70, 73ff.

38 Samuel L. Bufford, Revision of the European Union Regulation on Insolvency Proceedings – Recommendations, International Insolvency Law Review 3/2012, 341ff.

39 Revision of the European Insolvency Regulation. Proposals by INSOL Europe, Drafting Committee chaired by Robert van Galen, Nottingham: INSOL Europe, Nottingham, 2012.

40 See http://ec.europa.eu/justice/newsroom/civil/opinion/120326_en.htm, set out for the consultation period of 30 March to 21 June 2012 under the rather misleading title "Consultation on the future of European Insolvency Law". It contains over thirty questions, of which only one or two are related to non-cross-border issues.

41 Wessels participates in the Panel of Senior Advisors of this Study.

42 In May 2012 Wessels has been appointed as a member of this Group of Experts.

"cross-border and international insolvency law", are outside of the reporters' present scope of research. We must refer to literature.[43] In Europe, secondary Union law already has set its footprints in national insolvency laws.[44] Within a more broad European context, we concur with Tuula Linna's conclusion in 2009, in her contribution "Europeanization of Insolvency Law": "Indeed, when one considers the many trends of development merely in insolvency law – an area of the law traditionally considered very domestic in character – one can form a picture of how immense an influence Europeanization has been for justice and legislation".[45]

18. Our treatment of the theme is as follows. In Chapter 2 we will briefly analyse several methods of convergence of laws, such as unification, harmonisation and approximation. Chapter 3 explains the initiative to and the reasons for harmonization of insolvency law at EU level, with views expressed in favour of or in opposition to harmonisation of themes of civil and commercial law. It is without discussion that the EU treaties should provide a solid basis for any form of harmonisation and in Chapter 4 we analyse possible legislative grounds in, for instance, Article 81 TFEU and Article 114 TFEU as well as other legal instruments available to the Commission. In Chapter 5, after a short overview of available insolvency proceedings in the EU, we selected two insolvency topics to demonstrate the multi-faceted dimension of these topics. These are the "opening" of insolvency proceedings (and the "insolvency" tests applied) and the position of an insolvency office holder ("curator", "bewindvoerder", "administrator", in EU language covered by one European term: "the liquidator"), and the way such a liquidator is supervised. Chapter 6 challenges INSOL Europe's proposal to include the UNCITRAL Model Law as a part of the Insolvency Regulation, and therefore its direct application in all Member States (apart from Denmark). Finally, in Chapter 7 we recapitulate our findings and present our conclusions.

This Report was finalised during the last week of August 2012. In that week all references to internet-sources have been checked. The reporters are indebted to Ameer Muhammad, a master student at Leiden Law School, for his assistance in the development of Chapter 2 of this Report, to which we now turn.

43 See Ian F. Fletcher, Insolvency in Private International Law, Oxford, 2nd ed., 2005 with Supplement, 2007, Chap. 8; Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012; Florian Bruder, Insolvency, Cross-border, entry in: Jürgen Basedow et al., The Max Planck Encyclopedia of European Private Law, Volume I, Oxford University Press, 2012, 904ff; Bob Wessels, Insolvency Law, in: Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law, Edgar Elgar, Cheltenham, UK – Northampton, MA, USA London, 2nd ed., 2012 (forthcoming).

44 See J. Israël and S.C.J.J. Kortmann, *Europa en het Nederlandse insolventierecht*, in: A.S. Hartkamp et al. (ed.), De invloed van het Europese recht op het Nederlandse privaatrecht, serie Onderneming en Recht, deel 42-II, Deventer: Kluwer 2007, 601ff.

45 Tuula Linna, Europeanization of Insolvency Law, in: Laura Ervo, Minna Gräns, Antti Jokela (eds.), Europeanization of Procedural Law and the New Challenges to Fair Trail, Groningen: Europa Law Publishing 2009, 151ff.

2 Convergence of law

2.1 Introduction

19. The European Parliament's "Motion for a European Parliament resolution with recommendations to the Commission on insolvency proceedings in the context of EU company law" of November 2011 mentions that certain recommended topics are related to convergence of national insolvency law (recitals A – D). The Motion provides:

> "A. whereas disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies; whereas those disparities favour forum-shopping; whereas the internal market would benefit from a level playing field;
>
> B. whereas steps must be taken to prevent abuse, and any spread, of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided;
>
> C. whereas even if the creation of a body of substantive insolvency law at EU level is not possible, there are certain areas of insolvency law where harmonisation is worthwhile and achievable;
>
> D. whereas there is a progressive convergence in the national insolvency laws of the Member States".

It seems that Recital B aims to tame the choice (of debtors or creditors) for a national insolvency system, which is seen as in the best interest of the person making this choice and that Recital A expresses some effects of disparities between national insolvency laws. Recital C presents "harmonisation" of certain areas of national insolvency law as an option (based on an unverified assumption that "the creation of a body of substantive insolvency law at EU level is not possible"), whilst Recital D states – without further evidence – that there is progressive "convergence" of national insolvency laws.

20. Before we try to provide a short picture of how the process of, what we now call, "harmonization" of insolvency law in Europe has started and has developed over the last three years, a few remarks follow regarding the terminology used. In

the European Parliament's motion and in its Annex, terms are used such as "convergence", "harmonization" and "substantive insolvency law". In addition, terms like "approximation" or "unification" are used, either in the TFEU or in literature. These terms may generally be understood by specialists in the processes of drafting legislation in general and for those interested in (the development of) the area of civil or private law, where these forms of alignment of rules have already been ongoing for several decades. In the area of insolvency law, however, these terms are rather new or at least open to further clarification and development. As our aim is to come to the core of insolvency law and its relation to national law itself, in this Report we just briefly try to describe these phenomena, to get some grip on this "miniature Babel of terminology".[1] It will be demonstrated that a distinction has to be made between the general legal meaning of the terms used, and the meaning of these terms as they have developed within the European context.

2.2 Terminology

21. Convergence has been defined as "the tendency of societies to grow more alike, to develop similarities in structures, processes and performances".[2] This general description implies that convergence will shape political processes, public policies and even social structures in the same mould. In this context, as has been observed, convergence is a phenomenon that has profound consequences for a country's institutions and structures. Applied to the field of law, convergence is the generic, overarching term indicating the phenomenon that legal systems in different states actively or passively grow together. So convergence "(...) is to be understood as a more generic term referring to the growing together of laws either through an institutionalised process or through voluntary or even spontaneous action – and therefore not necessarily on the basis of a legal obligation, but for reasons of consistency or natural justice. As such, convergence refers to a global phenomenon that transcends different legal orders within and without the legal or geographic borders of the EU."[3] In the field of (international) comparative law for instance, the term convergence is mostly used to indicate "the degree to which (modern) legal systems are becoming more and more alike". Convergence, or "the phenomenon of similar solutions in different

1 Thus J. H. Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law, Stanford Journal of International Law 1981-17, 358.
2 C. Kerr, The Future of Industrial Societies: Convergence or Continuing Diversity?, Cambridge: Harvard University Press 1983, 3.
3 W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, in: F. Cafaggi (ed.), The Institutional Framework of European Private Law, Oxford: Oxford University Press, 2006, 65.

legal systems"[4], is often used as the umbrella term for all processes that contribute to a higher degree of similarity, while – as will be argued later – unification, approximation, harmonization or coordination are its manifestations, and denounce a certain process or method that could result in convergence.[5]

22. Unification is an expression used for deliberate projects that aim to remove disparities between different legal systems, for whatever reasons. Unification of law then would have as a result a group of identically worded legal rules which are binding on a general level in at least two jurisdictions where they are supposed to be interpreted and applied in the same manner. The term unification not only reflects its result, but also the process of its development, driven by specific will and efforts towards the creation of law that is intended to be the same on an international level. Ferrari uses for this commitment the term *animus unificandi*.[6] It may be noted however that "full" unification in the sense of fully similar corresponding rules, in which identical legal wording is used, is a sheer impossibility. The unified result must frequently be translated into different languages, must be interpreted and applied in practice (and in the absence of interpretative guidances the differences will be still greater) and will function on a national level in a larger legal context, e.g. in an area of labour law or insolvency law, which are underpinned by seldom identical, mostly different, policy aims or legal values.

23. Harmonisation has been defined by Boodman[7] as follows: "(...) [H]armonization is a process in which diverse elements are combined or adapted to each other so as to form a coherent whole while retaining their individuality. In its relative sense, harmonization is the creation of a relationship between diverse things. Its absolute and most common meaning, however, implies the creation of a relationship of accord or consonance." The description is rather vague, as it describes the creation of a relationship among subjects, however it does not as a concept limit or describe these subjects nor does it define precisely the nature of the established relationship. The nature of harmonisation seems conceptually

4 U. Mattei, Efficiency in Legal Transplants: an Essay in Comparative Law and Economics, International Review of Law and Economics 1994-14, 2; C. J. Bennet, What Is Policy Convergence and What Causes It?, British Journal of Political Science 1991-2, 225.

5 See J.H. Merryman, On the Convergence (and Divergence) of the Civil Law and the Common Law, Stanford Journal of International Law 1981-17, 369, where he discerns between three main modes or processes of convergence: natural convergence, legal transplants and (active) unification.

6 Franco Ferrari, Uniform Law, entry in: Jürgen Basedow et al., The Max Planck Encyclopedia of European Private Law, Volume II, Oxford University Press, 2012, 1732ff. On the distiction between harmonisation and unification, see Kåre Lilleholt, On European Private Law: Unification, Harmonisation or Coordination?, in: Roger Brownsword et al. (eds.), The foundations of European private law, Oxford: Hart, 2011, 353ff.

7 M. Boodman, The Myth of Harmonization of Laws, Journal of Comparative Law 1991-39, 702.

dependent upon the nature of its components, and accordingly, the use of not only of the term harmonisation, but also other terms referring to a process of convergence seems rather flexible and indeterminate.[8]

2.3 Convergence within the European Union

24. Article 2 TFEU attributes legislative powers to the European Union and/or to the Member States. Three general categories can be distinguished: exclusive competence for the Union, shared competence, and competence to carry out supporting, coordinating or supplementary action. In the last-mentioned category, the Union is competent to adopt legally binding acts, requiring however that these acts "shall not entail harmonisation of Member States' laws or regulations" (Article 2(5) TFEU), making the line between a legitimate legally binding act that advances the objectives of the areas covered by this category of competence and an illegitimate act of harmonisation of national laws a rather fine one.[9]

Article 4(2) TFEU lists the areas in which the Union and the Member States share competence, these include (a) internal market; (b) social policy, for the aspects defined in the Treaty; (c) economic, social and territorial cohesion; ..... (f) consumer protection;..... (j) area of freedom, security and justice. For instance, measures for making cross-border insolvency law more efficient and effective fall under the scope of the area of freedom, security and justice[10], thus making the principle of proportionality applicable.[11]

25. The categories that are set forth by Article 2 TFEU shape up the set of instruments that the EU can use as well as the hierarchy of the subsequent norms. Article 288 TFEU provides five mechanisms: regulations, directives, decisions, recommendations and opinions, and explicates the binding power of these mechanisms. We will look into these later in this Report. Another distinction has been made between legislative, delegated or implementing acts.[12] Article 289 TFEU labels regulations, directives and decisions as legal acts that can constitute legislative acts, provided that these legal acts are adopted in accordance with a legislative procedure. This formalism means that the content of the act is not relevant to its status as a legislative act. If the TFEU does not prescribe a legislative procedure for the passage of a legal act then it is not a legal act, even if judged by its content it lays down rules of general

8 M. Boodman, The Myth of Harmonization of Laws, Journal of Comparative Law 1991-39, 706.
9 P, Craig & G. de Búrca, EU Law, Text, Cases, and Materials, New York: Oxford University Press. 2008, 87.
10 Recital 2 of the EU Insolvency Regulation.
11 Explicitly mentioned in recital 6 of the EU Insolvency Regulation.
12 P. Craig & G. de Búrca, EU Law, Text, Cases, and Materials, New York: Oxford University Press. 2008, 87.

application that would in substantive terms be regarded as legislative in nature. The ordinary legislative procedure is comprehensively constructed in Article 294 TFEU, accommodating the different interests that have a stake in the legislative process: the European Parliament, the Council and the Commission, and emphasis is placed on compromise and dialogue.[13]

26. Within the context of the laws of the Member States of the EU a rather unique terminology has been developed, within which harmonisation does have a consistent and uniform definition, namely "the specific method of (legal) convergence through European Directives"[14], binding "as to the result to be achieved upon each Member State to which it is addressed, but (...) leav[ing] to the national authorities the choice of form and methods". This definition specifically refers to directives as a means of convergence, and its unique result: harmonisation leaves diversity in place by only harmonising to a minimum standard. The resulting national law does not always have to be identical in all Member States.[15] Harmonisation thus leads to a "law of uniform results", consisting of national rules, the core content of which has been determined on a unitary, European level.

27. In the European Treaties both the terms "harmonisation" and "approximation" have been used to describe active (often legislative) means of convergence.[16] Although both terms seem to have become synonymous over the years, Van Gerven submits that approximation and harmonisation have a different emphasis: approximation accents a certain result; harmonisation implies purpose.[17] The author continues to argue that harmonisation refers to legislation that is intended to remove disparities, while approximation refers to the result achieved: in the end, legal systems should have come closer to each other.[18] Approximation can also be the result of incremental convergence through case law, or it can occur through cross-fertilisation or natural convergence. Maybe – mindful of Ferrari – the distinction flows from a different *animus harmonisandi*.[19]

13 P. Craig & G. de Búrca, EU Law, Text, Cases, and Materials, New York: Oxford University Press. 2008, 129.
14 J.M. Smits, Convergence of Private Laws in Europe, in: E. Örücü & D. Nelken (eds.), Comparative Law, a Handbook, Oxford and Portland: Hart Publishing 2007, 220.
15 J.M. Smits, European Private Law: A Plea for a Spontaneous Legal Order, in: D. Curtin, European Integration and Law, Antwerpen: Intersentia 2006, 67.
16 W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, in: F. Cafaggi (ed.), The Institutional Framework of European Private Law, Oxford: Oxford University Press, 2006, 45.
17 W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, in: F. Cafaggi (ed.), The Institutional Framework of European Private Law, Oxford: Oxford University Press, 2006, 45.
18 W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, in: F. Cafaggi (ed.), The Institutional Framework of European Private Law, Oxford: Oxford University Press, 2006, 47.
19 Compare Eva J. Lohse, The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition, in: Mads Andenas and Camilla Baasch Andersen (eds.), Theory and Practice of Harmonisation, Cheltenham: Edward Elgar, 2011, 282ff, describing at p. 313 harmonisation as "…. a conscious process that has the aim of leading to the insertion of a concept into the national legal orders, which triggers a process of adaptation to form a European concept as required to serve the objective of the European Union,

28. Within the EU, the question remains which meaning is attributed to "unification". Smits clarifies: "Unification refers to the process that leads to uniform law: it is the possible result of integration or harmonisation. However, this result is seldom reached: after all, uniform law presupposes that national legal systems completely disappear and that a new, uniform, law is applied in a uniform way across all of Europe. To me, this is utopia."[20] This view is shared, among others, by Van Gerven[21], where he concludes: "[U]nification (...) is complete uniformity of national laws[.]" In the context of the European Union, the principles of subsidiarity and proportionality will often prevent unification, making this method exceptional. It should nevertheless be mentioned that several provisions of the Insolvency Regulation are characterized as substantive rules and are therefore now accepted throughout Europe as unified rules concerning the topics to which they relate, see for example Articles 7(2), 20, 29-35, 39 and 40 of the EU Insolvency Regulation.

29. In the mid 80s of the last century the picture generally was a stagnation of the internal market, national deregulatory tendencies and growing criticism of both the quantity and the quality of the body of accumulated European legislation. A catalyst for the EC has been to reconsider its legislative task, taking as its starting point the White Paper for the Internal Market of 1985 and the Single European Act of 1986.[22] Moreover, the classic legislative methods, influenced by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, has eventually resulted in relatively open-ended directives, leaving Member States with more flexibility and discretion in shaping national legislation.[23] This paved the way for a new way of governance: the Open Method of Coordination (OMC), which is a means of governance based on soft laws mechanisms. The OMC is not always applied in the exact same form, but the most common features can be perceived as follows:

- fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms;
- establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice;
- translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences;

20 J.M. Smits, European Private Law: A Plea for a Spontaneous Legal Order, in: D. Curtin, European Integration and Law, Antwerpen: Intersentia 2006, 67.
21 W. van Gerven, Bringing (Private) Laws Closer to Each Other at the European Level, in: F. Cafaggi (ed.), The Institutional Framework of European Private Law, Oxford: Oxford University Press, 2006, 46.
22 L. Senden, Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?, Electronic Journal of Comparative Law 2005-9.1, par 2.1, see http://www.ejcl.org/91/art91-3.html.
23 D.M. Trubek and L.G. Trubek, Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination, European Law Journal 2005-3, 361.

– periodic monitoring, evaluation and peer review organised as mutual learning processes.[24]

30. The OMC was introduced not only to increase compliance of Member States, but also –and more importantly in the context of this Report – to "achieve greater convergence towards the main EU goals".[25] Arguably its most valuable contribution to European policy-making is that the OMC offers a possibility to overcome the dilemma encountered by Member States which desire a closer cooperation in certain issues, but are not willing to resort to supranational decision-making, sometimes referred to as the "joint decision trap".[26] Coordination therefore has become part of a broad redefining of European governance, put forward in the Action Plan of the European Commission "Simplifying and Improving the Regulatory Environment".[27] This Action plan also proposes "soft" modes of governance, including in particular the use of recommendations, co-regulation, voluntary sectoral agreements, benchmarking, peer pressure, networks and, as a collection of these mechanisms, the OMC. Windhoff-Héritier characterizes the new modes of governance as follows: "These new modes of governance are guided by the principles of voluntarism (non-binding targets and the use of soft law), subsidiarity (measures are decided by member states), and inclusion (the actors concerned participate in governance). The mechanisms of governance are diffusion and learning, persuasion, standardization of knowledge about policies, repetition (iterative processes of monitoring and target readjustment are employed) and time management (setting of time-tables)."[28] It has been observed that OMC provides more than a simple soft law tool as it introduces fundamental reforms with regard to the level of standard-setting and the standard-setting process itself.[29]

31. In the field of creating private law, also the term "optional instrument" (or: optional tool) is used. An optional tool or instrument serves as a regulatory measure in creating certain domains of European law, such as European contract law. The term "optional instrument" (sometimes "28th Regime") refers to a supranational body of rules which provide an alternative model for doing

24 Lisbon European Council, Presidency Conclusions, 23–24 March 2000, Pt 37. See L.A.J. Senden/A. Tahtah, *Reguleringsintensiteit en regelgevingsinstumentarium in het Europese Gemeenschapsrecht. Over de relatie tussen wetgeving, soft law en de open methode van coördinatie*, in: SEW Februari 2008, 43ff; Filippo Fontanelli et al. (ed.), Shaping Rule of Law Through Dialogue, Europe Law Publishing, 2009.

25 Lisbon European Council, Presidency Conclusions, 23–24 March 2000, Pt 37.

26 A. Windhoff-Héritier, New Modes of Governance in Europe: Policy-Making without Legislating?, in: A. Windhoff-Héritier (ed.), Common Goods: Reinventing European and International Governance, Lanham: Rowman & Littlefield Publishers 2002; F.W. Scharpf, The Joint Decision Trap Revisited, Journal of Common Market Studies 2006-4, 845ff.

27 Communication from the Commission, Action plan "Simplifying and Improving the Regulatory Environment", COM(2002) 278 final, 5 June 2002, 7.

28 A. Windhoff-Héritier, New Modes of Governance in Europe: Policy-Making without Legislating?, in: A. Windhoff-Héritier (ed.), Common Goods: Reinventing European and International Governance, Lanham: Rowman & Littlefield Publishers 2002.

29 S. Borrás and K. Jacobsson, The open method of co-ordination and new governance patterns in the EU, Journal of European Public Policy 2004-11:2, 185ff.

business throughout the European Union while leaving national laws untouched. Although a system with options should not be excluded, in this report the viability of such an instrument, its legal basis, its scope of application and its interface with national law, including rules regarding labour law, securities law and of private international law, remains untouched.[30]

2.4 Principles of subsidiarity and proportionality

32. The scope of the competence of the EU to promulgate legislative acts is governed by the principles of subsidiarity and proportionality. Leaving untouched its genesis, after the Lisbon Treaty, the principle was codified in Article 5(3) of the Treaty on European Union (TEU), and in the new, post-Lisbon Treaty "Protocol on the application of the principles of subsidiarity and proportionality".[31] The Protocol on the application of the principles of subsidiarity and proportionality sets up proceedings that give shape to the principles of subsidiarity and proportionality in practice.[32] The general aim of the principle of subsidiarity is to guarantee a degree of independence for a lower authority in relation to a higher body or for a local authority in respect of a central authority. It therefore involves the sharing of powers between several levels of authority, a principle which forms the institutional basis for federal States.[33] In the context of the EU, the principle of subsidiarity derives its relevance from policy fields where the EU and the Member States share competence. This means that the application of the principle of subsidiarity depends on the policy area of the proposed legislative act.[34] The principle of proportionality in the context of the European legislative process also governs the exercise of powers by the EU, but differs from subsidiarity in that proportionality is about content and form of the Union action, and not about who should be competent to perform the action.[35] In literature it

30 See generally Holger Fleischer, The Optional Instrument in European Private Law ("28th Regime"), Rabels Zeitschrift für ausländisches und internationales Privatrecht 2012, 235ff.

31 Article 5(3) TEU reads as follows:
Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

32 Protocol (No 2) on the application of the principles of subsidiarity and proportionality, [2008] OJ L115/206.

33 R. Panizza, The Principle of Subsidiarity, in: Fact Sheets on the European Union, European Parliament, 2011. See http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf.

34 C. Ritzer, M. Ruttloff & K. Linhart, How to Sharpen a Dull Sword. The Principle of Subsidiarity and its Control, German Law Journal 2006-09, 737ff.

35 Article 5(4) TEU defines this principle as follows:
Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

has been submitted that the proportionality principle consists of three elements: the measure must be suitable to protect the interest at stake (the causal relationship requirement), it must be necessary (the least restrictive alternative requirement) and the restriction caused by the measure must not be out of proportion to the objective pursued (the proportionality sensu stricto).[36] We further refer to the yearly report on subsidiarity and proportionality from the Commission.[37] In the 2011 report on subsidiarity and proportionality, the Commission stated that it will continue to use these guidelines and that it recommends other actors to do the same.[38] The guidelines are helpful to shape up the rather abstract principles of proportionality and subsidiarity, and they boil down to a move away from centrally-dominated, detailed prescriptive legislation, instead referencing the need for broad consultation, to the desirability of leaving greater space for national action, and to the desirability of facilitating alternative ways of achieving broadly agreed aims.[39]

33. As indicated in recital 6 the EU Insolvency Regulation respects these principles[40] and thus limits its scope to those areas that follow from the latter principle, see the text of recital 6: "In accordance with the principle of proportionality this Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings. In addition, this Regulation should contain provisions regarding the recognition of those judgments and the applicable law which also satisfy that principle." The Court of Justice of the EU uses recital 6 clearly as a demarcation, where it has held that Article 3(1) of the Regulation must be interpreted as meaning that it also confers international jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is closely connected with them, within the meaning of recital 6 in the preamble to the Regulation.[41]

36 S. Prechal, 'Topic One: National Applications of the Proportionality Principle Free Movement and Procedural Requirements: Proportionality Reconsidered', Legal Issues of Economic Integration 2008-35(3), 201ff.

37 Report from the Commision on Subsidiarity and Proportionality, COM(2011) 344 final, p. 2.

38 Report from the Commision on Subsidiarity and Proportionality, COM(2011) 344 final.

39 P. Craig & G. de Búrca, EU Law, Text, Cases, and Materials, New York: Oxford University Press. 2008, 169.

40 See M. Virgós and F. Garcimartín, The European Insolvency Regulation: Law and Practice, Kluwer Law International, 2004, nr. 5, who are of the opinion that the Insolvency Regulation does not seek to establish a "uniform code of insolvency law in the European Community. The Regulation rather is based on the principle of respect for substantive diversity; each Member State retains its own insolvency law."

41 See ECJ 12 February 2009, Case C-339/07 (*Seagon v. Deko Marty Belgium NV*) [2009] ECR I-767; [2009] 1 WLR 2168; [2009] BCC 347. In CJEU 20 October 2011, Case C-396/09 (*Interedil Srl v. Fallimento Interedil Srl*) the CJEU examined in the light of recital 6 whether an application for joinder of insolvency proceedings of two different legal persons, incorporated in France and Italy respectively, on the ground that property has been intermixed can be deemed to be such an action. Its answer was negative. On the limitations for legal action of the EU (principle of subsidiarity;

2.5 Convergence and international insolvency law

34. It is notable that international trade law has developed its own terminology, attributing a different meaning to the terms used above to describe processes of convergence. For example, the meaning of the terms harmonisation and unification used in the context of international trade law as formulated by the United Nations Commission on International Trade Law (UNCITRAL)[42] is as follows: "Harmonization" and "unification" of the law of international trade refers to the process through which the law facilitating international commerce is created and adopted. (...) "Harmonization" may conceptually be thought of as the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions. "Unification" may be seen as the adoption by States of a common legal standard governing particular aspects of international business transactions. (...) In practice, the two concepts are closely related." In both processes the focus is on the more general aim of certainty and predictability of outcomes. Active projects related to convergence entail a deliberate and negotiated process aimed at producing legislative, explanatory and contractual guidelines, by a coherent group of transnational actors, a broad consonance of motivation and concern, with regular opportunities for interaction and dialogue.[43] Often the context of such projects is larger, such as UNCITRAL's unequivocal goal of furthering the progressive harmonisation and modernisation of the law of international trade.[44]

35. In 2000, UNCITRAL started the preparation of a comprehensive statement of key objectives and core features for a strong insolvency, debtor-creditor regime, including considerations of out-of-court restructuring. Discussions led to a Legislative Guide containing flexible approaches to the implementation of such objectives and features, including a reasoned discussion of the alternative approaches possible and the perceived benefits and detriments of such approaches. The UNCITRAL Legislative Guide on Insolvency Law of 2004 presents a comprehensive exposition of the core objectives and the structure of an effective and efficient commercial insolvency system. Every key provision which is recommended to be included in a national (insolvency) law is discussed and

principle of proportionality), see Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer / T.Wiedmann (Eds.), Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 21ff. The authors however note that in practice both principles do not succeed in holding back European law making.

42 UNCITRAL FAQ – Origin, Mandate and Composition of UNCITRAL, What does UNCITRAL mean by the "harmonization" and "unification" of the law of international trade?, UNCITRAL, 2012, see http://www.uncitral.org/uncitral/en/about/origin_faq.html.

43 See C. J. Bennet, What Is Policy Convergence and What Causes It?, British Journal of Political Science 1991-2, 225ff.

44 UN General Assembly, Resolution 2205 (XXI) of 17 December 1966 Establishing – United Nations Commission on International Trade Law – United Nations Commission on International Trade Law.

the possible treatment is evaluated. The Guide furthermore takes positions on controversial issues such as automatic stay, post-commencement finance, treatment of financial market transactions and the overriding of contract terms for termination.[45] Only once in the Guide is the word "convergence" mentioned. The traditional debate between different approaches (universality versus territoriality) creates "..... considerable uncertainty and undermines the effective application of national insolvency laws. However, as the differences between insolvency laws increasingly narrow and greater convergence emerges, there are fewer reasons for maintaining the territorial approach. It is increasingly desirable that an insolvency law provides that the insolvency estate comprise all assets of the debtor wherever located".[46] In the explanatory notes, the drafters are however quick in observing that ".... since divergence is likely to remain for some time, the UNCITRAL Model Law on Cross-border insolvency establishes a regime for effective cooperation in cross-border insolvency cases through recognition of foreign decisions and access for foreign insolvency representatives to local court proceedings." In a later part of the Guide the Model Law is referred to as a vehicle of harmonization of law.[47] The Guide's recommendation 5 provides: "The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended." The UNCITRAL's Legislative Guide on Insolvency Law[48] has been assessed as a very helpful tool of best practices for legislators.[49]

36. In May 2012 both the authors published a Report, presented to the American Law Institute (ALI), containing a set of Global Principles for Cooperation in International Insolvency Cases ("Global Principles"). These Global Principles reflect a non-binding statement, drafted in a manner to be used both in civil-law

45 See Susan Block-Lieb and Terence Halliday, Harmonization and Modernization in UNCITRAL's Legislative Guide on Insolvency Law, in: 42 Texas International Law Journal 2007, 475ff.; Jenny Clift, International Insolvency Law: The UNCITRAL Experience With Harmonization and Modernization Techniques, in: Yearbook of Private International Law, Volume 11 (2009), 405ff.

46 The Legislative Guide refers to the system of the EU Insolvency Regulation, which is based on the principle of proceedings with universal scope.

47 At page 309. UNCITRAL's Working Group V is in a process of drafting provisions of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), see its Report of Working Group V (Insolvency Law) on the work of its 41st session (New York, 30 April-4 May 2012). The revisions proposed for including in the Guide to Enactment of the Model Law have already been followed by the Superior Court of Justice of Ontario (Commercial List) in *Re LightSquared LP* (July 6, 2012), 2012 ONSC 2994.

48 UNCITRAL Legislative Guide on Insolvency Law 2004; In 2010 the Guide was augmented with a Part Three: "Treatment of enterprise groups in insolvency" developed by UNITRAL Working Group V. Available at www.uncitral.org (38th session, 19-23 April 2010, New York). See Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10425b and onwards.

49 See for instance Jean-Luc Vallens, Towards an Ideal System, the UNCITRAL Guide on Insolvency Law, in: Peter/Jeandin/Kilborn (eds.), The Challenges of Insolvency Law Reform in the 21st Century. Facilitating Investment and Recovery to Enhance Economic Growth, Zürich: Schultess 2006, 489ff, and A. Klauser/B. Pogacar, *Der UNCITRAL Legislative Guide on Insolvency Law – Ein Denkanstoss auch für das österreichische Insolvenzrecht*, in: Andreas Konecny (ed.), Insolvenz-Forum 2005, Wien-Graz, 2006, 179ff.

as well as common-law jurisdictions, and aim to cover all jurisdictions in the world.[50] In our Report to ALI 2012 we have been brief in describing "harmonization" and we did not intend to amend the initial groundwork on which our report was built: "The term "harmonization" refers to efforts to change the laws of two or more countries to be more substantively similar to each other."[51] It is clear, that the methods used that aim at similarity are not only "hard law" measures (international treaties, conventions). Also other techniques are employed, such as model laws, restatements, legislative guides, and model rules.[52] In the area of international insolvency law these techniques have resulted in an abundance of "soft law". In our Report to ALI 2012 we mention:

- World Bank: 2011 Principles for Effective Insolvency and Creditor/Debtor Regimes;[53]
- Principles of European Insolvency Law 2003;
- European Bank for Reconstruction and Development: Core Principles for an Insolvency Law Regime 2004;
- American Law Institute/UNIDROIT: Principles of Transnational Civil Procedure 2004;[54]
- European Bank for Reconstruction and Development: Office Holders Principles 2007;
- European Communication & Cooperation Guidelines for Cross-Border Insolvency 2007;[55]

50 The final Report, with over 280 pages, was presented to the ALI at the 89th Annual Meeting of ALI, May 23, 2012, Washington, D.C. The Report was subsequently discussed and unanimously approved by the III membership at the 12th Annual Conference of III, Paris, June 22, 2012. It will be published in book-form by the American Law Institute. It can be viewed on the website of the International Insolvency Institute at http://www.iiiglobal.org/component/jdownloads/viewdownload/36/5897.html, and via www.bobwessels.nl, weblog, document 2012-06-doc1.

51 ALI NAFTA Principles, Appendix A, Definitions.

52 L. Mistelis, Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law', in: I.F. Fletcher, L.A. Mistelis, M. Cremona (eds.) Foundations and Perspectives of International Trade Law, London: Sweet & Maxwell 2001, 3-27. J.A. Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?, Uniform Law Review 2009-5, 8.

53 The 2011 Principles replace the Principles and Guidelines for Effective Insolvency and Creditor Rights Systems 2001. See also the report "Orderly & Effective Insolvency Procedures. Key Issues, composed by the Legal Department, International Monetary Fund" of 1999, which builds on a 1998 report submitted by the G-22 Working Group on International Financial Crises, entitled "Key Principles and Features of Effective Insolvency Regimes." See Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus & Harry Rajak, A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010.

54 See e.g. H.B. Krans/C.H. van Rhee, *De Principles of Transnational Civil Procedure: een inleiding*, Tijdschrift voor Civiele Rechtspleging 2009, 49ff; Neil Andrews, Fundamental Principles of Civil Procedure: Order Out of Chaos, in: X.E. Kramer and C.H. van Rhee, Civil Litigation in a Globalising World, T.M.C. Asser Press, 2012, 19ff.

55 These so called CoCo Guidelines have been drafted by Miguel Virgós (Madrid) and Bob Wessels (Leiden), see Miguel Virgós and Bob Wessels, Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines For Cross-Border Insolvency, in: International Corporate Rescue, Vol. 4, Issue 5, 2007, 250-275. See http://bobwessels.nl/wordpress/wp-content/uploads/2007/09/icr-editorial-oct-07.pdf.

- UNICITRAL: Practice Guide on Cross-Border Insolvency Cooperation 2009 ("UNCITRAL Practice Guide").[56]
- Prospective Model International Cross-Border Insolvency Protocol;[57]
- Model Law on Cross-Border Insolvency: the Judicial Perspective (July 2011) ("UNCITRAL Judicial Perspective");[58]
- Guidelines for Coordination of Multi-National Enterprise Group Insolvencies (September 2011 Draft)).[59]

These documents clearly demonstrate the globalisation of commercial activity in the insolvency area, and the raised awareness internationally in all circles (NGOs, practitioners, judges, academics) of the need to address the issues associated with insolvency in a cross-border context.[60]

37. In his entry to the 2012 edition of the Elgar Encyclopedia of Comparative Law, under the heading "convergence" Wessels assembles a number of tendencies grouped around harmonization through legislation, soft law, modelling and guiding, and principles. The latter ones relate to sources which may offer legitimacy in that they come to the surface through (circles in) society, reflecting fairly generally accepted thoughts or practices. The materials of these sources though differ in the status of their drafters, their legally binding character, the goals they aim to achieve and the different legal underpinnings, let alone the willingness of states and other actors (courts, practitioners, institutions) to appreciate, to adopt or to operate conscientiously their terms.[61] Principles and Guidelines of this nature therefore may have several disadvantages: (i) they have

56 Adopted by UNCITRAL on 1 July 2009, see www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html. See Libby Elliott and Neil Griffiths, UNCITRAL Practice Guide on cross-border insolvency co-operation, Corporate Rescue and Insolvency, February 2010, 12ff. For an overview of a comprehensive collection of essential texts, see Bob Wessels (Ed.), Cross-Border Insolvency Law: International Instruments and Commentary, Alphen aan den Rijn: Kluwer Law International 2007. For a more systematic overview of these sources, see Bob Wessels, Bruce A. Markell and Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press, New York, 2009 (passim); Terence C. Halliday and Bruce G. Carruthers, Bankrupt. Global Lawmaking and Systemic Financial Crisis, Stanford University Press, California: Stanford, 2009, 70ff.

57 Joseph J. Bellissimo and S. Power Johnston, Cross Border Insolvency Protocols: Developing an International Standard, in: Norton Annual Review of International Insolvency 2010, 37ff.

58 Developed by UNITRAL Working Group V. Available at www.uncitral.org (39th session, 6-10 December 2010, Vienna). Adopted by UNCITRAL on 1 July 2011. The text as published under A/CN.9/WG.V/WP.97.

59 See Guidelines for Coordination of Multi-National Enterprise Group Insolvencies (September 2011 Draft) developed by an III Committee, chaired by Hon. Ralph R. Mabey and Susan Power Johnston, available at http://iiiglobal.org/images/pdfs/711841v8_NY_full%20form%20guidelines-sept2011.pdf. See also Ralph R. Mabey and Susan Power Johnston, Coordination Among Insolvency Courts in the Rescue of Multinational Enterprises, in: Norton Annual Review of International Insolvency 2009, 33ff.

60 In the same way Roman Tomasic, Insolvency Law Reform in Asia and Emerging Insolvency Norms, 15 Insolvency Law Journal 2007, 229ff.

61 Bob Wessels, Insolvency Law, in: Jan M. Smits (ed.), Elgar Encyclopedia of Comparative Law, Edgar Elgar, Cheltenham, UK – Northampton, MA, USA London, 2nd ed., 2012 (forthcoming). Reference is made also to: Bob Wessels, Bruce A. Markell, Jason J. Kilborn, International Cooperation in Bankruptcy and Insolvency Matters, Oxford University Press Inc., NewYork, 2009, Chapter 6 ("Convergence through Legislation and Professional Cooperation"); Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed. 2012.

an uncertain legal status, (ii) it may be problematic to ascertain these texts, (iii) they may lack quality and clarity, (iv) their legitimacy may be questioned, (v) their application or enforcement seldom is reported, and (vi) their effectiveness seldom is tested.

The Hague institute for the internationalisation of Law (HiiL)[62] has adopted a global research plan for an overall review of the quality, legitimacy, enforcement and effectiveness of certain measures of soft law. For instance "legitimacy" relates to such items as "openness, participation, transparency, accountability (not only of the private regulation but also the accountability and credibility of the participants in the rule-making negotiation process), effectiveness and democratic control, which is how constitutional democracies work in practice." This field contains a clear challenge for the future, in that several scholars from different jurisdictions could focus their combined research talent, energy and resources to improvements in this area.[63]

38. At this juncture, a preliminary conclusion can be drawn in that the terminology for convergence (and its manifestations) is foggy. In international trade law a term like harmonisation is much more goal oriented than in the general legal domain. Moreover, European's legal integration process has spurred its own vocabulary due to the unique modes of legislation and policy-making: harmonisation by means of directives, and approximation by means of soft law and the OMC. It is noticeable that presently, after a development of some 15 years, the area of international insolvency law houses a large number of soft law sources and several of them have been used in different contexts, though "hard numbers" of their usage are not available.

62 HiiL is accessible via www.hiil.nl. See also www.lawofthefuture.nl. For scholarly work on the general theme of the sources and development of international law, see Reinhard Zimmerman (ed.), *Globalisierung und Entstaatlichung des Rechts*, II. Nichtstaatliches Privatrecht: Geltung und Genese, Tübingen: Mohr 2008.

63 See the HiiL 2008 Inventory Report Relating to HiiL's Concept Paper: The Added Value of Private Regulation in an Internationalised World? Towards a Model of the Legitimacy, Effectiveness, Enforcement and Quality of Private Regulation, at 13. The Report suggests to include "bankruptcy" in the global HiiL research. We were not able to find any arguments for this choice. For a call for action (still unanswered), see Bob Wessels, ALI-III Global Principles, New Strategies for Cross-border Cooperation?, in: Annual Review of Insolvency Law 2009, Thompson Reuters, Carswell, Toronto, Canada, 587ff.

3 Harmonisation of insolvency law in Europe

3.1 Introduction

39. Until at least a decade ago, the combination of "harmonisation" and "insolvency law" in Europe was regarded just as impossible as a combination of fire and water. Thirteen years ago, in the first edition of his book, Fletcher concluded: "National attitudes towards the phenomenon of insolvency are extremely variable, as are the social and legal consequences for the debtors concerned".[1] Ten years ago, in 2002 when the EU Insolvency Regulation came into effect, the Regulation expressly stated – in recital 11 – that the Regulation is based on the acknowledgment of "..... the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community."[2] The recital continues: "The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. This applies, for example, to the widely differing laws on security interests to be found in the Community. Furthermore, the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different."[3] In the meanwhile it has been submitted that the "chaos" of preferential rights and securities should be dealt with on a European level[4]. However, thus far this has not met with much success. It is therefore no surprise that, contrary to many other areas of law, insolvency was not covered in a large study in the Netherlands regarding the question whether unifying commercial law was a reality or just utopia.[5]

1 See I. F. Fletcher, Insolvency in Private International Law. National and International Approaches, Oxford Private International Law Series, Oxford University Press, 1999, 4. The same words also appear in the second edition (2005), at p. 4.

2 In the English, French, German and Dutch versions the recital refers to "insolvency proceedings" and not to *eines einheitlichen Insolvenzrechts* (in the Dutch version: *een uniform insolventierecht*), meaning "a uniform insolvency law", as Advocate General Kokott in her Opinion of 24 May 2012, Case C-116/11 (*Bank Handlowy and Ryszard Adamiak v Christianapol sp.z. o.o.*) seems to suggest.

3 This observation has direct historic roots in a comparative survey (of domestic laws of the original six Member States of the EC) conducted by Sauveplanne, published in October 1963 as EEC Commission Doc 8838/IV/63-E.

4 For a comparative overview, see A. Piekenbrock, *Insolvenzprivilegien im deutschen, ausländischen und europäischen Recht*, in: 122 Zeitschrift für Zivilprozess 2009-1, 63ff. See also: Paul Omar, The challenge of divers priority rules in European insolvency laws, eurofenix Autumn 2011, 32ff.

5 See F. De Ly, K.F. Haak and W.H. van Boom, *Eenvormig bedrijfsrecht: Realiteit of Utopie?*, Den Haag: Boom Juridische Uitgevers 2006, 349ff.

3.2 Note of 2010 on the Harmonisation of Insolvency Law at EU level

40. In April 2010, at the request of the European Parliament, a report ("Note")[6] was presented on the harmonisation of Insolvency Law at EU level.[7] The aim of the Note is to assess whether harmonisation of insolvency laws at EU level is necessary or worthwhile. The Note further evaluates how the adoption of common rules in the field of insolvency can facilitate the harmonisation of company law within the EU. In the Note the topics which were identified (without being exhaustive), were chosen for the following reason: "…. Disparities between national insolvency and restructuring laws create obstacles, competitive advantages and/or disadvantages or difficulties for companies with cross-border activities or ownership within the EU." Such disparities, thus the Note, could give rise to obstacles to a successful restructuring of insolvent companies and will stand in the way of a level playing field.[8]

41. The Note continues by listing 15 problems that might occur in the absence of common rules on insolvency. Based on the method of research employed[9], the Note concludes[10] that the current positions of these 15 aspects of insolvency laws in the EU are as follows:

> "I. The laws of EU Member States have significantly different criteria for the opening of an insolvency proceeding.
>
> II. There are differences in the extent of the general stay on the creditors' powers to assert and enforce their rights after the commencement of insolvency and reorganization proceedings.
>
> III. The laws of EU Member States contain widely different rules with respect to the management of the insolvency proceedings.
>
> IV. In each EU Member State, there are different ranking of creditors reducing the predictability of the outcome for creditors.
>
> V. The rules on the process of the filing and verification of claims differ between EU Member States, increasing the inefficiency of proceedings for creditors.

6 Note of the Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs (C), Legal an Parliamentary Affairs (No. PE 419.633), "Harmonisation of Insolvency Law at EU level".

7 Available via: http://www.insol-europe.org/eu-research/harmonisation-of-insolvency-law-at-eu-level/. The text of the Note (not its Annexes) has been published in International Insolvency Law Review 2/2010, p. 87ff. The Note, in the form of a report, was issued by INSOL Europe, with as contributors: Georgio Cherubini, Neil Cooper, Daniel Fritz, Emmanuelle Inacio, Katarzyna Ingielewicz, Guy Lofalk, Myriam Mailly, David Marks Q.C., Anna Maria Pukszto, Barbara F.H. Rumora Scheltema, Robert Van Galen, Miguel Virgós, Bob Wessels and Nora Wouters. The views expressed here, in this Report, are the reporters' own and not necessarily those of INSOL Europe or the authors mentioned.

8 Note, p. 7.

9 Responses to a questionnaire that INSOL Europe sent to a representative sample of members in France, Germany, Italy, Poland, Spain, Sweden and the UK, and country reports from these countries, with additional comments from the authors, who are practicing lawyers, in Belgium and the Netherlands.

10 Note, p. 9ff.

VI. The laws of EU Member States contain different rules on the responsibility for the proposal, verification, adoption, modification and contents of a reorganization plan.

VII. The rules on the scope of the insolvency estate in EU Member States and the rules on the disposal or sale of assets seem to be similar.

VIII. The rules on the annulment of transactions entered into prior to the opening of insolvency proceedings (avoidance actions) vary as to the periods and the onus of proof during which such transactions can be liable for consideration for annulment, reducing the predictability of the proceedings.

IX. The differing rules on the termination of contracts and on the mandatory continuation of performance under contracts reduce predictability and can result in forum shopping.

X. The laws of EU Member States contain significantly different rules on the liability of directors, shadow directors, shareholders, lenders and other parties involved with the debtor, increasing forum shopping and reducing good corporate governance.

XI. The laws of EU Member States do not contain adequate provision on the availability and modalities of post-commencement finance.

XII. The laws of EU Member States have different rules on the qualifications and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives.

XIII. At present there are no rules on the coordination of insolvency proceedings with respect to different companies belonging to the same group of companies.

XIV. Cost effective administration is hindered by the absence of an EU database containing relevant court orders and judgments.

XV. The EC Regulation No 1346/2000 only applies within the territory of the EU (except for Denmark)."

42. The Note then raises the obvious question: "Is the harmonisation of substantive insolvency law at EU level worthwhile, necessary and attainable?" The answer, not surprisingly, starts from the premise that early 2012 insolvency proceedings "..... are to a large extent only effective in the EU Member State where they are initiated and mainly apply to those assets that are located within that jurisdiction. Procedural and substantive differences between the national insolvency laws of the EU Member States still exist."[11] According to the Note, harmonisation of substantive insolvency laws will be worthwhile for the following reasons:

"(i) The present system of different national insolvency regimes may imply that the laws of one Member State could be more beneficial for one stakeholder and the laws of another Member State could be more beneficial for another stakeholder. In addition, it avoids global solutions for global problems such as occur with the insolvency of groups of companies. This may lead to either the management indulging in what is termed 'insolvency tourism' (forum shopping) by the attempted shift of the COMI of a company to a jurisdiction that is more "debtor friendly", or the

11 Note, p. 26ff

debtor and the creditors possibly becoming involved in a race to the courts in different jurisdictions.

(ii) Harmonisation of national insolvency regimes will inevitably lead to greater confidence in the insolvency systems of EU Member States; this increases transparency and therefore leads to a better understanding by the parties involved of the means and methods that are available to address the needs of commercial entities that get into financial difficulty and of the remedies available to the creditors and other stakeholders of those entities;

(iii) Harmonisation of insolvency regimes will further promote a level playing field; and

(iv) Harmonisation of the insolvency processes across the Member States of the EU will increase the efficiency of the insolvency and business reorganization processes in the EU and as a consequence, increase the return to creditors where it is decided to liquidate the assets or the prospects of reorganisation by getting a greater number of creditors to support plans for restructuring. These in total will increase the confidence that the commercial and financial sectors have in the efficiency of the financial infrastructure of the EU."

43. The Note acknowledges that with respect to some insolvency issues the need for harmonisation is greater than for other issues. It recommends "..... a balanced and thoughtful approach to harmonisation, which may modify or condition attempts at a wholesale harmonisation of all aspects of insolvency and restructuring law. By its very nature, insolvency law interfaces with many other laws and systems such as land, employment and contract laws and the court systems of each country. Until these are all harmonised, it will not be possible to harmonise all aspects of insolvency law."[12] Interestingly, the Note provides as an example, that ".... because of the widely differing structures and roles that the courts play in insolvency proceedings, it will not be possible to harmonise the court's supervision of office holders. Therefore, at present, there are serious reservations as to whether full harmonisation would be attainable, even if it were deemed possible. However, striving for harmonisation of certain aspects of insolvency law would seem to be very worthwhile." The Note then takes the next step by listing six of – in the opinion of its drafters – its most appropriate issues:

(i) The roles, responsibilities and procedures for the proposal, verification, adoption, modification and contents of reorganisation plans;
(ii) Avoidance actions including the provisions relating to connected parties;
(iii) Rules on the variation and termination of contracts, in particular labour contracts. Different rules produce market distortion;
(iv) Rules on the coordination and effective organisation of insolvency proceedings with respect to different economic entities belonging to the same

12 See in this regard too Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus & Harry Rajak, A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010, 246 stressing the close connection between insolvency law and other fields of law.

economic group, international holding structures and the organization of financial groups according to business line;[13]

(v) In addition, there is no general harmonized provision on the rules governing the effect of lawsuits on insolvency proceedings or lawsuits that are directly or indirectly connected with insolvency proceedings. Article 15 of EC Regulation No 1346/2000 provides that the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending. This will probably also be reviewed on the reform of the EC Regulation No 1346/2000 by 2012;

(vi) The EU should consider embracing the concepts of the UNCITRAL Model Law on Cross Border Insolvency in its entirety, as it is not in conflict with any existing EU regulation.[14]

The latter suggestion will be discussed in Chapter 6 of this Report.

44. The Explanatory Statement[15] to the European Parliament's November 2011 motion, sets out that on 23 March 2011, the Legal Affairs Committee held a workshop on the topic "harmonisation of insolvency proceedings at EU level". The aim of the workshop was "to identify areas in national insolvency laws that are accessible and eligible for harmonisation." On the table was the aforementioned INSOL Europe study ("Note"), commissioned by the Legal Affairs Committee. In addition, during this one day meeting, hearings of experts were conducted, whilst certain topics were further explained in the accompanying documentation.[16]

13 Issue (i) relates to problem VI, (ii) to VIII, (iii) to IX and (iv) to XIII.

14 One of the other sets of recommendations in the Report relates to harmonisation of some of the company law provisions in the different EU Member States, subsequent to a harmonisation of substantive insolvency law. As a consequence of the Cartesio case (C-210/06) the report submits that there is a need for harmonisation of company law in order to avoid national legislation preventing a company from transferring its operational headquarters from one EU Member State to another (where the company wishes to retain its registration in the first state) and restricting the right of establishment and or the right of liquidation. The report notes that traditionally insolvency laws are rather abstracted from the rules of company law applying to an insolvent company-debtor. Harmonisation of insolvency law, however, may have some effect on the further harmonisation of company law, in particular if the harmonisation includes: (i) rules on capital adequacy for the protection of creditors, (ii) a clear definition of the corporate interest of the individual company versus the group interest, (iii) the "collective" liability of directors and shadow directors in case of a negative equity, restructuring or insolvency situation, in line with the collective directors' liability for the drafting and the publication of the annual report and accounts as provided in the Fourth and Seventh Company Law Directive, (iv) the liability/or rights of the shareholders in the event a company goes into a restructuring or insolvency situation, and (v) the rules on the lifting of the corporate veil, for example in case of abuse of company goods. In the report these topics are further elaborated upon. As this topic is outside the scope of this report, we refer to the Note itself.

15 Its Rapporteur is Klaus-Heiner Lehne.

16 For sources, see: www.europarl.europa.eu/committees/eng/juri/events.html?id=workshops. The accompanying documentation concerns five Briefing Notes on the following topics: Insolvency proceedings in case of groups of companies: prospects of harmonisation at EU level (Neil Cooper), Avoidance actions and rules on contracts (Daniel Fritz and German Bar Association), The Revision of the EU Insolvency Regulation (Robert van Galen), Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International Law and Procedural Law (Burkhard Hess and Thomas Pfeiffer), opening of proceedings, claims filing and verification and reorganisation plans (Anna Maria Pukszto). These notes differ quite remarkably in for instance their structure, the use of sources (such as case law) and size (from 11 to 188 pages).

The different issues that were mentioned during the hearing suggested, according to rapporteur Lehne, a four-fold structure of future legislative initiatives:
(1) harmonisation where possible,
(2) revision of the Insolvency Regulation where it will remain – in addition to harmonisation – relevant and where the practice has proven that improvement can be made,
(3) improvement of the cooperation of liquidators and cooperation in general on administrative level in cases where enterprises that are part of a group of companies become insolvent, and
(4) creation of an EU Registry for insolvency cases.

As explained in para. 6, in the Annex to the motion the recommendations were further detailed. After our comments on certain pro's and cons regarding harmonisation, from the EP's five (groups of) recommendations on harmonisation, we will analyse two of them, namely certain aspects of the opening of insolvency proceedings and some of the general aspects of the requirements for the qualification and work of liquidators.

3.3 The Reasons for Harmonization of Insolvency Law at EU level

45. There is a certain order in the 31 recitals in the November 2011 motion of the EP. The first four of them, supportive to harmonisation of national insolvency law, relate to disparities in national systems and the wish to overcome these:

> "A. whereas disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities which could become obstacles to a successful restructuring of insolvent companies; whereas those disparities favour forum-shopping; whereas the internal market would benefit from a level playing field;
>
> B. whereas steps must be taken to prevent abuse, and any spread, of the phenomenon of forum shopping, and whereas competing main proceedings should be avoided;
>
> C. whereas even if the creation of a body of substantive insolvency law at EU level is not possible, there are certain areas of insolvency law where harmonisation is worthwhile and achievable;
>
> D. whereas there is a progressive convergence in the national insolvency laws of the Member States".

Some twenty recitals further down, there is another clear hint to harmonisation:

> "AB. whereas the current lack of harmonisation with regard to the ranking of creditors reduces predictability of outcomes of judicial proceedings; whereas it is necessary to increase the priority of employees' claims relative to other creditors' claims;"

46. It is most remarkable that in these recitals the question of what the goals of insolvency law are, either national or on a European level, is not addressed. De Weijs has rightly submitted that in ".... deciding upon the content of such harmonized rules, there will need to be a common understanding about the goals of these rules and therefore a European debate on bankruptcy theory".[17] The traditional aim of insolvency law is addressed only in a limited and indirect way. We are of the opinion that the inherent goal of any insolvency law is the maximisation of the assets of the estate for the benefit of the body of creditors, in a transparent, predictable and efficient way. In an international context we have formulated an overriding objective, with a statement of twin goals: the maximisation of value and the furthering of the just administration of the proceedings.[18] The words in Global Principle 1.1 "..... preserving where appropriate the debtor's business" are intended to give further emphasis to the overriding aim by explicitly stating that any form of the available variations of administration which contributes to the primary goal of maximizing the value of the debtor's assets is likewise addressed in these Global Principles. We submit that this should be the approach in formulating recommendations for harmonising insolvency law too. Another notable issue in the recitals cited is also that "creditors" are only named once. It may be true that several of the mentioned recitals do influence the position of creditors, but likewise this influence could also be a negative one. In Global Principle 1.2 we have stressed the importance of acting in the interest of the debtor's creditors. In many countries creditors have the right to receive information, the right to lodge a claim in all pending insolvency proceedings regarding the debtor, the right to be heard concerning any proposal for a rescue plan and, overall, the general right of equal treatment. The words in Global Principle 1.2 ".... the interests of ..... other parties", cover other interests involved in an international case, such as the interests of maintaining employment or the interest of shareholders, whilst treated "equally" means a treatment of the same class of creditors in a similar way and without discrimination.[19]

17 Rolef J. de Weijs, Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons, 21 International Insolvency Review 2012, 67ff.

18 Global Principle 1 ("Overriding objective"):

"1.1. These Global Principles embody the overriding objective of enabling courts and insolvency administrators to operate effectively and efficiently in international insolvency cases with the goals of maximizing the value of the debtor's global assets, preserving where appropriate the debtors' business, and furthering the just administration of the proceeding.

1.2. In achieving the objective of Global Principle 1.1, due regard should be given to the interests of creditors, including the need to ensure similarly ranked creditors are treated equally. Due regard should also be given to the interests of the debtor and other parties in the case, and to the international character of the case."

19 As worded in Global Principle 11 ("Non-discriminatory treatment"), in which it is stated that subject to Global Principle 3 ("Public Policy"): "..... a court should not discriminate against creditors or claimants based on nationality, residence, registered seat or domicile of the claimant or on the nature of the claim."

3.3.1 LEVEL PLAYING FIELD

47. Recital A (see para. 45) reflects some notions expressed in the Note, although in goal (i) expressed in the Note, mention is made of different "stakeholders". This is a vague concept. In the Introduction to the Note[20] it is clearly submitted that harmonisation of certain aspects of insolvency laws could: ".... protect the value of the assets of the estate, thereby returning greater value to creditors and shareholders". Here it is not only odd that shareholders are mentioned, as generally in Europe (either by way of law or in case law) shareholders are subordinated. The possibility of retaining some value for shareholders is a concept which has its roots in the Chapter 11 proceedings in the USA. Generally, in Europe only in exceptional cases the shareholder's interest may have influence, for instance when the shareholder's role is of eminent importance for the survival of a business, but in the recital the shareholders' interests are presented on an equal footing with those of the creditors, without any argumentation.

48. The EP does not use the "level playing field" argument in the relative undetermined sense of the Note ("(iii) Harmonisation of insolvency regimes will further promote a level playing field"), but – if we see this correctly – it mainly serves in a cross-border context ("for companies with cross-border activities"), where differences in national insolvency laws hinder efficient and effective restructuring of these companies, to the detriment of the internal market. It is evident that the "disparities in national laws" is generally supported by the country surveys in the Note. The causal relationship, however, between these differences and the observation that these form "obstacles" to a successful restructuring of insolvent companies is less clear. Several cases have been reported, but as far as we know there has not been an analysis in depth, so it is not at all clear whether "....those disparities favour forum-shopping". Reasons for "forum shopping" (or: searching for applicable law) could also be related to an applicable tax regime, to the way in the other forum certain results are worked into the yearly accounts, the method of termination of key contracts (such as IP-licences) or to the way loans of shareholders are treated (unsecured or sub-ordinated; or in case of having been paid back prior to insolvency, the applicable claw-back mechanism). The EP's statement "whereas the internal market would benefit from a level playing field" we regard as a rather empty one. One of the first steps to be taken – if any – is a research into (available) data and statistics that could support this assertion.

20 Note, p. 7.

3.3.2 PREVENT FORUM SHOPPING

49. Recital B (see para 45) seems to capture the Note's observation of the present system of different national insolvency regimes which "may imply that the laws of one Member State could be more beneficial for one stakeholder and the laws of another Member State could be more beneficial for another stakeholder. In addition, it avoids global solutions for global problems such as occur with the insolvency of groups of companies. This may lead to either the management indulging in what is termed 'insolvency tourism' (forum shopping) by the attempted shift of the COMI of a company to a jurisdiction that is more "debtor friendly" or the debtor and the creditors possibly becoming involved in a race to the courts in different jurisdictions."[21]

There are indeed several examples where a choice between different insolvency or restructuring laws has played out, one of the first notable cases in Europe being in 2008 the Schefenacker case[22], with as a climax in 2009 Re Hellas Telecommunications (Luxembourg) II SCA[23], with an estimated loss for the unsecured creditors of € 1.3 billion, of which it is entirely understandable that The Sunday Times, March 7, 2010, carried the headline: "Firms flock to 'bankruptcy brothel' UK"[24] and that in the English Parliament concerns have been expressed about this form of "pre-pack tourism".[25] Insolvency law shopping, nevertheless, is not only on the strategic agenda of businesses from Luxembourg and Germany[26], but also from businesses in Spain[27] and France,

21 We are not going into the debate about "good" or "bad" forum shopping, in general private international law or in matters of European corporate or insolvency law. On that theme Horst Eidenmüller, Abuse of Law in the Context of European Insolvency Law, in: European Company and Financial Law Review Vol. 6, No. 1, April 2009, 1ff; Philipp M. Reuss, *Forum Shopping in der Insolvenz*, Studien zum ausländischen und internationalen Privatrecht, Band 259, Tübingen: Mohr Siebeck, 2011, and recently Paschalis Paschalidis, Freedom of Establishment and Private International Law for Corporations, Oxford University Press, 2012, 7.01ff.

22 See B. Wessels, Corporate migration or COMI manipulation?, in: Ondernemingsrecht 2008-1, 28 januari 2008, pp. 34/35. On these and other cases of transfer of COMI by means of (cross-border) succession universalis, Paschalis Paschalidis, Freedom of Establishment and Private International Law for Corporations, Oxford University Press, 2012, 7.131ff.

23 *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch); [2010] BCC 295. For a next step in this case (the company to be placed in liquidation and allowing the joint liquidators to undertake further enquiries in several matters), see *Re Hellas Telecommunications (Luxembourg) II SCA* [2011] EWHC 3176 (Ch).

24 The Sunday Times, March 7, 2010, see www.timesonline.co.uk.

25 www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100311-0002.htm#10031134000693.

26 See for instance *Re Rodenstock GmbH* [2011] EWHC 1104, [2011] B.C.C. 459, in which the UK High Court sanctioned a Scheme of Arrangement pursuant to Part 26 of the UK Companies Act 2006 relating to a German company's obligations to financiers where the underlying finance contracts were governed by English law. Another outcome results from the *German Bundesgerichtshof* (BGH; German Federal Court) 15 February 2012, IV ZR 194/09; ZIP 2012, 740ff, allowing a German direct insured to pursue his claim against insurance company Equitable Life (effectively for miss-selling a German law insurance policy) despite a Scheme of Arrangement being effective. The Federal Supreme Court however left open the question whether a non-insurance related scheme could qualify as "judgment" within the Brussel I Regulation. We refer too to Wolfgang Lücke and Alexander Scherz, *Zu den Wirkingen eines Solvent Scheme of Arrangement in Deutschland*, Zeitschrift für Wirtschaftsrecht (ZIP) 2012, 1101ff, submitting that such a scheme qualifies as "corporate law" and not as "insolvency law" and therefore such a scheme only can be applied to companies incorporated in England, and not to companies, incorporated in another Member State, with its COMI in England.

27 See High Court of Justice 26 May 2010 [2010] EWCH 1364 (Ch) (*La Seda de Barcelona S.A.*).

where a company called Apex – as reported in March 2012[28] – "…. has found a new twist on this theme. When Marken, a logistics company it bought in 2009 for 975 million pounds, breached covenants at the end of December, it moved a unit of the group to France. Unlike the UK, French bankruptcy law and its restructuring framework, called sauvegarde, is considered borrower-friendly. Courts give greater credence to shareholders and employees, and it is harder to disenfranchise creditors whose loans are out of the money. Take Eurotunnel, where shareholders were left with value even though creditors took losses. In practice, a so-called "comi shift" to France could be harder and less predictable than it sounds. Bondholders may threaten legal action. French courts could look askance at highly leveraged arrivistes, while documents drafted under UK law could create complications. However, the move may give Apex, and other buyout houses in similar situations, a subtle edge in negotiations with creditors. In Marken's case, the two sides will probably hammer out a deal without the company having to go through the trauma of sauvegarde. However, a high-profile example of a French comi shift and restructuring would create a precedent for other financial sponsors. With many private equity-owned companies creaking under high debt loads, sponsors may be tempted to explore all ways of stopping creditors from seizing control."[29] Although this Report does not deal with individuals it is worth mentioning that at least 13 Irish property developers, who owe the State's National Asset Management Agency (NAMA) at least € 2 billion, have been declared bankrupt in the UK (thereby escaping the Irish 12 years period to be discharged from debts – the period from adjudication to automatic discharge under current UK bankruptcy law is one year).[30]

28 Reported by Neil Unmack, see http://blogs.reuters.com/breakingviews/2012/03/06/apax-finds-french-twist-on-bankruptcy-tourism/.

29 Several proceedings which domestically are regarded as "insolvency proceeding" do not qualify to be listed in Annex A to the EU Insolvency Regulation and therefore for such proceeding its recognition in the other Member States is not regulated by this Regulation. We refer to a few examples from England, e.g. Administrative Receivership (as it can be initiated by (secured) creditors and the courts are not involved in the commencement of thereceivership-process, although they have jurisdiction over contested matters during the course of the receivership), Voluntary Winding Up (unless the court's confirmation is obtained) and the Scheme of Arrangement (conducted under the Companies legislation, but involving the court at both the inception and confirmation stages). For a discussion: B. Wessels, Scheme of arrangement: a viable European rescue strategy?, in: Ondernemingsrecht 2010-17, December 2010, pp. 710-712; Paulus, *Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für aussergerichtlichen Restructurierungen*, Zeitschrift für Wirtschaftsrecht (ZIP) 2011, 1077ff.; Friedrich L. Cranshaw, *Solvent Scheme of Arrangement, ein Sanierungsinstrument des englishen Rechts in der inländischen Rechtspraxis*, Deutsche Zeitschrift für Wirtschaftrecht (DZWIR) 2012, 223ff. From France we mention *Règlement amiable*, from Germany *Sequestrationsverfahren*, and from the Netherlands the Dutch concept of *buitengerechtelijke schuldsanering* (extra-judicial debt rescheduling) or *buitengerechtelijk dwangakkoord* (extra-judicial out-of court composition).

30 The Financial Times 6 July 2012. The Minister for Justice of Ireland, Alan Shatter, is cited: "The very essence of having a common market is that you need to have common rules with regard to access to bankruptcy legislation and not rules which appear to be in conflict with each other and can provide incentives for people to engage in bankruptcy tourism."

3.3.3 WORTHWHILE AND ACHIEVABLE

50. With a firm stance (that even if the creation of a body of substantive insolvency law at EU level is not possible), the EP regards in recital C (see para. 45) that harmonisation of certain areas of insolvency law is "worthwhile and achievable". It may be the case that certain arguments mentioned in the Note may have inspired these words. Briefly, in the Note expectations are expressed in that harmonisation of national insolvency regimes (i) will lead inevitably to greater confidence in the insolvency systems of EU Member States; (ii) will increase transparency and therefore lead to a better understanding by the parties involved of the means and methods that are available to address the needs of commercial entities that get into financial difficulty and of the remedies available to the creditors and other stakeholders of those entities; (iii) will increase the efficiency of the insolvency and business reorganization processes in the EU, and as a consequence (iv) will increase the return to creditors where it is decided to liquidate the assets, or alternatively improve the prospects of reorganisation by getting a greater number of creditors to support plans for restructuring. All these benefits (v) will increase the confidence that the commercial and financial sectors have in the efficiency of the financial infrastructure of the EU.[31] Although data supporting these assumptions are lacking, one finds general support for these goals.[32]

3.3.4 PROGRESSIVE CONVERGENCE

51. Finally, the EP's last recital supporting harmonisation (Recital D, see para. 45) refers to a progressive convergence in the national insolvency laws of the Member States, although further substantiation is lacking. As explained earlier, the reason why Europe in 2002 did not devise a single exclusive universal form of insolvency proceedings for the whole of the Union was diversity. It was considered too difficult to implement a universal proceeding without modifying, by the application of the law of the State of the opening of proceedings, pre-existing rights created before the

31 Note, p. 26ff. In the Introduction to the Note (Note, p. 7) other advantages of harmonisation are mentioned, such as the reduction of the costs of the administration of the estate, the increased "predictability on the parts of creditors and shareholders, thereby encouraging the provision of increased working capital", and "benefits in other respects, such as the preservation of employment".

32 See for instance UNCITRAL Legislative Guide on Insolvency Law of 2004, Recommendation 1:

"1. In order to establish and develop an effective insolvency law, the following key objectives should be considered:

(a) Provide certainty in the market to promote economic stability and growth;
(b) Maximize value of assets;
(c) Strike a balance between liquidation and reorganization;
(d) Ensure equitable treatment of similarly situated creditors;
(e) Provide for timely, efficient and impartial resolution of insolvency;
(f) Preserve the insolvency estate to allow equitable distribution to creditors;
(g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
(h) Recognize existing creditors' rights and establish clear rules for ranking of priority claims."

insolvency under the different national laws of the Member States. For a group of scholars a few years earlier, this stance was a challenge. In 1999 an International Working Group on European Insolvency Law concluded that it was remarkable that even the more recent national insolvency laws in Europe continued to show substantial differences in underlying policy considerations, both in structure and in content.[33] The Group then started a study on 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. The Working Group considered that the development of a European market requires (i) an understanding of the differences between legal systems, (ii) a move towards uniformity in legal terminology and concepts and (iii) the avoidance of diversity resulting from a lack of knowledge about other European jurisdictions. Although the idea of establishing in the short term a single universal insolvency proceeding for the entire European Union may seem elusive, the Working Group concluded that this does not mean that national insolvency laws do not share common characteristics. These common elements were captured in what were called Principles of European Insolvency Law, published in 2003. The Principles are the result of looking beyond these differences in structure, scope, concepts and formulation. The Working Group presented its Principles as "..... the essence of insolvency proceedings in Europe as they reflect, on a more abstract level, the common characteristics of the insolvency laws of the European Member States."[34] The other aim of the Principles is to provide a foundation for greater harmonization.[35]

52. These Principles, with the accompanying Commentary and the National Reports, serve two other aims. They enable lawyers with different national backgrounds to better understand the existing systems of insolvency law in Europe.[36] The Working Group also aimed to provide working material for further study, which could result in proposals for legislation on a supranational

33 The Working Group was founded in 1999, consisted of an academic group of fifteen professionals, originating from ten EU Member States (Belgium, Denmark, France, Germany, Italy, Luxembourg, The Netherlands, Spain and UK) and was chaired by professor Sebastian Kortmann (University of Nijmegen). EU-Member States in those days (Such as Austria, Finland, Greece, Ireland, Portugal and Sweden) were not represented.

34 McBryde/Flessner/Kortmann (eds.), Principles of European Insolvency Law, Series Law of Business and Finance, Volume 4, Deventer: Kluwer Legal Publishers 2003. For a short comment, see Bob Wessels, Principles of European Insolvency Law, in: American Bankruptcy Institute Journal, September 2003, 28ff. See also Axel Flessner, *Grundsätze des europäischen Insolvenzrechts*, Zeitschrift für Europäischen Privatrecht 2004, 887ff.

35 The Working Group developed fourteen Principles of European Insolvency Law, which deal with the following topics: (1) Insolvency proceedings, (2) Institutions and participants, (3) Effects of the opening of the proceeding, (4) Management of the assets, (5) Obligations incurred by, and fees of, the administrator, (6) Treatment of contracts, (7) Position of employees, (8) Reversal of juridical acts, (9) Security rights and set-off, (10) Submission and admission of insolvency claims, (11) Reorganization, (12) Liquidation, (13) Closure of the proceeding, and (14) Debtor in possession.

36 In this aim one can recognize the result of the approach chosen by American Law Institute (ALI) to describe, although much more extensively, the Bankruptcy Laws of Canada, Mexico and USA, in: Transnational Insolvency: Cooperation Among the NAFTA Countries, Juris Publishing, Inc., Huntington, NY, 2003 (4 Volumes).

level and – in the shorter term – provide support in the efforts to modernize national insolvency laws by serving as a European framework. Finally, it must be mentioned that the Working Group did not shy away from mentioning the C-word in that it refers to a "European Insolvency Code". It recognizes that the Principles do not try to reflect the ideal rules for such a Code, but the Group is firm in its belief that the Principles identify the areas of conformity and divergence and will thus be helpful when a Code could be developed. Presently, nearly ten years later (with an additional 12 Member States), however, the conclusion must be that, although the Principles provide scholars and practitioners with a much needed catalogue raisonné, bringing to the surface common foundations, policies and effects in constituent parts of Europe's insolvency law, they have had hardly any effect.

53. Nevertheless, during the last decade in legal literature some common features of insolvency law have been identified[37], which may be regarded as quite generally accepted prominent principles of insolvency law, such as the principle of collectivity, the notion of a common pool, the principle of equal treatment of creditors[38], the principle of respect for pre-insolvency rights and the idea of flexibility of insolvency legislation. On this last principle, many European countries have come to understand that the existing legal framework does not meet the challenge ".... to achieve economic results that are potentially better than those that might be achieved under liquidation, by preserving and potentially improving the company's business through rationalization".[39] Substantial revisions have taken place in countries like England and Belgium and in 1999 in Germany and Italy. Poland followed in 2003, Romania in 2003 (and 2006), Spain in 2004 (and 2011), France (again) in 2006 and Belgium (2009) and in countries such as Denmark, Portugal and Germany (as of March 2012).[40] Although even the more recent insolvency laws in several European countries

37 We agree with Wood, that these are general trends, but in individual cases ".... the noisy difference and bristling variation is unquestionably on the increase", see Philip Wood, Principles of International Insolvency, London: Sweet & Maxwell, 2nd. ed., 2007, at 1-018.

38 See recital 21 to the Insolvency Regulation: "Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims."

39 Rebecca Parry, Introduction, in: Katarzyna Gromek Broc and Rebecca Parry (eds.), Corporate Rescue. An Overview of Recent Developments from Selected Countries in Europe, The Hague/London/New York: Kluwer Law International, 2004, 2. This is quite a remarkable shift, as in 2005 it was still observed that: "Compared to U.S. bankruptcy laws, many countries' laws read like penal codes", see Natalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, in: 28 Boston College International & Comparative Law Review 2005, 46.

40 See e.g. Otto E. Fonseca Lobo (ed.), World Insolvency Systems: A Comparative Study, Sweet & Maxwell, 2009; Christopher Mallon (ed.), The Restructuring Review, London: Law Business Research, 2nd ed., 2009.

continue to show substantial differences in underlying policy considerations, in structure and in content of these laws, in most of these jurisdictions there is an openness towards "corporate rescue" procedures, as an alternative to liquidation procedures. In many of these countries the US Chapter 11 procedure has served as a model for legislators. Generally, these are based on the principle of a composition or an arrangement concluded between the insolvent debtor and his creditors, which is binding upon a (given percentage) of a dissenting minority of creditors (sometimes referred to as "cram-down"). Characteristic feature for these types of proceedings, aiming at reorganization of the debtor's business, is the fact that attempts to restructure or reorganise enterprises only can be initiated by the debtor himself or at least not against his will. The traditional "post-mortem autopsy" approach (liquidation; winding-up), slowly, supplemented by instruments which allow for "real time action" and domestic laws contain several proceedings which reflect different goals of a company in a rescue. Quite rightly it has recently been observed, that in most Member States insolvency laws have been modernised "..... to fit with the new economic context: beside traditional collective insolvency proceedings decided by the court on the basis of the debtor's insolvency, new schemes applicable to a group of main creditors (for example banks, public bodies) at a pre-insolvency stage are regarded as being more efficient for the purposes of business continuation and preservation of jobs."[41]

54. Also the approach, compared to some ten years ago, of Member States' attitude regarding cross-border insolvency cases has changed dramatically. Fletcher's observation of countries with "separate, self-contained systems" has turned as far as cross-border insolvency problems are concerned into rules to coordinate these cases, e.g. within the EU since the adoption of the Insolvency Regulation in 2002, but also by creating rules which deal with these issues in relation to non-EU countries, sometimes (indirectly) inspired by the UNCITRAL Model Law. We will return to this subject in Chapter 6.

55. Finally, renewed rules on accounting and reporting, increased attention for rules regarding integrity of corporate directors, elements of implemented good governance systems and improvements made to create an efficient framework of creditor protection against business risks (combatting late payments (Directive 2001/35/EC); improving wrongful trading rules) are just some characteristics of

41 See page 1 of the Terms of Reference for the EU Group of Experts on Cross-border Insolvency (http://ec.europa.eu/justice/newsroom/contracts/files/2012_expert-group-insolvency/terms_of_reference_group_insolvency_en.pdf). See in this respect Bob Wessels, Europe Deserves A New Approach To Insolvency Proceedings, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, pp. 267ff, mentioned in footnote 20. See too N.W.A. Tollenaar, *Faillissementsrechters in Nederland: geef ons de pre-pack!*, Tijdschrift voor Insolventierecht 2011-4, p. 130ff.; Cornelia J. Doliwa, *Die geplante Insolvenz. Unternemenssanierung mittels Prepackaged Plan und Eigenverwaltung*, Diss. Berlin, Nomos, 2011.

a 21st century commercial and corporate law in almost all well developed European countries.[42] To conclude, on several levels and in different forms several concepts and norms meet or even match.[43]

3.4 Downsides of harmonization.

56. Aren't there any disadvantages to harmonisation of national insolvency laws? Although in insolvency law related literature this question has not been addressed as frequently as it has been with regard to harmonisation of general private law within the EU, recently some downsides of harmonising insolvency laws have reached the surface. The German scholar Attinger for instance, in her 2008 dissertation, mentions three disadvantages[44]:

(i) Harmonisation results in the loss of national peculiarities of insolvency law;[45]

(ii) By harmonization countries lose the chance to enter into regular competition to create better law systems in which countries learn from each other. Armour makes a similar argument[46], although it has been submitted too by Enriques and Gelter that "states will not actively compete to attract bankruptcies".[47]

42 See Kraakman (et al.), The Anatomy of Corporate Law. A Company and Functional Approach, Oxford University Press, 2004.

43 See on tendencies of harmonisation Andreas Konecny, *Europäische Insolvenzkultur(en) – Kampf oder Harmoniserung?*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2008, 418ff., and Linna, Europeanization of Insolvency Law, in: Laura Ervo, Minna Gräns, Antti Jokela (eds.), Europeanization of Procedural Law and the New Challenges to Fair Trail, Groningen: Europa Law Publishing 2009, 151ff.

44 Barbara Jeanne Attinger, *Der Mittelpunkt der hauptsächlichen Interessen nach der EuInsVO – erfolgreiches Konzept oder Quelle der Rechtsunsicherheit?*, Saarbrücker Studien zum Privat- und Wirtschaftrecht, Band 61, Frankfurt am Main: Peter Lang, 2008, 277ff. Philip Wood, Principles of International Insolvency, London: Sweet & Maxwell, 2nd. ed., 2007, at 1-019, mentions as arguments against harmonisation of insolvency law "…. The need for competition as a spur to legal systems, the need for local democratic and accountable control, the need for freedom and plurality, the need to avoid the inability to change a rule because one has to persuade everybody to change it so that it does not get changed, and the need to reflect different cultures."

45 More general on this theme Maren Heidemann, International Commercial Harmonisation and National Resistance – the Development and Reform of Transnational Commercial Law and its Application Within National Legal Culture, in: Mads Andenas and Camilla Baasch Andersen (eds.), Theory and Practice of Harmonisation, Cheltenham: Edward Elgar, 2011, 180ff.

46 See John Armour, Who Should Make Corporate Law? EC Legislation versus Regulatory Competition (June 2005). ECGI – Law Working Paper No. 54/2005, see http://ssrn.com/abstract=860444, submitting that differences in corporate governance regimes in Europe will result in specialisation rather than convergence. Where European legislators cannot be sure of the "optimal" model for company law, Armour submits that the future of European company law-making would better be left with Member States than take the form of harmonized legislation. More general on this issue: Stelios Andreadakis, Regulatory Competition or Harmonisation: The Dilemma, the Alternatives and the Prospect of Reflexive Harmonisation, in: Mads Andenas and Camilla Baasch Andersen (eds.), Theory and Practice of Harmonisation, Cheltenham: Edward Elgar, 2011, 52ff.

47 L. Enriques & M. Gelter, How the Old World Encountered the New One: Regulatory Competition and Cooperation in European Corporate and Bankruptcy Law, in: 81 Tulane Law Reviw 2007, 577, 621. In the same way H. Eidenmüller, *Wettbewerb der Insolvenzrechte?*, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2006, 469ff.

(iii) Harmonisation of substantial insolvency law will lead to what Eva-Maria Kieninger calls a "*Versteinerungseffect*" (an inflexible petrifaction).[48] Harmonization and unification on a European level will result in a country losing the dynamic effects of national legislative competition, on the one hand, but individual countries will also be confronted with an extreme slowing down of the process of amending the law and the possibility of adapting this law, see Eidenmüller.[49] It seems that the argument even has a wider meaning, as it has been submitted by Wood that harmonisation contrasts the "need for freedom and plurality"[50], whilst Paschalidis – against INSOL Europe's 2010 Report's proposals of harmonisation of certain key areas of national insolvency law – points at the limitation of the possibility of competition, but also roars: "Worse, it would eliminate diversity which is necessary for the evolution of the law".[51]

(iv) Another argument is from the Belgian professor Walter van Gerven: the "bright side" of harmonization (harmonization between legal systems of Member States) often leads to differences within the national systems themselves. For the future of insolvency harmonization these would lead in a Member State to a "European system" especially related to inter-state trade and investment and a "national" insolvency law system for local, intra-state) matters. Related to this fourth downside is the matter of visibility: where to legislate in existing sources of national law and where to arrange for legislative matters with a European source or background.[52]

57. Although all these observations may in their core be relevant, they are not very convincing. Regarding (i) we would argue that "procedural matters" historically have been closely linked with a county's identity. In cases that do not involve natural persons the inherent requirement of protecting the "weaker" party will not be felt as strongly, whilst – if efficient case management and the principle of equality of arms is fully observed in business insolvency cases – not all national procedural folklore is meaningful. Moreover, streamlining procedural peculiarities seems in general to involve advancing the level playing field's rules for operating and competing by businesses in distress. The second disadvantage (ii) does only have mixed support. The new German rules for

48 Eva-Maria Kieninger, *Rechtsentwickelung im Wettbewerp der Rechtsordnungen*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtshaftsräumen, Mohr Siebeck, 2002, 77ff.

49 H. Eidenmüller, *Obligatorisches versus optionales europäischen Vertragsgezetzbuch*, in: Claus Ott/Hans-Bernd Schäfer (eds.), Vereinheitlichung und Diversität des Zivilrechts in transnationalen Wirtshaftsräumen, Mohr Siebeck, 2022, 240ff. Eidenmüller also points at the rent seeking effect by certain lobbying groups in the process of European harmonisation.

50 Philip Wood, Principles of International Insolvency, London: Sweet & Maxwell, 2nd. ed., 2007, at 1-019, referred to above.

51 Paschalis Paschalidis, Freedom of Establishment and Private International Law for Corporations, Oxford University Press, 2012, at 8.30.

52 Walter van Gerven, *Koophandel zonder wetboek. Synthese en slotbeschouwingen*, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 368ff, at 380ff.

reorganising distressed businesses (*ESUG*) of March 2012 seems to be built on this argument, as it has as one of its arguments to create a better and attractive EU platform also for international insolvency cases.[53] On the other hand, "better" national law, as the result of regular competition, does not exclude the possibility that the results of harmonisation will be even better (under the condition that it is possible to formulate what "better" is). The third topic (iii) seems to purely focus on (hard) law, overlooking the fact that the legal rules surrounding businesses in financial distress also could be drafted in a more flexible way, allowing judicial discretion, in a field where there is hardly one single solution, many times in a process with many parties of interest and where only private money is involved. Van Gerven's argument holds true, where for example Article 31 InsReg (duty for administrators to engage in cross-border cooperation) has no equivalent in domestic Dutch law, but Article 40 InsReg (notices to known creditors) in the Netherlands is not limited to those creditors with their registered offices etc. in the Union, as this circle is limited in Article 40 InsReg.

53 *ESUG* stands for *Entwurf eines Gesetzes zur weiteren Erleichterung der Sanierung von Unternehmen* or: Draft for a Law for further simplifying reorganising businesses. For Explanatory Notes to ESUG, see Deutscher Bundestag Drucksache 17/5712 (17. Wahlperiode 04. 05. 2011), p. 1 (translation by the authors): "Current insolvency law contains obstacles for the timely reorganisation of companies in financial distress. Recently some companies have transferred their seat (*Sitz*) to England because its management and the most important creditors thought the opening of insolvency proceedings there beneficial." The ESUG legislation aims to revise the German insolvency law, where the outcome of insolvency proceedings especially for foreign investors was perceived as less predictable, the mechanism of debt-for-equity swap was lacking and individual creditors could block contractual plans to solve distress.

4 Legal Basis for actions of the European Commission

4.1 Introduction

58. The TFEU does not contain an explicit legal basis authorising the Union to adopt measures which aim at the approximation of insolvency law. As indicated earlier, the EP suggests as a legislative basis for the Commission's proposals Article 50 TFEU (freedom of establishment), Article 81(2) TFEU (cross-border judicial cooperation) or Article 114 TFEU (measures "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market"). The Commission will certainly assess its "constitutionality", i.e. to what extent the objectives of the envisaged proposals fall within the legislative authority of the European Commission. A solid basis in the TFEU is necessary for at least two reasons. Such a basis forms the foundation for the Commission's powers to realise a certain EU goal as well as the limits which apply to the exercise of the Commission's competence, but it also determines the available decision-making procedure and the applicable legal measures. Only with a clear picture of the Commission's legislative competence, can specific measures or instruments in this complex area be adopted.

4.2 Basis in TFEU of the Insolvency Regulation and the Directives 2001/17 and 2001/24

59. Leaving Article 50 TFEU aside, in May 2002, in the larger part of Europe, the EU Insolvency Regulation came into effect. Article 1(1) defines a framework for the applicability of the Regulation to collective insolvency proceedings, defined as requiring four cumulative conditions, all of which have to be fulfilled: (i) insolvency proceedings must be collective in that all creditors concerned may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded; (ii) the proceedings must be based on the debtor's insolvency and not on other grounds, with the insolvency test based on the law applicable in the Member State within which a court opens such proceedings;

(iii) the proceedings must entail the total or partial divestment of the debtor; and (iv) the proceedings should entail the appointment of a liquidator.[1] In all, in August 2012, the EU Insolvency Regulation applies to over ninety types of national insolvency proceedings and over ninety types of persons/bodies (acting as liquidators) in twenty-six Member States. The type of legislative instrument chosen for this area of (cross-border) insolvency is a "regulation". A regulation is a European Union law measure that is binding and directly applicable in Member States.[2] It should be noted that the Insolvency Regulation itself aims to fill a gap that deliberately was left over forty years ago in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Article 1(1) of this Convention excluded from its scope insolvency proceedings relating to "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings." The Brussels Convention has been transformed into a Regulation as of March 1, 2002[3], but article 1(2) Brussels Regulation 2002 contains the same exclusion for which the EU Insolvency Regulation now should contain the necessary rules. As explained elsewhere the Insolvency Regulation applies to a debtor, being a natural person or a company (or legal person) and Article 1(2) EU Insolvency Regulation excludes from its scope insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. For insurance undertakings and credit institutions Directive 2001/17 and Directive 2001/24 were produced, which have been implemented in the EEA (European Economic Area) Member States.[4] Systematically, judgments which are not covered by the winding-up directives fall within the scope of the Brussels Regulation 2002. Therefore there is still a gap with regard to insolvency proceedings concerning investment undertakings that provide services involving the holding of funds or securities for third parties or to collective investment undertakings, as included in Article 1(2) InsReg.[5] Here, Mr Bernard Madoff may derive some private consolation from the fact that he has (unintentionally) added

1 However, for the Insolvency Regulation to be applied, it is not sufficient that the proceedings in question meets the four conditions mentioned as a fifth condition is also necessary. The specific proceeding and its liquidator should be mentioned in one of the applicable Lists in the Annexes. Other requirements are (i) that the Regulation only applies in cases where the centre of main interests of the debtor is located in one of the EU Members States for which it is in force, see Recital (14) and (ii) that the insolvency case has an international element, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10511ff.

2 See Article 47 InsReg. A regulation therefore does not allow, much less require, implementation as it binds Member States directly.

3 Council Regulation No. 44/2001 of 22 December 2000, O.J. 2001 L 12/1.

4 For commentaries on both Directives and for Member State implementation reviews, see Gabriel Moss and Bob Wessels (eds.), EU Banking and Insurance Insolvency, Oxford University Press, London, 2006. For a commentary of Directive 2001/24, see Charles Proctor, The Law and Practice of International Banking, Oxford University Press, 2010, 12.01ff.

5 See E. Braun / G. Heinrich, *Finanzdienstleister in der 'grensüberschreitenden' Insolvenz-Lücken im System?*, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI) 2005, 578ff.

to the body of knowledge concerning European insolvency law in a matter concerning his yacht, called "the Bull". We leave the case as it is, just mentioning that the English High Court ruled that the exclusion of Article 1(2) InsReg is only applicable for "investment undertakings which provide services involving the holding of funds or securities for third parties", which is a rather limited, literal interpretation of this exclusion.[6] The gap mentioned leaves an important blank space in the EU legal framework on cross-border insolvency, whilst the lack of common cross-border insolvency rules, including its system of automatic recognition of Member States' insolvency judgments[7] has as a consequence that national rules regarding recognition of insolvency judgments apply. Dependent on the system of recognition chosen by a country, recognition can take an unjustifiable length of time, as was demonstrated in one of the *Lehman Brothers* cases.[8] In June 2012 the European Commission has issued a proposal for a Directive, which (partly?) fills this gap.[9]

60. The Directives related to financial institutions and the Insolvency Regulation have different bases in the TFEU. The Insolvency Regulation's basis in the TFEU is in Title V ("Area of Freedom, Security and Justice") of which Article 67 TFEU (ex Article 61 ECT) provides:

> "1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
>
> 2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, ...

6 *Byers v. Yacht Bull Corporation*, High Court of Justice (Ch. Div.) 1 February 2010 [2010] EWHC 133 (Ch); [2010] B.C.C. 368.

7 European Commission, Summary of the public consultation on the reorganization and winding-up of credit institutions, December 2007, p. 3, at www.ec.europa.eu/internal_market/bank/docs/windinup/spc_en.pdf; B. Wessels, Towards a European Bank Company Law?, in F.B. Graaf/W.A. K. Rank (eds.), Financiële sector en international privaatrecht, Financieel Juridische Reeks 3, NIBE-SVV, Amsterdam, 2011, 139ff.

8 We are referring to Lehman Brothers International (Europe), a company incorporated in the UK, with a branch in Spain. Recognition in Spain of an insolvency proceedings opened by a UK court requires an exequatur procedure. Such a specific and autonomous declaration by a Spanish court confirming that the foreign ruling meets certain conditions in this case took nine months, within which period the role of an insolvency office holder appointed and the meaning and effect of provisional measures or the law applicable is uncertain. See Francisco Garcimartín, The Review of the EU Insolvency Regulation: Some General Considerations and Two Selected Issues (Hybrid Procedures and Netting Arrangements), Report to the Netherlands Association for Comparative and International Insolvency Law 2011, para. 7, referring to a Judgement of the Commercial Court of Madrid of 4 June 2009, in: A.E.D.I.Pr., 2009, 1045.

9 See Proposal for a Directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms (and amending nine existing directives and regulations), COM(2012) 280 final, which proposal addresses crisis management (preparation, recovery and resolution) in relation to all credit institutions and certain investment firms. In its Explanatory Memorandum (at page 8ff) it is submitted that investment firms ".... need to be part of the framework since, as shown by the failure of Lehman Brothers, their failure can have serious systemic consequences." Does this include "investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings", in the meaning of Article 1(2) InsReg?

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia ...., as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."

In Title V, Chapter 3 ("Judicial Cooperation in Civil Matters") Article 81 TFEU (ex Article 65 ECT) says:

"1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
(b) the cross-border service of judicial and extrajudicial documents;
(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

3....."

61. Therefore the Regulation's main focus is judicial cooperation between Member States (rules for recognition of judgments; cooperation between liquidators), whereas the Directives find their basis in Title IV ("Free Movement of Persons, Services and Capital"), especially Article 49 TFEU (ex Article 43 ECT) concerning the "Right of Establishment". Directive 2001/24, in its recitals, refers to Article 47 ECT (now: Article 53 TFEU): "....the harmonious and balanced development of economic activities throughout the Community should be promoted through the elimination of any obstacles to the freedom of establishment and the freedom to provide services within the Community", see Recital 2 Directive 2001/24. It goes without saying that this rationale rather differs from "judicial cooperation", the overarching principle of the Insolvency Regulation.[10]

10 For some ten other differences in goals, scope and structure between the InsReg and the Directives, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10512ff.

4.3 Article 81 TFEU as legal basis for harmonisation

62. The wording of Article 81(1) is related to development of "judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases", where such "... cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States") allows to cover any topic in the area of judicial cooperation in civil matters. Article 81(2) then continues by providing that for the purposes of Article 81(1) measures are allowed to be taken "..... particularly when necessary for the proper functioning of the internal market, aimed at ensuring: [goal (a) – (h), see para. 60]. From this it follows that "judicial cooperation" as a term is not specifically defined. Article 81 discloses judicial cooperation's basis (mutual trust), provides what it may include (approximation etc.) and where it should have its focus (goals of Article 81(2)), but the term itself remains rather vague.[11]

63. Article 81 TFEU (and its predecessor Article 65 EC Treaty) has been exclusively used for the adoption of conflict of law matters and rules on cross-border civil procedure. Some fifteen Regulations and Directives have already been issued in this area. These contain, in addition to the Brussels I to Regulation and the Insolvency Regulation, measures for cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, on certain aspects of mediation in civil and commercial matters, on the law applicable to contractual and non-contractual obligations (Rome I and Rome II respectively), on the service of documents, on the creating of a European Enforcement Order for uncontested claims, on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, on the establishment of a European Small Claims Procedure and the creation of a European order for payment procedure.[12]

64. Article 81 TFEU has provided the foundation for the creation of conflict of law matters and rules on cross-border civil procedure. It seems that approximation of substantive laws in general, and more specifically the harmonisation of certain matters of national insolvency laws, is only covered by it where the matters to be harmonised have an international element. See for instance from the EU Insolvency Regulation recital 2 ("cross-border insolvency proceedings"), recital 3 (business activities "have more and more cross-border effects"), recital 4

11 In the same way Burkhard Hess, Procedural Harmonisation in a European Context, in: Xandra E. Kramer and C.H. van Ree (eds.), Civil Litigation in a Globalised World, T.M.C. Asser Press, The Hague, 2012, 159ff., at 162.

12 See Peter Stone, EU Private International Law, 2nd ed., Cheltenham: Edward Elgar 2010, 3ff., and the contributions in: X.E. Kramer and C.H. van Rhee (eds), Civil Litigation in a Globalising World, T.M.C. Asser Press, 2012, as well as Eva-Maria Kieninger / Olivier Remien, *Europäische Kollisionrechtsvereinheitlichung*, Nomos, 2012.

("proper functioning of internal market"; "avoid incentives for ... forum shopping") and recital 8 ("insolvency proceedings having cross-border effects") and the 2011 CJEU case regarding *Interedil Srl v. Fallimento Interedil Srl.*[13] Kuipers, however, submits that there is nothing in the wording of Article 81 that would exclude the adoption of measures envisaged at the approximation or unification of substantive law as long as the measure contributes to the general goal of judicial cooperation in civil proceedings.[14] Leaving aside the question whether the catalogue mentioned in Article 81(2) is meant to be exhaustive or rather illustrative, this view would mean that certain policy objectives could give support to measures of harmonisation.

65. From the second paragraph of Article 81 we give the following examples related to the policy goals: (e) effective access to justice, (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States[15] and (h) support for the training of the judiciary and judicial staff. For general transnational civil legislation it has been suggested a few year ago[16] that the non-binding ALI/UNIDROIT Principles and Rules of Transnational Civil Procedure, adopted by both organisations in 2004, could serve as material to convert in a specific measure by the Commission, on the basis of Article 81(2)(f), as differences in court procedures also hamper international trade. These Principles too could serve as best practices for national lawmakers – or in certain countries for courts themselves – to reform and augment national procedural law. The same approach we would recommend for two sets of soft law tools from the area of (international) insolvency, namely the European Communication and Cooperation Guidelines for Cross-Border Insolvency, published in 2007

13 CJEU 20 October 2011, Case C-396/09 (*Interedil Srl v. Fallimento Interedil Srl*) [2011] B.P.I.R. 1639, where the court observes: "It should be noted that the Regulation simply establishes uniform rules on international jurisdiction, the recognition of judgments and the applicable law in insolvency proceedings having cross-border effects. The question whether an application for a debtor to be declared bankrupt is admissible is still governed by the national law applicable." (para. 24).

14 Jan-Jaap Kuipers, The Legal Basis for a European Optional Instrument, European Review of Private Law 5-2011, 545ff., referring to legislative and scholarly sources.

15 C.H. van Ree, Harmonisation of Civil Procedure: An Historical and Comparative Perspective, in: Xandra E. Kramer and C.H. van Ree (eds.), Civil Litigation in a Globalised World, T.M.C. Asser Press, The Hague, 2012, 39ff., is of the opinion that Article 81(2)(f) may form the basis for an alignment of the civil procedural rules of the Member States irrespective of the national or international character of the litigation at hand, whilst business will regard these as obstacles in their decisions where to produce, market or sale their products and services. He acknowledges however that he is defending a minority view. However, strong support for the view that differences in national procedural rules function as trade obstacles can be found by Hon. J.J. Spigelman (retired in 2010 as Chief Justice of New South Wales, Australia), see J.J. Spigelman, Transaction costs and international litigation, (2006) 80 Australian Law Journal, 438ff; J.J. Spigelman, Cross-Border Insolvency: Co-operation or conflict? (2009) 83 Australian Law Journal, 44ff.

16 See e.g. H.B. Krans / C.H. van Rhee, *De Principles of Transnational Civil Procedure: een inleiding*, Tijdschrift voor Civiele Rechtspleging 2009, 49ff; Neil Andrews, Fundamental Principles of Civil Procedure: Order Out of Chaos, in: X.E. Kramer and C.H. van Rhee, Civil Litigation in a Globalising World, T.M.C. Asser Press, 2012, 19ff.; Michele Taruffo, Harmonisation in a Global Context: The ALI/UNIDROIT Principles, in: Xandra E. Kramer and C.H. van Ree (eds.), Civil Litigation in a Globalised World, T.M.C. Asser Press, The Hague, 2012, 207ff.

("CoCo Guidelines") and the Global Principles for Cooperation in International Insolvency Cases ("Global Principles"), from 2012, introduced in para. 36 of this Report.

66. The legal model of the EU Insolvency Regulation poses considerable challenges to both courts and insolvency practitioners called upon to interpret and apply its provisions in practice. Article 31 InsReg mandates a duty on liquidators to co-operate and communicate, a position that some courts have extended to include themselves. It is important therefore that insolvency office holders as well as judges gain a clear understanding of the Regulation, particularly the procedural issues it raises and the mechanisms by which it protects interested parties in the insolvency process (liquidation or reorganisation) by means of the availability and organisation of a fair and equitable procedure. It is also important that courts understand the need to find an autonomous (i.e. non-domestic) interpretation of the Regulation, focusing on the purpose of the text.[17] This is particularly important, given the text of the Insolvency Regulation itself is structured to allow concurrent insolvency proceedings to take place in different Member States, thus explicitly requiring the development of mechanisms for cooperation. In this context, the connection of the Insolvency Regulation to the rationale of judicial cross-border cooperation is evident and an effective and uniform application of the text within the Member States of the EU is vital. In 2007 the European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines) have been developed. These were drafted to provide non-binding guidelines to supplement the loosely formulated framework established by Article 31 InsReg and to provide a basis for cross-border communication and cooperation. It has received attention from practitioners and judges and was used as the basis for the June 2009 Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies.[18] The suggestion is that direct court-to-court communication enhances the international collegiality that has emerged amongst judges in cross-border insolvency cases, a form of judicial globalisation that will lead to the development of more such cross-border methodologies such as protocols and guidelines. This is also of considerable interest for the EU Member States that have adopted (or are considering adopting) the UNCITRAL Model Law on Cross-Border Insolvency, whose Article 27 provides a non-exhaustive list of how cooperation may be

17 See CJEU 20 October 2011, Case C-396/09 (*Interedil Srl v. Fallimento Interedil Srl*) (above, n.182): "The Court has consistently held that it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question ....." (para. 42).

18 See Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10855f and onwards.

implemented including through communication between courts and office-holders as well as cooperation through co-ordinating concurrent proceedings. Finally, the Global Principles of 2012 build on these and other initiatives to extend to the global level awareness of the fundamental need for cooperation and communication, adding to the consensus being seen in the area of cross-border insolvency.

67. As an example reference is made to Global Principle 20 ("Court Access"), which seemingly fits with Article 81(2)(e). Its text provides:

> "20.1. Upon recognition, a representative of a foreign insolvency case should have direct access to any court in the recognizing state necessary for the exercise of its legal rights.
>
> 20.2. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should have access to any court to the same extent as a domestic insolvency administrator.
>
> 20.3. Upon recognition, a representative of a foreign insolvency case that is a main proceeding should be able to request the opening of a domestic insolvency case with respect to the debtor."

It makes clear that – were this principle to be adopted in an EU context – Member States should have in place a legal mechanism for recognition of judgments opening insolvency proceedings. Article 16 InsReg provides the simple answer: recognition of these judgments is automatic. The principle, however, would need additional national procedural rules to make it work in practice. In this light, further study is recommended. We tentatively see four fields for attention: (i) the study should detect where the Global Principles or the CoCo Guidelines are incomplete or where they have not sufficiently addressed certain matters, e.g. pre-action or pre-hearing coordination or exchange of information, cross-border fact gathering, matters of costs and funding, possibility of appeals (e.g. if a national court rejects opening of domestic proceeding in the meaning of Global Principle 20.3, the possibility of appeal, only by the foreign representative or also by others, possibility to challenge such an appeal, which court is authorised to deal with the appeal etc.).; (ii) the Global Guidelines should be tailor made for functioning within the EU contexts, which follow from their foundation in the TFEU; (iii) the study should address the unattractive situation that courts and practitioners are confronted with a system of (purely) national rules combined with international rules. Such a double-track system may be justified based on legal theory, but is unpractical and may endanger efficiency in insolvency proceedings, and (iv) the recommendations following from such a study should be assessed on its coherence compared with similar procedural topics, as included in the set of other EU procedural instruments, based on Article 81 TFEU.

68. The result should reflect the central principle of cooperation and coordination between concurrent insolvency proceedings and lead to a set of Guidelines:
(i) ensuring as far as possible that the EIR works in practice, so that the debtor's estate is dealt with efficiently and effectively;
(ii) fitting the current environment where efficient and effective solutions have been developed based on models reflecting cooperation and communication;
(iii) guaranteeing the organisation and conduct of a fair legal process and ensuring the fair representation of stakeholders concerned in insolvency processes.

This then should be followed by training, which will aim to build capacity amongst the judges and practitioners, with the delivery of tools to be able to give full effect to the InsReg, to develop autonomous and uniform interpretation of insolvency terms and concepts having regard to the objective of the Insolvency Regulation and to enable the development and familiarity with the developed Guidelines.

69. The downside of harmonising via the route of Article 81 TFEU should be mentioned too. In the more limited view on Article 81, the chosen topics would be limited to civil matters (including topics of corporate law or insolvency law) having cross-border implications, whereas their geographical scope would not include Denmark[19], whilst Ireland and the UK have an opt-in position.[20] Politically as well as practically (in the light of the UK's strong presence in cross-border insolvency cases), Article 81 TFEU is not an attractive basis for harmonisation.

4.4 Article 114 TFEU as legal basis for harmonisation

70. The EP also mentions as a basis for harmonisation Article 114 TFEU, which places harmonisation of insolvency law within the goals of the establishment of the internal market.[21] Title VII ("Common Rules of Competition, Taxation and

19 Article 1 of Protocol 22 to the TFEU, on the position of Denmark, provides that Denmark shall not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU.
20 Article 1 and 3 of Protocol 21 to the TFEU, on the position of the UK and Ireland in respect of the area of Freedom, Security and Justice, provides that the UK and Ireland shall not take part in adoption of measures pursuant to Title V of Part Three of the TFEU, but also states that both Member States may notify the President of the Council within three months after a proposal or initiative has been presented to Council, that it wishes to take part in adoption and application of such proposal.
21 In general on harmonisation and the internal market, see Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer/T.Wiedmann (Eds.), Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 37.

Approximation of Laws") TFEU, contains a Chapter 3 ("Approximation of Laws"), which includes Article 114 (ex Article 95 TEC). Its first paragraph provides:

> "1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[22] We now limit ourselves to make some remarks on the relation between Article 114(1) and harmonisation of insolvency law.[23]

71. Recently, in Dutch legal literature, "internal market" has been described as a territorial (geographic) space within which there is full mobility of production factors, such as labour, capital, goods and services, as an efficient allocation of these factors results in a higher level of welfare in the Union.[24] This internal market (*Binnenmarkt; marché intérieur*) has developed from a step-by-step developing project to a permanent duty of the Union (*Binnenmarktaftrag* as a *Daueraufgabe der Union* or Internal market as an endurance assignment).[25] The term "internal market", therefore, has a dual meaning. Next to the indication of a certain space, it also relates to a goal, to strive for two complementary avenues: (i) measures for the approximation of the provisions laid down by law[26] and (ii) provisions which do not allow (private) obstacles in inter-Member State traffic, such as hindrances to the freedom of establishment (for corporations) (Article 49 TFEU) and the prohibitions regarding free competition (e.g. Articles 101 and 107 on State Aid).

72. Kuipers refers to the discussions on the question which obstacles, and to what level, would negatively influence the establishment and the functioning of the internal market. These may relate to the burdens business would encounter

22 Article 26 TFEU (ex Article 14 TEC): "1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. 3...."

23 The other paragraphs of Article 114(2) – 114(10) TFEU contain inter alia limitations on the scope of para. 1, formulate certain levels of protection (concerning health, safety, environmental protection and consumer protection), allow Member States under certain conditions, after the adoption of a harmonisation measure, to maintain or introduce national provisions with the power of the Commission to approve or reject these after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether or not they shall constitute an obstacle to the functioning of the internal market. We leave these possibilities – if at all applicable to insolvency law – undiscussed.

24 See R.W.E. van Leuken, *Internemarktbeginsel en privaatrecht*, WPNR 2011/6901 (Themanummer "Algemene beginselen van Unierecht en het privaatrecht").

25 See Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer/T.Wiedmann (Eds.), Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 32.

26 See Articles 114 and 115 TFEU. For an overview of these measures related to civil law in Dutch literature, see Asser/Hartkamp 3-I* 2011, nr. 235ff.

(legal costs, insufficient degree of confidence, differences in national contract laws) in cross-border transactions which involve private law systems, especially related to cross-border delivery of services and goods. Based on available literature and case law Kuipers submits that the potential scope of Article 114 TFEU is very broad, but that the mere finding of disparities between national laws and the abstract risk of the presence of obstacles alone would not be regarded as sufficient. However, on the other hand, the CJEU has observed that Article 114 may serve as a legal basis provided that the legal instrument is genuinely aimed at improving market conditions and actually contributes to the elimination or prevention of existing or future obstacles to the right of free movement.[27] With regard to the present proposals for a European Sales Law it has been submitted that with the lack of sufficient data pointing at the fact that business is really hindered in its business operations, and therefore the uncertainty that parties really need uniform law, any basis in Article 114 is flawed.[28] Finally, Kuipers explains the hierarchical relation between Article 81 and Article 114, by observing that internal market objectives are already pursued by Article 81, which provision therefore blocks the resort to Article 114 as a legal basis if the object of a measure relates to judicial cooperation in civil matters.[29]

4.5 Legal instruments available to the Commission

73. A first assessment could be to recognize the pluriformity of tools the EU can use. Concerning the legal acts of the Union Article 288 (ex Article 249 TEC) provides:

> "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

27 Kuipers refers to ECJ 10 December 2001, Case C-491/01 (*British American Tabacco*).

28 Jan Smits, *Gemeenschappelijk Europees Kooprecht gaat niet ver genoeg*, Ars Aequi mei 2012, 348ff. For a radical other view, see a committee from the German Association of Lawyers (*Deutschen Anwaltsverein*), submitting that Article 114 provides a solid basis and that no objections can be made in the light of the principles of subsidiarity and proportionality, Zeitschrift für Wirtschatsrecht (ZIP) 2012, 809ff.

29 Kuipers, interestingly, also mentions (p. 560ff) the TFEU's "safety net" of Article 352 TFEU (Article 352 (1) "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. ....." Article 352(3) "Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.") as legal basis for harmonisation, a legal basis that functions subsidiary to Articles 81 and 114 TFEU. We leave this aside for now.

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.

Recommendations and opinions shall have no binding force."

74. Article 288 TFEU is rather self-explanatory regarding the five instruments that are available to the Commission. In its result a Regulation functions as a domestic national law. Its content allows all persons addressed by its norms to learn about their rights and duties. A Regulation results in (textual) uniformity of law. Directives contain more or less specific rules which must be implemented into the Member State's national law system, to have effect. That will harm uniformity, but the directives' goals should be reflected in each Member State's legislation, whilst in its interpretation account should be given to its European origin.

A "decision", contrary to a Regulation, does not have general application; a decision only applies to the group that is addressed in it, e.g. undertakings acting contrary to EU competition rules.[30] Recommendations and opinions do not have binding force. They may relate to announcements, which display certain policies of the Commission. They may also serve as a first step to the preparation or the creation of law. In general they may take the form of a Green book or a White book. A Green book describes the problems, the way practice or legislators are addressing these, the variety of alternatives and option to act that may interfere with underlying notions of EU law, possible solutions and the pros and cons of these and the invitation to the public at large to provide opinions and points of view. The results of a Green book equalise and level the field for European legislation, without concrete legislative proposals. In a White book the basis is formed by a process of building an opinion, leading to certain proposals. Both will be discussed in EP and in Council, whist committees such as ECOSOC will provide its views. Both books finally may act as historic source for interpretation (displaying the meaning of the legislator). In Chapter 7 we will further elaborate on the EU constitutionality topic.

30 See Thomas Wiedmann and Martin Gebauer, *Zivilrecht und europäische Integration*, in: M. Gebauer / T.Wiedmann (Eds.), Zivilrecht unter europäischem Einfluss. Die richtlinienkonforme Auslegung des BGB und andere Gesetze – Kommentierung der wichtigsten EU-Verordnungen, Richard Boorberg Verlag, 2nd ed. 2010, Kap. 1, nr. 73ff.

5 Harmonisation of selected insolvency topics

5.1 Introduction

75. Looking into the possibility of harmonisation of a topic of insolvency law bears resemblance to a first adventure into an uncharted territory, which is formed by legal sources of more than one country. For the present volume of supportive literature for further research one does not need a large bookshelf. It is not yet 20 years ago that Jan Vranken, a well-known Dutch professor in legal theory and methodology, assessed that the Netherlands had "a considerable obsolete insolvency law", being "an area with hardly any movement without any recent legal literature". Although that observation has been criticised[1], Vranken's assessment seems a better fit for comparative insolvency law, both on a global scale as well as in Europe.

76. Evidently, since decades one finds comparative studies on all sorts of insolvency topics related to countries that share the foundations of a legal system and the use of one language, most notably English as a language, especially the USA, England and the commonwealth countries. However, when non-English speaking countries are involved, the development of comparative insolvency law studies – and we add: presented in English[2] – is still in its infant's shoes. The last decade or so, many publications have been produced, containing reports on (certain topics of) the insolvency law system of a country, written by practitioners. These country reports are useful for a first glance of the way certain topics in these countries' legislation generally are addressed and may serve as reference guidance on the topics covered. However most often they lack appropriate detail and do not provide supporting sources, the authentic legislative texts and/or an analysis of these topics, let alone a synthesis, to be of use for a comparative

1 See (in Dutch), B. Wessels, *Insolventierecht een functioneel rechtsgebied?*, Tijdschrift voor Insolventierecht 1997, 1-3, criticising Vranken in Asser, Algemeen Deel, Kluwer 1995, paras. 238 and 243.

2 Several PhD's or similar publications in Western-Europe, contain thorough studies of topics with a comparison of different jurisdictions, but in the European or even global discourse their role is limited as these are written in languages such as French, Dutch or German. It is recommended that such studies should contain an adequate summary in English. It is recalled that several studies from French authors in the early 90s favour strongly harmonisation of certain aspects of insolvency. See the authors mentioned by Paul J. Omar, European Insolvency Law, Aldershot: Ashgate, 2004, 50.

exercise.[3] During the past few years such comparative sources have gained in depth, but their number is still rather limited.[4] More recently, comparative studies have been published, either at the initiative of scholars[5], for instance on the question what belongs to the insolvency estate[6] or – on the contrary – what is exempted from such an insolvency estate[7] and for instance with regard to the process of rescuing companies in England and Germany.[8] It will be no surprise to expect that the European Parliament's call for harmonisation will trigger more focused comparative studies[9], although it has been rightly submitted that in "…. deciding upon the content of such harmonized rules, there will need to be a common understanding about the goals of these rules and therefore a European debate on bankruptcy theory".[10]

77. The Note rightly takes a careful approach: harmonisation of certain topics, whilst acknowledging that many of these topics are interconnected to larger (non insolvency law related) legal areas, such as employment law, property law, contract law or procedural law. For the German practitioner Kolmann this latter observation is decisive. He argues that only in case that greater consensus in these non-insolvency areas exists, will harmonisation of insolvency law have a greater prospect of success.[11] Other authors seem more hopeful.[12] The harmonisation

3 Reference is made to surveys published by such publishers as Euromoney and Law Business Research Ltd. From the latter, see e.g. Restructuring & Insolvency in 53 jurisdictions worldwide 2012. In this category one also finds booklets of INSOL International on such themes as Directors Liabilities, Employee Entitlements or Treatment of Secured Claims in Insolvency and Pre-insolvency Proceedings.

4 Reference is made to the publications, mentioned earlier, edited by Mallon and Fonseca Lobo, both from 2009, and to: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012. The latter we regard as a valuable source for the countries presented, but most remarkeably a synthesis of the topic of "commencement" is lacking. See for a short review: Bob Wessels, International Insolvency Law Review 4/2012 (forthcoming). For a fine example of such a sythesis, see Janis Sarra, Employee and Pension Claims During Company Insolvency. A Comparative Study of 62 Jurisdictions, Thomson Canada Ltd., 2008.

5 See the contributions in: Wolf-Georg Ringe, Louise Gullifer and Philippe Théry, Current Issues in European Financial and Insolvency Law. Perspectives from France and the UK, Studies of the Oxford Institute of European and Comparative Law, Vol. 11, Hart Publishing, 2009.

6 H. Rajak, Determining the Insolvent Estate – A Comparative Analysis, 20 International Insolvency Review, Spring 2011, Issue 1, 1ff.

7 D. McKenzie Skene, The Composition of the Debtor's Estate on Insolvency: A Comparative Study of Exemptions, 20 International Insolvency Review, Spring 2011, Vol. 20, Issue 1, 28ff.; Rolef J. de Weijs, Harmonisation of European Insolvency Law and the Need to Tackle Two Common Problems: Common Pool & Anticommons, 21 International Insolvency Review 2012, 67ff.

8 Reinhart Bork, Rescuing Companies in England and Germany, Oxford University Press, 2012.

9 See Rolef de Weijs, Towards an Objective European Rule on Transaction Avoidance in Insolvencies, 20 International Insolvency Review (2011), 219ff, presenting "a blue print for future European harmonisation" (at 242). See related to this topic however too INSOL Europe Revision Report 2012, the Appendix "Harmonised rules on detrimental acts".

10 De Weijs, op. cit., at 16.

11 See his paper presented at a Joint international insolvency conference in Amsterdam, April 2011. Stephan Kolmann, Thoughts on the governing insolvency laws, at www.eir-reform.eu/uploads/pdf/ammend_Kolmann.pdf.

12 See David Marks, EU Insolvency law in harmony or totally atonal, in: 3-4 Digest, July 2010, 20ff; Luminița Tuleașcă, The Harmonization of the European Laws of Insolvency, Lex Et Scientia International Journal (LESIJ) No. XVIII, Vol. 1/2011 (http://lexetscientia.univnt.ro/402_389_lesij_js_XVIII_1_2011_art _014.pdf). We already pointed at the rather negative point of view of Paschalis Paschalidis, Freedom of Establishment and Private International Law for Corporations, Oxford University Press, 2012, at 8.30.

initiative of the European Parliament, some nine months after its publication (the date of finalising the text of this Report) has had only one published reaction, with the opinion of Dutch scholar Titia Bos, saying that the list of topics of the EP can not be qualified as modest, whilst she submits that certain recommendations will be controversial, and will lead to a breach with existing national insolvency law. For the Netherlands Bos mentions as such an example the "opening" of insolvency proceedings.[13]

5.2 Europe: 100 different collective insolvency proceedings

78. It is known from Annex A, accompanying the Insolvency Regulation, that the national laws of the EU Member States list some hundred national names for "collective insolvency proceedings" which are functioning in their respective countries.[14] These range from countries listing just one proceeding (Bulgaria, Estonia, Spain) up to countries listing five (Malta, United Kingdom), six (Austria, Greece) or seven (Belgium, Ireland, Portugal) proceedings. These proceedings reflect all insolvency proceedings available in a Member State, with some sixty of these proceedings listed in Annex B of the Insolvency Regulation, and therefore being "winding-up proceedings".[15]

79. As an example, the Netherlands lists in Annex A three proceedings: "Het faillissement", "De surséance van betaling" and "De schuldsaneringsregeling natuurlijke personen". The first and the latter one also appear in Annex B, as they are regarded in their main function: leading to liquidation of the assets of the insolvent debtor. The entry tests for all three insolvency proceedings are different. Bankruptcy liquidation (*faillissement*) can be applied for regarding a debtor, "*die in de toestand verkeert dat hij heeft opgehouden te betalen*" (Article 1, section 1 Fw): "A debtor in a situation where he has ceased to pay his debts as they fall due shall be declared bankrupt by a court order either on his own application or on the petition of one or more of his creditors." Postponement of payments (or: moratorium) (*Surseance van betaling*) is at hand in case a debtor "*... voorziet, dat hij met betalen van zijn opeisbare schulden niet zal kunnen voortgaan*" (Article 214, section 1 Fw): "A debtor who expects not to be able to continue to discharge his liabilities as and when they fall due may apply for suspension of payments." Debt rescheduling for natural persons may be applied for where the test meets a sheer combination of the two mentioned: "*indien*

13 T.M. Bos, *Herziening van de Europese Insolventieverordening. Gedeeltelijke harmonisatie als wenkend perspectief*?, Nederlands Tijdschrift voor Handelsrecht 2012-3, 138ff.

14 Bob Wessels, What is an insolvency proceeding anyway?, International Insolvency Law Review (IILR) 4/2011, pp. 491-511, has expressed the majority opinion that in case of (perceived) discrepancies between Article 1(1) jo. Article 2(a) InsReg and the Annex, the Annex is decisive for recognition purposes.

15 In the meaning of Article 2(c) InsReg.

redelijkerwijs is te voorzien dat hij niet zal kunnen voortgaan met het betalen van zijn schulden of indien hij in de toestand verkeert dat hij heeft opgehouden te betalen" (Article 284, section 1 Fw): "…. when reasonably it is to be foreseen that he will not be able to continue to discharge his liabilities as and when they fall due or in a situation where he has ceased to pay his debts as they fall due."

80. For the United Kingdom the entry in Annex A lists five procedures: winding-up by or subject to the supervision of the court; creditors' voluntary winding-up (with confirmation by the court); administration (including appointments made by filing prescribed documents with the court); voluntary arrangements under insolvency legislation; and bankruptcy (with its Scottish equivalent, sequestration). Annex B lists as winding-up proceedings: both forms of company winding-up; together with bankruptcy/sequestration; and also winding-up through administration, including appointments made out of court by filing prescribed documents with the court. The entry criteria for each form of insolvency proceeding are separately specified, and differ from each other in important ways. For company winding-up by the court (also termed "compulsory winding-up) the company must be unable to pay its debts in the sense defined in section 123 of the Insolvency Act 1986, which delineates a variety of tests to establish "inability" for this purpose, embracing both "balance sheet" and "cash-flow" tests of insolvency as alternative grounds on which involuntary winding-up can be initiated. For voluntary winding up on the other hand, all that is prescribed in section 84 of the Insolvency Act is that a duly convened general meeting of the company must pass a special resolution that it be wound up voluntarily (a special resolution, by section 283 of the Companies Act 2006, is one which is passed by a majority of not less than three quarters of the members entitled to vote, in person or by proxy, on the resolution). Company administrations can be commenced by court order obtained on application by a qualified party from among those listed in paragraph 12 of Schedule B1 to the Insolvency Act 1986. The court has jurisdiction to make an administration order only if satisfied that the company is or is likely to become unable to pay its debts (based on the tests already mentioned) and that the administration order is reasonably likely to achieve the purpose of administration (as defined in the complex terms of paragraph 3 of Schedule B1). Alternatively, company administration can be commenced by an out of court appointment made by the holder of floating charge security in respect of the company's property (paragraph 14), or by the company or its directors (paragraph 22). The process of out of court appointment is completed by the filing of the notice of appointment with the court, together with a number of prescribed documents. In such appointments, the principal criterion to be satisfied is that the insolvency practitioner appointed as administrator must file a statement that in his opinion the purpose of administration is reasonably likely to be achieved (paragraph 18(3)(b) or 29(3)(b), according to the

circumstances). Voluntary arrangements, both for companies and for individuals, are available under Part I and Part VIII of the Insolvency Act respectively. They are concluded between the debtor and the creditors by means of an out of court process and are generally free from specific entry criteria, the common sense assumption being that a debtor will not wish to embark on such a procedure unless financial difficulties necessitate the conclusion of a composition or scheme of arrangement with the creditors collectively. There are requirements to lodge documents and reports on the course of proceedings with the court, but the court is not actively involved at any stage unless its jurisdiction is invoked by an interested party who is aggrieved in some way. Bankruptcy of individuals (and sequestration in Scotland) are court-based proceedings which can be initiated either by the debtor petitioning in person, or by one or more duly qualified creditors who petition for a bankruptcy order. For England and Wales, detailed criteria are laid down in sections 264-269 of the Insolvency Act to control the exercise of jurisdiction to make a bankruptcy order. A fundamental requirement of both voluntary and involuntary bankruptcy petitions is that the debtor must be unable to pay his or her debts. In the case of involuntary proceedings (creditor's petition) the requirements are especially exacting, as the petitioning creditor must show that the debtor is unable to pay a debt for at least £750 (net of security) that is presently due and payable to the petitioning creditor personally (sections 267-269). See also para. 82.

81. In the Dutch book on Adjudication of Bankruptcy[16] Wessels has listed some fifteen differences between these three proceedings, which include differences related to (i) the type of debtor that can apply for opening of one or more of these proceedings, (ii) whether a creditor has a right to file such a request, (iii) the goal of the proceeding (which already partly is reflected in the status of Annex A and Annex B), (iv) the financial position of the debtor, (v) the legal position of the debtor (sometimes having a limited judicial power to act with third parties), (vi) the appointment of an insolvency office holder (Annex C mentions three national names for these Dutch "liquidators"), who all have different sets of authority, (vii) the legal consequences of the proceedings (the assets constituting the insolvent estate, divestment of the debtor, fixation of the position of creditors, consequences for current contracts and pending lawsuits and other proceedings etc.)[17], (viii) the order in distribution of payments of claims, (ix) the effects an

16 B.Wessels, *Faillietverklaring*, Wessels Insolventierecht I, 3rd ed., 2012 (forthcoming), para. 1016 and onwards.

17 Or maybe in future not being allowed to cross-border transfer the debtor's company seat, see European Parliament resolution of 2 February 2012 with recommendations to the Commission on a 14th company law directive on the cross-border transfer of company seats (P7_TA-PROV(2012)0019), Recommendation 6 ("on protective measures"): "Any company against which proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought should not be allowed to undertake a cross-border transfer of seat." We leave aside whether "have been brought" equals "opening". The EP calls for further and more broad action, see European Parliament resolution of 14 June 2012 on the future of European company law (2012/2669(RSP)).

appointed liquidator can realize (invoke an avoidance action, right to open correspondence, the right to question the insolvent debtor (including its director and supervisory board members) and to provide him with all information, and (x) the legal consequences of the proceedings themselves, e.g. in debt rescheduling natural persons leading – after successfully fulfilling a certain period, generally three years – to legally unenforceable obligations of the debtor, whilst after bankruptcy liquidation all unfulfilled claims could lead again to bankruptcy.

82. In England the picture is rather similar. The various insolvency procedures listed in Annex A to the Regulation each have a distinctive structure and are separately governed by provisions contained in discrete parts of the Insolvency Act 1986 (although other Parts of the Act contain provisions which have general application to all insolvency proceedings – see Parts XII-XVIII – or which apply to insolvent companies generally – Parts VI and VII – or to insolvent individuals generally – Parts X and XI). Correspondingly, each insolvency procedure has a distinctively named office holder whose duties and functions are tailored to the requirements of the procedure in question. Accordingly, the entry for the UK in Annex C of the Regulation lists seven different species of office holder, any of whom assumes the title of "liquidator" for the purposes of Article 2(b). They are: "liquidator" (for both forms of winding-up, whether by the court or as a voluntary winding-up confirmed by the court); "provisional liquidator" (who can be appointed by the court whenever there is a pending application for a winding-up order in respect of a company); "supervisor of a voluntary arrangement" (whether for a company – CVA – or an individual – IVA); "administrator" (whether appointed by order of the court or by a qualified party out of court); "trustee" (sc. in bankruptcy); "judicial factor" (a species of appointment available under the law of Scotland in relation to individual and company insolvencies, as well as in non-insolvency cases); and "Official Receiver" (there are more than 30 holders of the office of official receiver. They are public officials holding statutory office under Part XIV of the Insolvency Act 1986, and are assigned a number of duties and functions in relation to both individual and company insolvency matters. Among other functions they undertake the role of liquidator of the company in the first phase of every winding-up by the court, and the role of trustee in bankruptcy in the first phase of every individual bankruptcy. In each case, the official receiver continues as office holder unless and until a private-sector insolvency practitioner is appointed as liquidator or trustee in bankruptcy, as the case may be, and the official receiver automatically resumes office in the event of any vacancy in the office of liquidator or trustee. The Official Receiver does not act as office holder in other kinds of insolvency proceeding – company administration, voluntary winding up of a company, or either form of voluntary arrangement – but on the other hand there are important investigative functions which the Official Receiver is required to undertake in all cases of company

insolvency, and in relation to individual bankrupts, including the exclusive responsibility for making application to the court for the public examination of directors and other officers of companies which are being wound up (sections 133 and 112) and likewise of bankrupts (section 290), where this is considered appropriate.

83. We are not so optimistic as to think that in other Member States the differences between the available (two to seven) proceedings will result in a more limited list of differences, whilst within countries that list only one proceeding there will certainly be differences because in such a "one entry" system, generally after its opening different possibilities (liquidation, reorganisation etc.) can be chosen, and this opening itself may be only "temporary".

5.3 Opening of insolvency proceedings

84. The EP proposes in recommendation 1.1 the harmonisation of the conditions under which insolvency proceedings may be opened. The EP considers that "a directive should harmonise aspects of the opening of proceedings". Leaving aside that a European legal measure should follow from the meaning and function of the topic to be regulated, according to the EP harmonisation should take place in such a way that (Arabic numbers were added by us):

1. insolvency proceedings can be brought against debtors who are natural persons, legal entities or associations;
2. insolvency proceedings are initiated in a timely manner in order to allow a rescue of the troubled enterprise;
3. insolvency proceedings can be opened concerning the assets of the above-mentioned debtors, the assets of entities without legal personality (e.g. a European Economic Interest Grouping), a decedent's estate and the assets of a community of property;
4. all companies can start insolvency proceedings in cases where the insolvency is temporary, in order to protect themselves;
5. insolvency proceedings can also be opened after the dissolution of a legal entity or of an entity without legal personality, as long as the distribution of the assets has not yet taken place, or in cases where assets are still available;
6. insolvency proceedings can be opened by a court or other competent authority upon a written request of a creditor or the debtor; the request for the opening of the proceedings can be withdrawn as long as the proceedings have not been opened or the request has not been refused by a court;
7. a creditor may request the opening of proceedings if he/she has a legal interest therein and shows credibly that he/she has got a claim;

8. proceedings can be opened if the debtor is insolvent, i.e. unable to satisfy the payment obligations; if the request is made by the debtor, the proceedings can also be opened if the debtor's insolvency is imminent, i.e. if the debtor is likely not to be able to satisfy the payment obligations;
9. as far as mandatory filing for bankruptcy by the debtor is concerned, the proceedings must be opened within a period of between one and two months after the cessation of payments if the court has not already initiated preliminary proceedings or other appropriate measures in order to protect the assets and provided that adequate assets are available to cover the costs of the insolvency proceedings;
10. Member States are required to lay down rules rendering the debtor liable in the event of non-filing or improper filing, and to provide for effective, proportionate and dissuasive sanctions.

85. Let's try to summarise the EP's broad recommendation. Matters of harmonisation are:

a. the subject of insolvency proceedings, being natural persons, legal entities or associations (see 1);
b. the initiation ("start"; "introduction") of insolvency proceedings on such a date in order to allow a rescue of the troubled enterprise (see 2), but (b(i)) "all companies" (see 4) can start insolvency proceedings in cases where the insolvency is temporary, in order to protect themselves,
c. the estate of insolvency proceedings, being assets (see 3) of the debtor (see 1) but also concerning the assets of entities without legal personality (e.g. an EEIG), a descendant's estate and the assets of a community of property (see 3); as long as the distribution of the assets has not yet taken place, or in cases where assets are still available insolvency proceedings can also be opened after the dissolution of a legal entity or of an entity without legal personality;
d. the authority to open (initiate?) insolvency proceedings: a court or other competent authority;
e. the request for opening of insolvency proceedings: a written request of a creditor or the debtor; withdrawal of the request is possible as long as the proceedings have not been opened or the request has not been refused by a court;
f. the creditor's right to request being dependent on (i) demonstrating a legal interest therein (i.e. the opening), and (ii) showing credibly that he/she has got a claim;
g. the general insolvency test (criterion for opening) is if the debtor is insolvent, i.e. unable to satisfy the payment obligations, however the debtor's insolvency test is if the debtor's insolvency is imminent, i.e. if the debtor is likely not to be able to satisfy the payment obligations;

h. (debtor's mandatory request) the request for opening of insolvency proceedings[18] is mandatory for a debtor must result in the opening within a period of between one and two months after the cessation of payments if the court has not already initiated preliminary proceedings or other appropriate measures in order to protect the assets and provided that adequate assets are available to cover the costs of the insolvency proceedings;
i. (debtor's liability) Member States are required to lay down rules rendering the debtor liable in the event of non-filing or improper filing, and to provide for effective, proportionate and dissuasive sanctions.

86. In the Note of 2010 it was suggested that in view of the increased mobility of companies and the interdependency between main and secondary insolvency proceedings it is desirable that the requirements relating to the opening of insolvency proceedings and the eligibility of the debtor are harmonized. If we see it correctly, the EP does not limit itself to (the opening of) insolvency cases in a cross-border context. The Note selected four topics:
– Standardisation of the test to be applied for the opening of the insolvency proceeding;
– The entities that are eligible as debtor in insolvency proceedings;
– The entities that may file for bankruptcy; and
– The rules on mandatory filing for bankruptcy by the debtor.

In his Explanatory Statement reporter Lehne too limits his remarks to the Insolvency Regulation, which stipulates that the State of the opening of proceedings shall determine the conditions, in particular determine against which debtors insolvency proceedings may be brought on account of their capacity (Article 4(2)(a)) and what assets form part of the estate and the treatment of assets (Article 4(2)(b)): "A new directive should harmonise these aspects so that there is more legal certainty directly from the very beginning of the proceedings."

5.3.1 THE "INSOLVENCY" TEST

87. The matters regarding opening as mentioned by the EP can by categorized in topics on (i) pre-opening (a, b and c), (ii) the opening itself (d, e, f and h), (iii) the opening test (g), and (iv) post-opening matters. For now we will try to concentrate our remarks to the opening test or the aspect of the "insolvency test" for the opening of insolvency proceedings. The Note recommends "standardisation" of this test, whilst the EP recommends a more nuanced approach, see in the summary under (b) (the opening of insolvency proceedings on such a date in order to allow a rescue of the troubled enterprise, be it that all companies can

18 Curiously the EP switches to a different terminology: "filing for bankruptcy".

start insolvency proceedings in cases where the insolvency is temporary, in order to protect themselves), and under (g) (differentiating between a general insolvency test in the case that the debtor is insolvent, i.e. unable to satisfy the payment of its obligations and a separate debtor's insolvency test in case the debtor applies for opening if the debtor's insolvency is imminent, i.e. if the debtor is likely not to be able to satisfy the payment obligations). This approach brings into the discussion the element of the nature (or: goal) of a certain insolvency proceeding and the person who has the ability to invoke such proceedings, but we will not delve into these matters now.

88. In our Glossary of Terms and Expressions in the Global Principles Report to ALI 2012 for the expression "Opening of Proceedings", we explained that a decade of relevant soft law instruments has not led to a complete or precise definition of the "opening" or "commencement" of insolvency proceedings. The EU Insolvency Regulation only refers to "the time of the opening of proceedings", which means the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not.[19] The "opening" itself is determined by the respective national test. The Principles of European Insolvency Law, mentioned in Chapter 3.3.4 above, provide that a proceeding can be opened when the debtor is unable or is likely to become unable to pay his debts as they become due.[20]

89. One of the other soft law sources mentioned, the UNCITRAL Legislative Guide, provides a more nuanced approach. It distinguishes as "commencement"-criteria: (i) the "liquidity", "cash flow" or "general cessation of payments" test, (ii) the "balance sheet" test, and (iii) the "imminent insolvency (prospective illiquidity)" test.[21]

(i) The "liquidity", "cash flow" or "general cessation of payments" test comes down to the determination of a situation in which a debtor generally has ceased making payments and will not have sufficient cash flow to service its existing obligations as they fall due in the ordinary course of business. This test (we are using: "liquidity" test) sometimes also is referred to as "equity" test.[22]
(ii) The balance sheet test is based "on excess of liabilities over assets as an indication of financial distress"[23] Under this test the debtor is insolvent

19 Article 2(f) InsReg.
20 Principle 1.2-1.3. The debtor or a creditor or a public authority can apply for the opening of the proceeding. According to these Principles the effect of the opening of proceedings is that assets belonging to the debtor at the time of the opening of the proceeding and assets acquired thereafter are included in the proceeding. When the debtor is a natural person certain assets are excluded from the proceeding, see Principle 3.1.
21 UNCITRAL Legislative Guide (2004), paras. 22ff.
22 John A. Pearce II and Ilya A. Lipin, The Duties of Directors and Officers Within the Fuzzy Zone of Insolvency, 19 American Bankruptcy Institute Law Review 2011, 361ff, at 380.
23 UNCITRAL Legislative Guide (2004, paras. 25ff.

when its assets are below its liabilities with no reasonable prospect that the business can successfully be continued.[24]

(iii) The "Imminent insolvency (prospective illiquidity)" test is, according to the UNCITRAL Legislative Guide, the test where the debtor will be unable to meet its future obligations as they fall due.[25] Other tests are used too, for instance Pearce and Lipman distinguish two other tests: the "insolvency in fact test", when a debtor has liabilities in excess of the reasonable market value of its assets (seems to apply to nearly all start-ups), and the "bankruptcy test", in which the debts exceed the fair value of its property.[26] It should not pass without mention that in the USA for insolvency proceedings involving general business entities the U.S. Bankruptcy Code imposes "virtually no conditions on the debtor's seeking voluntary relief."[27]

90. A few words to explain the three tests as distinguished. The most prominent indicators of the liquidity test are a debtor not meeting its trade claims and other business costs, to pay rent, taxes, salaries, etc. The test therefore has a typical creditors' angle, as they will experience when their claims indeed are not paid when they fall due, whilst it is up to them to require payment and – if payment is not forthcoming – initiate proceedings: "Reliance on this test is designed to activate insolvency proceedings sufficiently early in the period of the debtor's financial distress to minimize dissipation of assets and avoid a race by creditors to grab assets that would cause dismemberment of the debtor to the collective disadvantage of all creditors."[28] From the debtor's side the argument may be made that the inability to pay its debts as they become due may point only to a temporary cash flow or liquidity problem in his business, which business is otherwise viable, or that it has a claim against one or more other parties which can be set-off. The business argument could be that during a certain period the debtor had to deal with high cost for purchasing raw materials or semi-manufactured goods or high costs for hiring specific personnel or independent contractors, or that he had to deal with upcoming competition, forcing him to accept smaller margins or even losses on a temporary basis in an aim to gain revenue (market share) or to out-compete another young entrant to the market or an existing marketplayer. In the individual application of a liquidity test,

24 John A. Pearce II and Ilya A. Lipin, The Duties of Directors and Officers Within the Fuzzy Zone of Insolvency, 19 American Bankruptcy Institute Law Review 2011, 361ff, at 380.

25 John A. Pearce II and Ilya A. Lipin, The Duties of Directors and Officers Within the Fuzzy Zone of Insolvency, 19 American Bankruptcy Institute Law Review 2011, 361ff, at 380ff list a variation of this test: "future operations" test, in which the debtor's capital is evaluated in terms of its ability to support financing of its future operations.

26 John A. Pearce II and Ilya A. Lipin, The Duties of Directors and Officers Within the Fuzzy Zone of Insolvency, 19 American Bankruptcy Institute Law Review 2011, 361ff, at 381.

27 See Jason Kilborn, National Report for the United States, in: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012, 753ff. This author mentions as the sole condition a statutory filing fee of $ 1000, whilst in all States the board of directors exclusively have the authority to file a bankruptcy petition under Chapter 11.

28 UNCITRAL Legislative Guide (2004), para. 23.

generally, we feel that the legal norm should leave enough flexibility for a court (if the country has a discretionary regime of control by a court) to deliver a decision allowing it to avoid a premature finding of insolvency, and therefore to not open insolvency proceedings.

It is clear that the second test mentioned, the balance sheet test, relies heavily on information which is under the control of the debtor. It will be hardly possible for other parties to ascertain what the true state of the debtor's financial affairs is until after its difficulties have become a settled state of affairs or (as often happens) these are an irreversible fact and thus it may not easily form the basis for a creditor application, see UNCITRAL Legislative Guide[29], that rightly adds that the test may be based on misleading information, on questionable valuation criteria (a liquidation value, a fair – at "arm's length" – market value or a going concern value) or on the uncontrollable assessment of work to be performed in the (near) future and (therefore) the debtor's ability to pay (out of the future prediction of incoming cash), in full or in parts over a certain period. The balance sheet test is not only difficult to ascertain, it will inherently take time to establish this test rather accurately.

The "imminent insolvency" test has the inherent flaw of the length of time to take into account. In some cases the prospective inability might relate to a short period of time into the future, there may be other cases however where it will relate to a significantly longer term, not only depending upon the nature of the obligation to be met (a trade debt or a bond)[30], but also upon the contractual clauses in each specific case with the uncertainty of claims to be expected related to liabilities for e.g. product failures, asbestos or fines for law evasions.

91. From the Note it becomes clear that the insolvency laws of the Member States apply different criteria for the opening of insolvency proceedings. Some EU Member States apply the liquidity test, such as Spain and France, whilst under Italian law the liquidity test applies only when certain conditions are met[31] and under Swedish law, the liquidity test applies, but under certain conditions it cannot be invoked by a creditor.[32] Under the laws of Poland both the liquidity test as well as the balance sheet test is used (for liquidation proceedings). From

29 UNCITRAL Legislative Guide (2004), paras 25 and 26.

30 As the UNCITRAL Legislative Guide (2004), para. 30 seems to suggest.

31 For instance: (1) the insolvent entity achieved a gross income, in the three years before the filing of the petition for bankruptcy, in a yearly amount not higher than €200,000; (2) the capital invested by the insolvent entity in the business in the three years before the filing of the petition of bankruptcy did not exceed €300,000; and (3) the total amount of debts of the insolvent entity was not higher than €500,000. See Annina H. Persson and Marie Karlsson Tuula, National Report for Sweden, in: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012, 659ff.

32 For instance in Sweden the Note lists that a creditor is not entitled to have a debtor declared bankrupt if: (1) the creditor has a satisfactory charge or collateral equivalent in value to the property belonging to the debtor;(2) a third party has presented satisfactory collateral for the creditor's claim and the bankruptcy petition conflicts with the conditions for the provision of the collateral; or (3) the creditor's claim is not due and payable and satisfactory collateral is offered by a third party.

2 May 2009 onwards a rehabilitation proceeding has been introduced (*post-*ępowanie naprawcze), with contains the "imminent insolvency" test, understood as the threat of insolvency, being a situation when the debtor still performs his obligations, but insolvency is imminent.[33] In German law, imminent illiquidity can be a reason to file for insolvency, whilst also "overindebtedness" is used as a test.[34] In Spanish law the "imminent insolvency" test is also used, whereby the debtor foresees that he will not be able to satisfy regularly and punctually his obligations, which is rather flexible on the length of the timeframe, also there is consensus that "the imminence refers to a short-term period, with one or two months falling undoubtedly within the rule's scope".[35] In England, as was explained in paragraph 80 above, both the balance sheet and cash flow test can be applied, in the alternative, to provide the basis for seeking an involuntary winding-up of a company by the court on the ground that the company "is unable to pay its debts". Conversely, no specific entry test is imposed by the Insolvency Act 1986 for a company to undergo a voluntary winding-up, except for the formal condition that the company must pass a special resolution to that effect. For the obtaining of a court order to place a company in administration the court must be satisfied that the company is "unable to pay its debts" according to the same tests applicable for winding-up by the court, but for an out of court appointment of an administrator to be made there is no requirement that any test of insolvency must be satisfied, merely that the proposed administrator must certify that there is a reasonable likelihood that the statutory purpose of administration can be achieved. For individual debtors, the petitioner for a bankruptcy order must satisfy an insolvency test expressed in terms of "the debtor's inability to pay his debts". In the case of a voluntary petition presented by the debtor personally, the test is satisfied upon proof that the debtor is unable to pay such debts as are currently due and payable, and for which the creditors in question are seeking payment. In the case of an involuntary petition for a bankruptcy order presented by one or more creditors, a more exacting test must be satisfied in that the petitioning creditor(s) must show that there is a debt, or aggregate debts, for an

33 See Marek Porzucki, National Report for Poland, in: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012, 479ff., at 486 and 489. *Post*ępowanie naprawcze as reorganisation proceeding is however not listed in Annex A of the EU Insolvency Regulation, either because it is not seen as a "collective insolvency proceeding", or simply because the Polish government has forgotten to notify the Commission, see Article 45 InsReg.

34 For imminent illiquidity, see § 18(2) German Insolvency Code. *Uberschuldung* or overindebtedness shall exist if the assets owned by the debtor no longer cover his existing obligations to pay. In the assessment of the debtor's assets, however, the continuation of the enterprise shall be taken as a basis if according to the circumstances such continuation is deemed highly likely, see § 19(2) German Insolvency Code. From a recent evaluation it follows that 16% of the cases in Germany are based on overindebtedness and that a majority of experts submit that a debtor should have a right to apply for such proceedings, see Georg Bitter, Christoph Hommerich, Nicole Reiss, *Die Zukunft des "Uberschuldungsbegriffs. Expertenbefragung im Auftrag des Bundesministeriums der Justiz*, Zeitschrift für Wirtschaftrecht (ZIP) 2012, 1201ff.

35 In this way Ignacio Tirado, National Report for Spain, in: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012, 614ff., at 626.

amount equal to or in excess of the bankruptcy level of £750, which is for a liquidated sum payable to one or more of the petitioning creditors, and which the debtor is demonstrably unable to pay, or in the case of debts payable at some certain, future time, that the debtor has no reasonable prospect of being able to pay (sections 267 and 268 of the Insolvency Act 1986). We are now leaving aside the multitudinous other queries regarding the opening test, such as (regarding the liquidity test) whether for opening the claim of one creditor suffices, whether he must show that the debtor also cannot meet another claim (sometimes called: requirement of plurality), whether there should be two creditors, whether a claim (or all claims) should at least represent a certain minimum amount, or (regarding the imminent insolvency test) whether indebtedness only applies to current debts or whether the test also includes future debts.

92. The Note submits that overall, the liquidity test seems to be the most commonly used test in the EU Member States and that this result is in line with the UNCITRAL Legislative Guide on Insolvency Law: "However, differences exist in defining how much indebtedness must be due for an insolvency or reorganization proceeding to be opened and in reconciling other entry criteria applied by Member States. Because Member States apply different tests, in some cases companies will not be able to open main proceedings but they may open territorial proceedings, in other cases they may open main proceedings and may, by virtue of Article 27 of Regulation No 1346/2000, open subsequent territorial proceedings in Member States where they do not meet the domestic insolvency test." The latter remark brings in the cross-border alignment of opening of proceedings, which we will leave aside now.

93. In the concluding chapter we will further elaborate on the question whether harmonisation is desirable and if so, how to go forward with it.

5.4 The liquidator

94. A distinctively different approach to harmonisation of (substantive and procedural) laws is looking at the organisational structure within which such laws operate. For matters of insolvency the most important actors in nearly any insolvency proceeding in Europe (more specifically the court and the insolvency office holder) have their authorities and roles, based on or limited to the provisions of domestic law.[36] With organisational structure we mean a country's insolvency governance system in an individual case (the allocation of functions between courts and liquidators, including the legal and operational relationships between them, based on law and additional regulations) as well as a country's institutional system,

36 We are now leaving aside these roles as they are determined by the EU Insolvency Regulation.

merely related to the requirements to fulfil these actors' functions, including professional and ethical rules that apply to them. Where a solid contract or a smooth merger largely depends on the good work of a professional involved (a contract drafter or an M&A specialist), a successful insolvency proceeding is heavily dependent on a skilled and experienced insolvency office holder and court. Indeed: "In the field of insolvency there are two actors whose integrity and experience are central to the functioning of the insolvency system: judges and administrators".[37]

95. Regarding the harmonisation of general aspects of the requirements for the qualification and work of liquidators, the EP is not (as it does for "opening", see para 5.3) suggesting a certain harmonisation instrument. It recommends harmonisation on the following (we have added numbers):

1. the liquidator must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State, must be of good repute and must have the educational background needed for the performance of his/her duties;
2. the liquidator must be competent and qualified to assess the situation of the debtor's entity and to take over management duties for the company;
3. when main insolvency proceedings are opened, the liquidator should be empowered for a period of six months to decide on the protection of assets with retroactive effect in cases where companies have moved capital;
4. the liquidator must be empowered to use appropriate priority procedures to recover monies owing to companies, in advance of settlement with creditors and as an alternative to transfers of claims;
5. the liquidator must be independent of the creditors and other stakeholders in the insolvency proceedings;
6. in the event of a conflict of interest, the liquidator must resign from his/her office.

As a reporter Lehne indicates that "liquidator" means the liquidator described in Article 2(b) InsReg. Lehne rightly notes that according to Article 4(2)(c) InsReg, the State of the opening of collective insolvency proceedings shall determine the powers of the liquidator, and that Articles 18 and 19 contain basic provisions for the liquidator: "While the rapporteur would not endeavour to harmonise the powers and duties of liquidators at that stage, he would still like to propose some common requirements. Some harmonisation in this area would support the idea of closer cooperation between the liquidators and enhance the comparability in the profession." As with the topic of "opening" of insolvency proceedings the reporter seems to limit its remarks to liquidators appointed in cross-border cases, whilst the proposals of the EP seem to have a wider scope.

37 Jay Lawrence Westbrook et al., A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010, 203.

96. The European Parliament recommends harmonisation of certain elements of the profession of an insolvency office holder, and topics 1, 2, 5 and 6 are typically elements for the deontology of nearly any profession in the commercial area. Topics 3 and 4 however sound odd in this list, in that they recommend certain powers which, when executed, will have an immediate effect on third parties. Where the first group relates to the nature of the profession, these latter topics would better fit in a category close to recommendation 1.3 ("Aspects of avoidance actions"). Where in any insolvency proceeding the judge is an insolvency office holder's antipole, we observe that it is remarkable that the EP is silent with suggesting a similar recommendation for the work of an insolvency judge. Its recommendation 2.4 ("Recommendation on cooperation between courts") only provides "…. that Article 32 [read 31, authors] of the Insolvency Regulation should provide for an unequivocal duty of communication and cooperation not only between liquidators but also between courts." In our Global Principles Report to ALI 2012 we have submitted that in relation to the European Union the Global Guidelines could be considered in the context of the work following from the European Parliament resolution of 15 November 2011 and as a model or guide also for regional legislators.[38]

97. The lack of a suggestion to introduce a common (minimum) standard for an insolvency judge becomes clear when the general tableau of "courts" is displayed. In many civil law countries insolvency cases are not dealt with by specialised courts (like the bankruptcy courts in the USA), but by a court that has general competence in civil matters and disputes. These countries include Belgium, Czech Republic, Estonia, Germany, France and the Netherlands. In some countries (supervisory) judges could be non-professional lay judges, such as in Belgium, France and the Netherlands. In England, the High Court Bankruptcy Registrars, and throughout the country the county court judges with designated jurisdiction in insolvency matters, oversee individual insolvency proceedings, as the bankruptcy order must be made judicially. Other types of procedure – such as Individual Voluntary Arrangements (IVA) and Debt Relief Orders (DRO) – are commenced out of court, but the court always has "oversight" in the sense that there can be a reference or an appeal to the court if contested issues arise.[39] We do not know of any research results related to such questions as whether the judges in these courts are specialised enough (in applying rather complicated insolvency law matters, many times in a rather short time frame) and possess sufficient commercial experience. Only in the last decade useful, but limited data have become available to sketch the general European procedural landscape,

38 Report, at page 30.

39 See Insolvency Act 1986, Part VIIA (ss.251A-251X) (Debt Relief Orders), and Part VIII (ss.252-263G) (Individual Voluntary Arrangements). These non-bankruptcy procedures are described in I.F. Fletcher, The Law of Insolvency, 4th edition (2009), with Supplement (2011) in Chapter 12 (paras 12-010-12-013) and Chapter 4 (paras 4-003-4-058) respectively.

resulting in such conclusions as that there is no common European definition for "court", that there are "radically different" court budgets and that the professional status of judges is not harmonised.[40] The fundamental principle in cross-border insolvency matters within the EU is that recognition of judgments delivered by the courts of the Member States is automatic (Article 16 InsReg) as it "should be based on the principle of mutual trust," see recital 22 to the Insolvency Regulation. This principle serves as the cornerstone for confidence in the Member State's judicial capacity. We would recommend systematic examination in this specific field in an aim to obtain accurate and comparative data on aspects of the functioning of courts in insolvency matters.[41]

98. The Note displays some eight EU Member State reports, from which it follows that the laws of EU Member States have different rules on the qualifications and eligibility for the appointment, licensing, regulation, remuneration, supervision and professional ethics and conduct of liquidators. Where its drafters have not experienced that the use of different systems in the EU Member States have caused any difficulties in practice, "…. there is no merit in seeking to harmonise these issues until a further harmonisation of substantive insolvency law and company law has been achieved".[42] Here it seems that the Note is carried away by its main message of allowing cross-border group insolvencies under the guidance of one insolvency office holder being appointed in the insolvency of an "ultimate parent" company as well as proceedings involving subsidiaries.[43]

99. We are not convinced by this reasoning. The accent should not be on what an insolvency office holder does, but on her or his inherent professional and personal qualities, both in an international as well as in a national context. With the automatic recognition of an opening judgment, the powers of any appointed liquidator can be exercised – within the rules set by Article 18 and onwards of the Insolvency Regulation – in 25 other Member States. The coordination of activities related to the insolvent debtor's estate in all Member States in the EU is in her or his hands. The model on which the EU Insolvency Regulation is based may result in one main insolvency proceeding with the liquidator dealing with assets located in any other Member State, or it may result in a split of insolvency proceedings opened against the debtor, who has assets or

40 See Alan Uzelac, Harmonised Civil Procedure in a World of Structural Divergences? Lessons Learned from the CEPEJ Evaluations, in: X.E. Kramer and C.H. van Rhee, Civil Litigation in a Globalising World, T.M.C. Asser Press, 2012, 175ff.

41 Article 2 (d) InsReg provides: "court" shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings".

42 INSOL Europe Note 2010, at 20.

43 See also INSOL Europe Revision Report 2012, Robert van Galen et al., Revision of the Insolvency Regulation, INSOL Europe, 2012, 91ff recommending a Chapter V ("Insolvency of Groups of Companies") to be included in the Insolvency Regulation.

operations in two or more jurisdictions of the EU: main insolvency proceedings can be opened in Member State X, when the centre of the debtor's main interest (COMI) is in Member State X (Article 3(1)); secondary insolvency proceedings can be opened in the other Member States where the debtor has an establishment within the meaning of Article 2(h). These proceedings, as they are both concerned with the same debtor, should be coordinated, but they do not operate on an equal footing: "Main insolvency proceedings and secondary proceedings can ... contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure *the dominant role of the main insolvency proceedings*, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time", thus recital (20) preceding the text of the EU Insolvency Regulation (italics by us, reporters). This position requires certain specific qualities and skills. On a national level we adhere to a vision which was already expressed over thirty years ago: "The success of any insolvency system .... is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse".[44] It is not only the creditors' confidence but the trust the market puts in the insolvency office holders' actions, which may translate in her/his ability to exercise a transparent process, e.g. for unsecured creditors to be informed in a clear way about any process and to be able to influence any administration, to understand the way the profession is regulated, which would include a mechanism to maintain trust in any regulatory regime, such as a post-action review or a complaints procedure. In Chapter 7 we will further elaborate on this position.

5.4.1 SUPERVISION OF LIQUIDATORS

100. The first part of the first recommendation of the EP goes that "the liquidator must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State". From existing research it follows that for the functioning of insolvency office holders in several EU Member States some common criteria apply. In 2006 the German practitioner

44 Cork Report, Insolvency Law and Practice – Report of the Review Committee (Chairman, Sir Kenneth Cork) (June 1982, Cmnd. 8558), London, HMSO ISBN 0 10 185580, at para. 732. This highly influential report, produced between 1976 and 1982, formed the basis for the reform of insolvency law in the UK, centred on the Insolvency Act 1986. For an overview, see I.F. Fletcher, *op. cit supra* n.39, Chapter 1, paras. 1-027-1-038. In more detail see Fletcher: (1981) 44 *Modern Law Review* 77-86; [1983] *Journal of Business Law* 94-104, 200-217; [1984] J.B.L. 304-307; [1986] J.B.L. 169-171; and [1989] J.B.L. 365-376.

Köhler-Ma reviewed some 12 jurisdictions in Europe[45] and concluded that in all jurisdictions reviewed for the selection of insolvency administrators it is necessary to possess the appropriate training, that "it is either expressly or implicitly stated that persons who may be selected must, at least, possess the necessary mental and physical health and be able to prove that they have no relevant criminal record" and that the most important general exclusion criterion is that the insolvency administrator not be exposed to any conflict of interest, e.g. an accountant previously involved in preparing a financial statement or a previous attorney-client relationship that gives rise to similar objections.[46]

101. A recent short overview of a few different jurisdictions[47] demonstrates that selection of insolvency office holders, their supervision and their remuneration can be arranged in "quite a number of ways".[48] A few years ago, in his dissertation, Henke made an effort to measure supervision systems.[49] He compares the German system of supervision with the English system. For Germany he distinguishes preventive and repressive ("*information-repressive*") supervision, performed either by the State ("*staatlich*", i.e. the court) or privately ("*privat*", i.e. by creditors). In the UK Henke explains that "the State" can be a Court (or the Secretary of State) and "privately" contains creditors and the recognised professional bodies (RPBs).[50] Such (governmental) agencies are also operational in the Czech Republic and Sweden, but non-existent in Belgium, France, Germany, Poland, Spain and the Netherlands. His conclusions are nonetheless difficult to understand, in that the author's method ("*Mechanismusdesign-Theory*" as a part of game theory) is rather unfamiliar for us. He however recognises the limits of his work and recommends further research.

45 Chistian Köhler-Ma, Insolvency Administrator Selection and Quality Criteria in International Comparison, www.insol.org/emailer/september 2006_downloads/ENL_insolvency_01_sep_2006.doc. See too Christian Köhler-Ma, *Verwalterauswahl und Qualitätskriterien im internationalen Vergleich*, Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (DZWiR) 2006, 228ff.

46 See Reinhard Bork, *Die Unabhängigkeit des Insolvenzverwalters – ein hohes Gut*, Zeitschrift für Wirtschaftrecht (ZIP) 2006, 58ff.; Björn Laukemann, *Die Unabhängigkeit des Insolvenzverwalters. Eine rechtsvergleichende Untersuchung*, Heidelberger Rechtswissenschaftliche Abhandlungen, Tübingen: Mohr Siebeck 2010.

47 Australia, Canada, Finland, United Kingdom, United States, Slovakia, China.

48 Jay Lawrence Westbrook et al., A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010, 208ff.

49 Johannes Henke, *Effektivität der Kontrollmechnismen gegenüber dem Unternehmensinsolvenzverwalter. Eine Untersuchung des deutschen und englishen rechts*, Studien zum ausländischen und internationalen Privatrecht, nr. 229, Mohr Siebeck, 2009.

50 The recognised professional bodies that regulate the practice of insolvency in Great Britain are: The Association of Chartered Certified Accountants; The Insolvency Service; Insolvency Practitioners Association; The Institute of Chartered Accountants in England and Wales; Chartered Accountants, Ireland; The Institute of Chartered Accountants of Scotland; The Law Society of Scotland; Solicitors Regulation Authority. See Insolvency Act 1986, s.391, together with S.I.1986/1764: the Insolvency Practitioners (Recognised Professional Bodies) Order 1986.

102. Several exercises in comparative research have been performed in concrete insolvency practice, i. e. "on the ground". In a report of 2007, published by the European Bank for Reconstruction and Development (EBRD), a comparative survey has reviewed the manner in which the laws of eight south-eastern European countries make provision for issues such as qualifications, licensing, appointment, removal/retirement/replacement, standards of work and conduct, discipline and remuneration of office holders in insolvency cases.[51] The principal purpose of the survey was to determine whether and the extent to which the respective laws of the countries mentioned make such provision. Aware of the relatively young and rather untested legal regimes related to insolvency in these countries the drafters' main conclusions are: (i) that in all the topics mentioned a variety of approaches have been chosen in a country's laws and regulations, (ii) that there is a clear need for appropriate detailed standards to guide office holders in their work and to improve the basis on which their work can be measured and assessed, and that (iii) in general there is an inadequate disciplinary system for insolvency office holders (either related to the vague ground for disciplinary action or the limited type of available sanctions).

103. In 2010, the International Association of Insolvency Regulators (IAIR)[52] has conducted a comparative study into a similar list of topics.[53] From this report – we limit the results to commercial insolvency – the main results of 19 organisations that participated are three of a kind: (i) in all jurisdictions represented insolvency professionals play a role in administering insolvency proceedings, (ii) in the majority of jurisdictions insolvency professionals are private sector professionals (17), (iii) in 55% of the jurisdictions insolvency professionals are licensed, most often licences are renewable and there is a register of insolvency professionals, whilst (non licensed) registration in a register of insolvency professionals is available in "some" jurisdictions.

104. In the concluding chapter we will further elaborate on the question whether harmonisation is desirable and if so, how to go forward with it.

51 Jay Allen, Neil Cooper, Ron Harmer, A Regional Report on Insolvency Office Holders in South-East Europe, June 2007. See www.ebrd.com/downloads/legal/insolvency /insolserv.pdf. These eight countries are Albania, Bosnia and Herzegovina, Bulgaria, FYR Macedonia, Montenegro, Romania, Serbia, and Slovenia.

52 The International Association of Insolvency Regulators (IAIR) is an international body with around 25 members, being government departments, agencies or public authorities (further: "agencies") which have responsibility in their country for insolvency regulation, practice, policy and/or legislation. Among its members are agencies of Australia, Canada, China, India, Mexico, Russian Federation and the USA. EU Member States represented are Czech Republic, Finland, Ireland, Romania, UK: England & Wales (The Insolvency Service), UK Northern Ireland (The Insolvency Service) and UK Scotland – Accountant in Bankruptcy.

53 IAIR, An international comparative study of the development of an insolvency profession and its performance, March 19, 2010, see www.insolvencyreg.org.

6 UNCITRAL Model Law across the EU

6.1 Introduction

105. The last theme related to harmonisation of insolvency law in Europe which we would like to raise has an international angle, that is to say it has a dimension of private international law (conflict of laws). In the INSOL Europe Revision Report 2012 it is proposed that the UNCITRAL Model Law on Cross-border Insolvency should be incorporated into the Insolvency Regulation.[1] In their explanatory notes the drafters submit that as to the recognition of insolvency proceedings opened outside the European Union, the UNCITRAL Model Law provides a system which is supported "by the global community which created it", and that "[c]ontrary to the Regulation, it is not based on a similar principle to that of the community trust and therefore the effect of foreign proceedings within the receiving state is much less pronounced and there are more elaborate reviews than under the Regulation." After briefly explaining that the Regulation contains a system of automatic recognition of judgments opening insolvency systems and judicial decisions which are closely related to these proceedings, the drafters favour the Model Law's staged system of recognition of such decisions (further explained below) in which the courts can investigate whether the interests of all parties concerned are adequately protected. INSOL Europe wishes the Model Law provisions be incorporated within the EU Insolvency Regulation: "A unified approach to insolvency proceedings opened outside the European Union will enhance the proper functioning of the internal market and support a unified external trade policy." Words to that effect have been laid down in a proposed new recital to the Insolvency Regulation.[2]

The suggestion is creative and challenging. The intention of the drafters of the UNCITRAL Model Law however has been to offer individual states the choice for an international insolvency regime: "Thus, the Model Law offers to States

1 Revision of the European Insolvency Regulation. Proposals by INSOL Europe, Drafting Committee chaired by Robert van Galen, Nottingham: INSOL Europe, 2012, 109ff.

2 Outside the scope of our analysis is the question of what is the basis for the EU to legislate such proposal. The Drafting Committee (o.c., 109) finds a sufficient basis in Articles 3(1)(e), 4(2)(a) and 81 TFEU.

members of the European Union a complementary regime."[3] On the other hand, the completion of the Insolvency Regulation with the Model Law has met favourable reception.[4]

106. The proposal is based on the assumption that the EU Insolvency Regulation has "intra-Union" effect. Indeed, to a great extent the Regulation only applies within the territory of the Union (except for Denmark) and the consequences for debtors or creditors outside of the Union are small.[5] As was submitted recently, the reason for such a geographical limitation can be understood in a historical and political context, but it is clearly at odds with growing globalised patterns of business and financial relationships. In trading or financial relationships with e.g. Denmark, Norway, Switzerland, Turkey or Japan and the USA, when the COMI of a debtor-company is located outside the Union, the company remains untouched by the Insolvency Regulation. Its insolvency, adjudicated in a non-Member State, will only have those effects which the insolvency system of any national Member State will accord to it. With all national insolvency systems having so many differences, these "hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment", which is the foundation for the Model Law's creation.[6]

3 See Guide to Enactment (1997), nr. 19.

4 See e.g. Jernej Sekolec, UNCITRAL Model Law on Cross-Border Insolvency: An indispensable complement to the EU Insolvency Regulation, in: Tijdschrift voor Insolventierecht (TvI) 2002/ Special – Insolventieverordening, 147ff.; Bob Wessels, Unilateral Regimes Concerning International Insolvency in Modern Europe, in: 6 International Corporate Rescue 2009, 90ff., observing that in Europe instead of individual Member States' responses, one would expect "..... that (certain) countries would discuss the challenge of creating international insolvency provision collectively and as best possible align their approaches together."

5 See V. Marquette/C. Barbé, *Les procédures d'insolvabilité extra-communautaires*, in: 133 Journal du droit international 2006, 511; Paul Omar, The Extra-territorial Reach of the European Insolvency Regulation, International Corporate and Commercial Law Review 2007, 57ff; Masaaki Haga, *Das europäische Insolvenzrecht aus der Sicht von Drittstaaten*, in: Peter Gottwald (ed.), Europäisches Insolvenzrecht – Kollectiver Rechtsschultz, Veröffentlichen der Wissenschaftlichen Vereinigung für Internationales Verfahrensrecht e.V., Band 18, Gieseking Verlag, Bielefeld, 2008, 169ff. For an indication of the potential impact of the Regulation (formerly convention) on parties external to the EU, see also Ian Fletcher, The European Union Insolvency Convention: An Overview and Comment, with U.S. Interest in Mind, (1997) XXIII Brooklyn Journal of International Law 25-55.

6 See Guide to Enactment (1997), nr. 13. It is noted that "debtor" relates to the (legal) person that is the subject of an insolvency proceeding. In recital 9 of the EU Insolvency Regulation it is stated: "This Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual." Such a debtor is not any "multinational (European) corporation", as seems to be suggested by Pedro Jose F. Bernardo, Cross-border Insolvency and the Challenges of the Global Corporation: Evaluating Globalization and Stakeholder Predictability through the UNCITRAL Model Law on Cross-Border Insolvency and the European Union Insolvency Regulation, 50 Ateneo Law Journal 2012, 799ff.

107. This Report is not the place to dive deep into the Model Law itself, which we have done elsewhere.[7] It suffices here to observe that the Model Law contains 32 articles, representing non-binding soft law and thus respects the differences between national substantial and procedural (insolvency) laws. It also does not attempt a substantive unification of insolvency law, as the Model Law merely assists as a template for national legislatures that are introducing or amending a system of international insolvency law provisions in taking the approaches of the Model into account, although the intention has been to enact as closely as possible the original Model Law text. The Model Law, if enacted, offers four core solutions. The Model Law (i) grants access to local courts in the state that has enacted the Model Law to foreign representatives and creditors, (ii) accords recognition to certain orders from foreign courts (recognition is a foreign representative's sole entry point to a state's court systems (except to collect debtor's accounts receivable), (iii) provides relief considered necessary for orderly and fair conduct of a cross-border insolvency case, and (iv) promotes cooperation among courts of the states where the debtor's assets are located, and also between office holders in concurrent proceedings.

108. As indicated the Model Law contains a staged system of recognition of a foreign insolvency proceeding. A foreign representative may apply to the court for recognition of the foreign proceeding in which he or she has been appointed. Such an application shall be accompanied by certain specified and certified documents, see Article 15 Model Law. Between the date of filing for such recognition and the date of the court's order for recognition "interim relief" is available. Forms of such relief include the staying of an execution against the debtor's assets located in the enacting state, entrusting the administration or realisation of the debtor's assets to the applicant (foreign representative), suspending the right to transfer assets of the debtor, providing for the examination of witnesses, taking of evidence or delivery of information, and granting any additional relief that may be available under the laws of the state that has enacted the Model Law. See Article 19 Model Law. Article 20 ("Automatic Relief") then provides that upon recognition of foreign proceedings itself by the court the commencement or continuation of individual actions or proceedings concerning the debtor's assets is stayed, the execution against the debtor's assets is stayed and that the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. This system of staged recognition, or recognition in a two-tier way, provides a certain degree of flexibility and discretion to a court.

7 See for a commentary Ian F. Fletcher, Insolvency in Private International Law, Oxford, 2nd ed., 2005 with Supplement, 2007, Chap. 8, and Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10181c and onwards. See also Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, London: Globe Business Publishing, 3rd ed., 2012.

6.2 Present state of enactment of the Model Law in EU Member States

109. Several countries throughout the world have enacted legislation that – to a varying extent – incorporates the UNCITRAL Model Law into their domestic law. Alphabetically these countries are: Australia (2008), British Virgin Islands (2003), Canada (2009), Colombia (2006), Eritrea (1998), United Kingdom (Great Britain – England, Wales and Scotland, 2006; Northern Ireland, 2007), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2008), South Africa (2000), and the United States (2005).[8] It is clear that after the approval of the final text of the Insolvency Regulation, in 2000, the Model Law has become the flag-ship of international insolvency law. With regard to EU Member States during the fifteen years since its publication the Model Law has found its way into five Member States. We will briefly report on their way of enacting the Model Law.

110. Romania was the first Member State to do so, acknowledging that at the time of enactment Romania was not yet a Member State of the European Union. By law N° 637 of 7 December 2002 Romania adopted the framework for regulating private international law relations in the field of insolvency and its law uses three titles dealing with relations with foreign States, relations with the Member States of the European Union and transitional aspects of the new legal regime.[9] Title I follows the Model Law almost verbatim, with some slight variations, e.g. in definitions (providing definitions for "centre of main interest", "main establishment", "professional establishment" and "establishment") and the public policy exception which appears somewhat stricter than the one included in Article 6 of the Model Law. Article 2 limits the scope of its provision, where banks and insurance companies are exempted, as are stock exchanges, clearing houses, brokers and traders, as well as agents of insurance companies, see Lefter and Pachiu, who also point out that Romania's version of Article 17 Model Law ("Decision to recognise a foreign proceeding") includes a reciprocity requirement, that fits in the overall approach of Romania to foreign judicial decisions, that any recognition of a foreign decision is dependent on the fact that the country, from which the judgment originates, itself recognises Romanian court rulings.[10]

8 See Chapter 15 of the US Bankruptcy Code, which nearly literary follows the UNCITRAL Model Law, see Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, par. 10223 et seq.

9 The text of Title II was similar to that of the EU Insolvency Regulation, to ensure alignment with European rules, given the accession of Romania as of January 2007 as a Member of the EU. Since then Title II has been repealed.

10 Alexandru Lefter and Laurentiu Pachiu, Romania, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 373ff.

111. Also Poland turned to the UNCITRAL Model Law prior to becoming a member of the European Union. Poland adopted its Law on Bankruptcy and Reorganisation and Restructuring Law in 2003.[11] The international provisions generally reflect the Model Law, although on the face of the text several provisions of the Model Law have not found a counterpart in Polish law. The provision with regard to recognition includes the recognition of decisions issued in the course of such proceedings and the appointment, recalling and replacement of the foreign receiver, as well as decisions concerning the course of foreign insolvency proceedings, their staying and completion. Articles 25-27 of the Model Law concerning cooperation and coordination have been included, without significant deviation, although Article 26(2) has been altered to the effect that communication will not be dealt with directly, but through a judge.[12] Seven Model Law provisions appear to have been excluded, e.g. Article 9 of the Model Law ("Right of direct access") and Article 14 ("Notifications to foreign creditors"), however, other provisions in Polish law seem broad enough to capture their content.[13] However, e.g. Article 19 (interim relief) and Article 32 (hotch-pot rule) do not seem to be reflected in the text. Also Article 8 ("Interpretation") has not been included, as it was felt that a Polish court "would be solely bound by the provisions of Polish law and any binding international agreement to which Poland is a party", see Barłowski.[14]

112. In the UK, which had been closely involved in the process of negotiation of the Model Law within UNCITRAL, there was a firm intention on the part of the government to set an example to the rest of the world by being among the first states to complete the process of enactment, and to do so in terms which remained as closely faithful to the letter and spirit of the "mother" text as was practicable. Provision was included in s.14 of the Insolvency Act 2000 to enable the Model Law to be enacted by means of secondary legislation (statutory instrument). Technical factors, including the need to undertake consultations engaging both the public and private sectors, and constitutional issues concerning the component parts of the United Kingdom, delayed the enactment of the Model Law until 4 April 2006 (for Great Britain, comprising England and Wales

11 Journal of Laws of 2003, No. 60, Item 535. Entry into force: 9 April 2003. Two different Acts from 1934 were replaced.

12 Ewa Klima, The new Polish Insolvency Act and the Influence of the UNCITRAL Model Law, in: 5 Griffin's View On International and Comparative Law, nr. 2, 2004, 15.

13 See Jenny Clift, The UNCITRAL Model Law On Cross-Border Insolvency – A Legislative Framework To Facilitate Coordination And Cooperation In Cross-Border Insolvency, in: 12 Tulane Journal of International & Comparative Law 2004, 307; Michael Veck, The Legal Responses of Canada and Poland to International Bankruptcy and Insolvency With a Focus on Cross-Border Insolvency Law, in: 15 International Insolvency Review, Summer 2006, Issue 2, 77.

14 Michał Barłowski, Poland, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 349ff. The author acknowledges that in practice the international origin of the Model Law will be hard to deny.

and Scotland),[15] and April 12, 2007 (for Northern Ireland).[16] Although these two versions of enactment are in most respects identical in substance (subject only to differences in matters of drafting, making reference to "Great Britain" or "Northern Ireland" as appropriate), it should be noted that there are also certain material differences between the two versions of Art. 1(2) (lists of excluded companies and other entities), and also of Art. 2 (definitions) which make it essential to refer to the relevant version of the enacting instruments (CBIR or CBIRNI) when making use of the Model Law in Great Britain or in Northern Ireland, as the case may be.

113. The policy of adhering closely to the original UNCITRAL text wherever possible has been followed in the drafting of Articles 4-22 and 24-32, which replicate, almost verbatim, the texts of the equivalent articles of the "mother" text, albeit with certain additional phrases or paragraphs inserted for the purpose of ensuring clarity in their operation in the context of Great Britain and Northern Ireland. The following points should be noted:

- The UK has kept faith with the "core" principle of the Model Law, as embraced by the negotiators at UNCITRAL, that the enacting states should refrain from imposing any requirement of reciprocity in relation to the operation of the provisions they enact into their domestic laws based upon those contained in the Model Law itself. Although this principle has not been followed by all the states which have so far enacted the Model Law, it is believed that by "opening their doors" to the world at large those states which respect the "non-reciprocity" ideal are setting a powerful example to the rest of the world in terms of their readiness to embrace the ideals of international cooperation in insolvency matters. It is especially important that those states which are seen as major players on the international commercial stage, and which aspire to set bench-marks in terms of good practice in such matters, should take the initiative in this way *pour encourager les autres*;
- In Article 13 the principle of equal access of foreign creditors to a proceeding under British insolvency law is amplified so as to confer express eligibility on foreign tax or social security authorities to submit their claims in such proceedings. Article 13(2) states that such a claim may be challenged on the ground that it is in whole or in part a penalty, or on any other ground that enables a claim to be rejected under British insolvency law. However, the exclusionary rule of English private international law that precludes the direct

15 The Cross-Border Regulations 2006, SI 2006/1030 (here referred to as "CBIR"). The Model Law, as enacted for Great Britain, is contained in Schedule 1. For text and commentary, see Ian Fletcher, Insolvency in Private International Law, Oxford, 2nd ed. (2005), in Supplement (2007) at pp.1-106; Look Chan Ho in Look Chan Ho (Ed.), Cross-Border Insolvency, A Commentary on the UNCITRAL Model Law, London, 3rd ed. 2012.

16 The Cross-Border Insolvency Regulations (Northern Ireland) 2007, SR 2007, No.115 (here referred to as "CBIRNI"). The Model Law, as enacted for Northern Ireland, is contained in Schedule 1.

or indirect enforcement of foreign revenue or other public law claims is specifically abrogated in cases which are within the scope of the Model Law;[17]

– The scope and effect of the "automatic stay" arising under Article 20(1)(a) upon recognition of a foreign main proceeding are defined for UK purposes by the terms of Article 20(2) and are the same as if the debtor (if an individual) had been adjudged bankrupt (or in Scotland, had his estate sequestrated), or (in the case of a corporate debtor) had been made the subject of a winding-up order, under the relevant provisions of the Insolvency Act 1986. The significance of this is articulated in Article 20(3), which states that the stay or suspension does not affect the rights of secured creditors to enforce their security, or to repossess goods subject to retention of title (ROT) or hire purchase contracts, or to exercise rights of set-off. This important concession to the traditional rights of such creditors under English insolvency law is balanced by the provision inserted in Article 21(1)(g) which confers on the court a discretionary power, upon application by the foreign representative, to grant additional relief amounting to a comprehensive stay and suspension of all such rights of creditors. An example of the circumstances under which such an extended moratorium could be applied for is where the foreign representative is seeking to bring about the rescue or restructuring of the debtor or its business;
– The provisions of Article 23, "Actions to avoid acts detrimental to creditors", are an important enhancement, in favour of the foreign representative, of the rather sparse terms of the original UNCITRAL version of this article. As enacted in the UK, Article 23 makes available to the foreign representative a series of clawback actions which are available to office holders in proceedings opened under the Insolvency Act 1986. Not only are these remedies available to the foreign representative without it being necessary to open an insolvency proceeding within the UK, but the "look-back" periods contained within the provisions in question are specially modified so as to operate from the time of opening of the foreign proceeding, thereby circumventing the notorious problem in cross-border cases of expiry of time periods before the foreign representative can invoke the assistance of a court with jurisdiction over the parties against whom avoidance and recovery proceedings should be brought;
– In the UK enactment, Article 3 (International obligations of the enacting state) is conveniently employed to make a clear provision to the effect that, to the extent that any conflict should arise between the provisions of the Model Law and an obligation of the UK under the EU Insolvency Regulation, the requirements of the Regulation prevail.

17 This constitutes an abrogation, in matters of insolvency law, of the exclusionary rule (applicable throughout the UK) embodied in the decision of the House of Lords in *Government of India v. Taylor* [1955] AC 491 (HL). The rule was already part-abrogated since 31 May 2002 in consequence of the entry into force of Article 39 of the EU Insolvency Regulation, which entitles the tax authorities and other social security authorities of Member States to lodge claims in insolvency proceedings to which the Regulation has application.

Care has been taken in enacting the Model Law to preserve and maintain the pre-existing grounds at English common law whereby recognition and assistance can be granted by English courts in international insolvency matters.[18] Additionally, the provisions of s.426 of the Insolvency Act 1986, empowering the UK courts to give enhanced assistance to the courts of certain countries and territories with historic links to the UK, have also been preserved.[19] This is in contrast to the approach taken e.g. in the USA where the enactment of the Model Law via Chapter 15 of the US Bankruptcy Code was designed to create a single gateway to recognition and assistance within the USA, replacing other previous grounds under which such assistance had formerly been available.

114. Slovenia enacted its version of the Model Law as of 15 January 2008, as part of the Act on financial operations, insolvency proceedings and compulsory dissolution.[20] Chapter 8 ("International Insolvency Procedures") contains over forty articles (Articles 445-488). It reflects Slovenia's own version of the Model Law, in which many of the provisions have alternative formulations and include additions to make these compatible with Slovenian domestic laws. It also contains some ten provisions of law applicable, many of which have their counterpart in Articles 4-15 InsReg. Apart from two specific cases, jurisdiction of the domestic court (in the meaning of Article 4 Model Law) is exercised by the District Court of Ljubljana. In Articles 471 – 473 the system of Articles 25-27 Model Law regarding cross-border cooperation has been laid down, including the duty for a domestic court to cooperate to the fullest extent possible with foreign courts and foreign administrators directly or through a domestic administrator. Most notably such cooperation "may be executed in any form which provides for the realisation of the purpose of cooperation" and includes "the conclusion and carrying out of agreements which refer to the coordination of insolvency proceedings with foreign courts", see Article 473(1)(4), and "The Supreme Court may conclude a direct agreement ..... with the court or another body of a foreign country which is, under law of such country, competent for direct conclusion and the implementation of such agreements", and this agreement shall be binding for all courts competent for adjudication and carrying out other tasks that fall under the scope of Chapter 8.[21]

18 For a detailed account of the English law and practice concerning recognition and assistance in cross-border insolvency matters, see Ian Fletcher, Insolvency in Private International Law, Oxford, 2nd ed. (2005, with Supplement 2007), Chapters 2 (Individuals), and 3 (Companies).

19 For an account of the special jurisdiction conferred by s.426 of the Insolvency Act 1986, see Ian Fletcher (o.c, in previous footnote), chapter 4, paras. 4.04-4.26.

20 Enacted by the Law No. 6413/2007, published in Official Gazette No. 126 (31 December 2007). See Miodrag Đorđević, The (new) Insolvency Act of Slovenia, available via http://www.justiz.nrw.de.

21 Recently on the phenomenon of a "protocol" or a "cross-border agreement" in international insolvency cases, see Bob Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt (red.), Overeenkomsten en insolventie, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, 359-384.

115. Greece is presently (as of last week August 2012) the latest EU Member State to adopt its version of the Model Law.[22] The law is not enacted in the Greek Insolvency Code, but introduced as a separate Act (Law 3858) and is effective as of July 1, 2010. Although intended as a uniform and nearly verbatim enactment of the Model Law, it contains some deviations, for instance of the definition of foreign proceeding, meaning "a collective judicial or administrative proceeding in another State, including interim proceedings relating to insolvency, which proceeding involves insolvency of the debtor and results in the debtor being deprived, in part or in whole, of the power of management over the debtor's assets (divestment of the debtor) and in the appointment of a representative for reorganization or liquidation purposes;" It is clear that this definition adds two elements that are unrelated to the Model Law: (i) that the proceeding involves "insolvency of the debtor" (the Model Law provides that it is sufficient that it be a proceeding "pursuant to a law relating to insolvency", see below), and (ii) that the proceeding "results in the debtor being deprived, in part or in whole, of the power of management over the debtor's assets (divestment of the debtor) and in the appointment of a representative for reorganization or liquidation purposes" (the Model Law applies to a proceeding in which "the assets and affairs of the debtor are subject to control or supervision by a foreign court"). On the face of the text, foreign proceedings that do not involve "insolvency" of the debtor (proceedings such as a voluntary liquidation or scheme of arrangement) will fall outside the scope of the Greek legislative system for international insolvency law. The same would go for proceedings that do not involve "the appointment of a representative." This seems to exclude debtor-in-possession proceedings where these are organised with judicial supervision but without the appointment of an administrator or liquidator. The Greek legislation is more flexible regarding Article 15 Model Law, by allowing the Greek courts for instance the acceptation of documents in their original language. The cross-border cooperation provisions are nearly similar to Articles 25 – 27 Model Law, including cross-border judicial cooperation, be it that the Greek courts are not obliged to cooperate (as in the UK, the court "may" cooperate), but they may do so directly with foreign courts. Greek Law contains – like Slovenia – the most remarkable provision that such cooperation can include "the approval or implementation by the courts of agreements concerning the coordination of proceedings".[23] As far as we know Greece therefore is the second Member State to allow the adoption of protocols or cross-border insolvency agreements.

116. To add to the above impressionistic picture of this area, in this Report a few remarks follow regarding the system of international insolvency in countries

22 Dimitris S. Passas and Vassilis G. Saliaris, Greece, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 245ff.

23 Dimitris S. Passas and Vassilis G. Saliaris, o.c., 269.

neighbouring the Netherlands (i.e. Germany and Belgium) as well as in the Netherlands itself. Also here we must be brief. Both in Germany as well as in Belgium the chosen system of international insolvency law has been the result of larger domestic legislative developments. The same is true for the Netherlands, although these have been aborted early 2011.

117. In Germany, a proposal for a set of rules on international insolvency law was issued within the context of the overall renewal of Germany's insolvency law (*Insolvenzordnung* (*InsO*)), which itself entered into force 1 January 1999. During the parliamentary preparations, the proposal was deleted in anticipation of the EU Bankruptcy Convention of 1995 (which later became the "predecessor" of the EU Insolvency Regulation). Where in the mid 90s it became clear that the (what is now) EU Insolvency Regulation would form the basis of the future legislative system of German international insolvency law, the choice was made that its international provisions would be based on the rationale of reading the Regulation's term "Member State" as "any state of the world"[24]. This resulted in a Chapter 11, containing § 335 – 358, in the German Insolvency Code. In this system a foreign insolvency proceeding is recognised directly, without any specific formality. This is however not the case when (i) the court that opened the proceeding does not have jurisdiction according to German law, or (ii) recognition would lead to a result which would be manifestly contrary to essential principles of German law ("*wesentlichen Grundsätzen des deutschen Rechts*"), in particular its fundamental rights. See § 343. Following the rationale of its choice, the larger part of Germany's international insolvency law is based on the idea of the extension of rules of the EU Insolvency Regulation, including its conflict of law rules.[25] Finally, since 1 March 2012, a legal basis for cross-border communication between courts has been included, see § 348(2) (translation by the authors): "When the requirements for recognition of a foreign insolvency proceeding have been met, the insolvency court may cooperate with the foreign insolvency court, more particularly provide information, which is meaningful for the foreign proceeding". The new provision is the German legislator's reaction to the (perceived) lack of a legal basis to allow courts a discretion (the court "may") for cross-border cooperation.[26]

24 Christoph G. Paulus, A Theoretical Approach to Cooperation in Transnational Insolvencies: A European Perspective, in: European Business Law Review (EBLR) 2000, 435, at 437.

25 Austria has as of 1 July 2003 enacted the Federal Act on International Insolvency Law (the "*IIR G*"), which inserted a new section entitled "International Insolvency Law" into the Austrian *Konkursordnung*, see sections 217 to 251 KO, which equally mirrors (in sections 222 – 234) Articles 4 – 15 InsReg. Spain, also in 2003, has followed the same idea of extension of the Regulation's conflict of law rules in relation to non-EU Member States, see Carlos Aurelio Esplugues and Silvia Barona-Vilar, International Bankruptcy in Spain (November 1, 2011). Available at SSRN: http://ssrn.com/abstract=1952782.

26 See Jessica Schmidt, German International Insolvency Law: Recent Developments (forthcoming in INSOL Europe Academic Forum Series (21-22 September 2011 Conference, Venice), explaining that § 348(2) *InsO* will also apply in cases falling within the scope of the Insolvency Regulation. See too Bob Wessels, The role of courts in solving cross-border insolvency cases, 24 Insolvency Intelligence, 2011, 65 at 71.

118. In Belgium, as part of a full overhaul of existing private international law in Belgium, as of 1 October 2004, Chapter XI ("Collective Insolvency Proceedings") of the Belgian Code of Private International Law has been introduced. It contains only five Articles, as certain matters (e.g. public policy defence) are dealt with in earlier chapters of this Code. Its scope is rather loosely formulated. Chapter XI "applies to collective proceedings that entail the divestment of the debtor". Articles 117 and 118 relate to matters of international jurisdiction, whereas Article 119 applies as the law applicable to collective insolvency proceedings the lex concursus, with special rules for rights in rem, set-off and reservation of title when such rights relate to assets outside Belgium. Like in Germany, the system of Article 4, with the exclusions in Articles 5 – 15 InsReg, is easy to recognise. Article 121 is concerned with the effect of foreign insolvency judgements: these will be recognized or declared enforceable in Belgium (i) as a judgement in "principal" proceedings, if the judgment was given by a judge in a State in which the debtor had its "main establishment" at the time the action was introduced, or (ii) as a judgment in territorial proceedings, if the judgement was given by a judge in a State in which the debtor had "another establishment than its main establishment" at the time the action was introduced; in this event the recognition and enforcement of the judgment may only relate to assets located in the territory of the State in which the proceedings were opened.[27] Article 120 ("Duty to inform and cooperate') determines that liquidators are duty bound to cooperate and communicate information with the liquidators of foreign insolvency proceedings concerning the same debtor. These provisions however only apply if the law of the State where the proceedings were opened, provides on a reciprocal basis for an equivalent co-operation and communication duty in respect of the relevant proceedings.[28]

119. In the Netherlands, in 2003, the Ministry of Justice (as it then was named) appointed the "*Commissie Insolventierecht*" (Insolvency Law Committee).[29] Four years later, in November 2007, the Committee published a pre-draft for a complete new Insolvency Act, with around 350 legal provisions and an explanatory memorandum of over 200 pages. One of the reasons for changing the existing Bankruptcy Act (*Faillissementswet*) was its lack of sufficient international insolvency rules. In its pre-draft the Committee has presented Title 10, which contains provisions concerning "International Insolvency Law". Title 10 contains 35 articles, divided over five chapters: (i) Chapter 10.1 (General Provisions);

27 As a consequence of recognition, the foreign liquidator may exercise all the powers conferred on him by the foreign judgement. He may in particular in his capacity as liquidator of foreign principal proceedings request territorial proceedings or temporary and conservative measures in Belgium (Article 121(3) Belgian PIL Code).

28 More elaborate: Vincent Sagaert, *Internationaal insolventierecht: enkele actuele ontwikkelingen*, in: Braeckmans et al. (eds.), Curatoren en Vereffenaars: Actuele Ontwikkelingen II, Antwerpen-Oxford: intersentia 2010, 249ff.

29 Wessels was a member of the Committee.

(ii) Chapter 10.2 (Insolvency Proceedings in the Netherlands); Chapter 10.3 (Foreign Insolvency Proceedings); Chapter 10.4 (Law Applicable); and Chapter 10.5 (International Cooperation).[30] The Committee's ambition was to draft a legal system for international insolvency law that can pass the test of quality established by the laws of Netherlands' neighbouring countries, thus Germany, Belgium and England (& Wales). The Committee was convinced that with the draft of Title 10, the Netherlands would be: (i) in alignment with comparable recent changes in legislation in countries such as Germany, Spain, Poland, Belgium and England (as well as the other parts of the United Kingdom); (ii) pushing considerably back, as one of the last countries in the world to do so, the broad application of the principle of territoriality – also known as the "grab rule"; (iii) pushing back the old fashioned and uncertain present status of international insolvency; (iv) creating a system of efficient and effective administration of insolvency proceedings in relation to non EU-Member States; (v) providing certainty with regard to the law applicable to such proceedings; and (vi) providing an improved system of mutual cross-border exchange of information and cooperation between administrators and courts. For the chosen system of recognition one notes the inspiration the Committee took from the UNCITRAL Model Law. Both Chapter 10.3 (Foreign Insolvency Proceedings) and also Chapter 10.5 (International Cooperation) have been strongly influenced by it.[31] Early 2011, however, the Minister of Security and Justice, announced that the Committee's pre-draft will not be tabled for the Netherlands' parliamentary treatment (for reasons unrelated to matters of international insolvency law). In literature it has been submitted that this Title 10 of the pre-draft should be seriously considered as a separate piece of legislation, especially in the wake of the ongoing uncertainties surrounding the insolvency of the Russian corporate giant Yukos Oil in the Netherlands.[32] The Yukos case was, remarkably, the only illustration provided by the drafters of the INSOL Europe Revision Report 2012, to defend their claim regarding the necessity of including the Model Law into the Insolvency Regulation[33], which – we add respectfully – for a proposal that covers the whole of the EU does not seem to express an urgent need to follow the proposal.

120. As an interim-conclusion, from this general overview concerning foreign insolvency proceedings having been initiated in the EU beyond the scope of the

30 For an overview, see the contributions in: Bob Wessels and Paul Omar (eds.), Crossing (Dutch) Borders in Insolvency. Papers from the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden, The Netherlands, 5-6 June 2008, Nottingham, Paris, 2009. This publication includes an English version of the text of Title 10 of the pre-draft.

31 For comments on Title 10 in Dutch, see e.g. T.M. Bos, Nederlands Tijdschrift voor Handelsrecht 2009, 169ff.

32 Loes Lennarts and Michael Veder, The Dutch Domestic Cross-Border Insolvency Framework (and Why it is Badly in Need of Reform, Illustrated by the Yukos Litigation), International Insolvency Law Review 2/2012, 220ff.

33 INSOL Europe Revision Report 2012, at 8.

Insolvency Regulation, the following can be taken. Fletcher's observation (see para. 54) of countries with "separate, self-contained systems" has turned as far as cross-border insolvency problems are concerned nearly into its opposite, into including rules to coordinate these cases, e.g. within the EU since the adoption of the Insolvency Regulation in 2002, but also by creating rules which deal with these issues in relation to non-EU countries, sometimes (indirectly) inspired by the UNCITRAL Model Law, e.g. UK, Poland, Romania, Slovenia and Greece, but also Spain and draft-legislation in the Netherlands[34] or by introducing their own rules with comparable concepts (Germany, Austria and Belgium).[35] Most remarkable is the tendency to extend the rules regarding law applicable from the Insolvency Regulation to relationships with non-EU Member States, see the Austrian, Belgian, German, Spanish and Romanian systems (and the Dutch pre-draft). In the history of the Insolvency Regulation a clear call for this approach was however already made in the Virgós / Schmit Report in the mid 90s.[36]

Thirdly, although our observations are only supported by a first preliminary look at things, in these countries notable differences can be seen, e.g. (i) in the UK, Greece and Germany cross-border cooperation in international cases is discretionary for a court (the court "may"), (ii) Romania and Spain[37] use reciprocity provisions (related to recognition), as Belgium does (more limited, related to cross-border cooperation), (iii) whilst in England and Wales, Scotland and Slovenia a concentration of cases to specific courts has been included, taking the decisions in international cases away from the general national rules for jurisdiction of domestic courts, and (iv) quite striking, Slovenia and also Greece integrate in their legislative framework as a form of judicial cooperation the possibility of formalisation by the court of cross-border protocols or insolvency agreements.

34 Irit Mevorach, On the Road to Universalism: A Comparative and Empirical Study on the UNCITRAL Model Law on Cross-Border Insolvency, 11 European Business Organisation Law Review (EBOR) 2011, 517ff., concludes that the body of jurisprudence (mainly for US and UK) after some five years of enactment shows that the Model Law "....greatly facilitates uniformity in international insolvencies" (at p. 550).

35 See too Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd. ed., 2012, para. 10182ff. For the points we want to make, we did not think it necessary that in this Report we should do research into the regimes of some 15 other Member States.

36 See Virgós/Schmit Report (1996), nr. 45: "As the [Regulation] provides only partial (intra-Community) rules, it needs to be supplemented by the private international law provisions of the State in which the insolvency proceedings were opened. When incorporating the [Regulation] into their legislations, the ... States will therefore have to examine whether their current rules can appropriately implement the rules of the [Regulation] or whether they should establish new rules to that end. In this respect, nothing prevents ... States from extending all or some of the solutions of the [Regulation] unilaterally on an extra-Community basis, as part of their national law."

37 Carlos Aurelio Esplugues and Silvia Barona-Vilar, International Bankruptcy in Spain (November 1, 2011), at 85. Available at SSRN: http://ssrn.com/abstract=1952782.

6.3 Test of selected general provisions

121. The INSOL Europe Revision Report 2012 proposes a fully new Chapter VII to the Insolvency Regulation, which has as a heading "Provisions on Insolvency Proceedings Opened Outside the European Union". Similar to the Model Law it suggests five sections, which in all contain 31 provisions, Articles 58 – 88, which in substance nearly mirror the provisions contained in Articles 1 – 32 Model Law. The one number missing a counterpart here is Article 2 Model Law, which includes definitions, but this has found its way to the definitions the drafters of the Revision Report have added to the present Article 2 InsReg, Articles 2(p) – 2(t).[38] Although the suggested numbering makes comparison with the numbering of the Model Law burdensome, the text of Chapter VII is nearly verbatim the text of the Model Law. To conclude the theme of this chapter we will make some remarks related to the inclusion in the INSOL Europe proposal of Section I, its General Provisions.

122. The general provisions contained in Chapter I Model Law (Articles 1-8 Model Law) set the domain of the law. They deal with scope of application (Article 1), definitions (Article 2), international obligations of the enacting State (Article 3), the competent court or authority in the enacting State (Article 4), the authorization of an "acting person" on behalf of any foreign insolvency proceeding (Article 5), the public policy exception (Article 6), the provision of additional assistance by a court of the enacting State (Article 7) and a rule on the method of interpretation (Article 8). Our aim is only to uncover some controversies or presently unknown issues which are in need for further clarification if the suggestion of INSOL Europe were to be followed without reconsideration. Yet these controversies are not limited to these first eight articles, as for instance in the proposal that Article 13 Model Law (Access of foreign creditors to a proceeding under the law of the enacting State) should be followed, would thereby introduce an inconsistency with Article 39 InsReg, within which claims of foreign tax authorities and social security authorities of Member States, may be lodged in any pending insolvency proceeding. The opposite is the rather general rule in other parts of the world.[39] As signalled above, the tendency of "extension" of nearly all the rules on law applicable in several EU countries has found its way in the proposal, for in the event that the court grants relief (in the meaning of Article 21/Article 77 in the proposal) the court "will apply Articles 5, 6, 7, 8, 9, 10 paragraph 1[40], 11, 12, 13, 15 and 18 paragraph 3", see Article 77(1) second sentence of the proposal. However Article 27(f) Model Law, allowing the

38 As the proposal contains an Article 2(s) two times, we numbered the second one Article 2(t).
39 As explained in para. 113 above, for this reason the UK adopted Article 13(3), to allow such claims. See also Bob Wessels, Tax Claims: Lodging and Enforcing in Cross-Border Insolvencies in Europe, International Insolvency Law Review (IILR) 2/2011, 131ff.
40 The proposal suggests a new paragraph 2 to Article 10, including a conflict of law rule in case of the transfer of an undertaking in the meaning of Council Directive 2001/23/EC of 12 March 2001.

enacting State to list additional forms or examples of cooperation, with Slovenia and Greece as ground-breaking examples (adding cross-border insolvency agreements) is not mirrored in the proposal.

6.3.1 A "NON-EU PROCEEDING"

123. In the INSOL Europe Revision Report 2012 the Model Law's system of recognition will be applied to proceedings in the meaning of Art. 2(p), termed "non-EU proceedings", which shall mean "a collective judicial or administrative proceeding in a non-Member State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a court from a non-Member State, for the purpose of reorganization or liquidation;"[41] The definition contains several elements which ask for further elaboration, but in this Report we will only focus on the meaning of "a law relating to insolvency".

What is "a law relating to insolvency"? Can a court rely on the plain meaning of the term "insolvency", consistent with its own legal system? Must a court "ex officio" clarify the meaning of "insolvency" as understood in the foreign country? Must such a foreign law be statutory? Must such a law relate exclusively to insolvency? Is it sufficient that such foreign law requires a foreign court "to consider the solvency of the debtor"?[42] Must the foreign proceeding be "pending", when for instance the debtor is appealing an opening decision on bona fide and substantial grounds?[43] Is the requirement met when within an administrative proceeding assets are realized (and collectively administered) for the benefit of all creditors, which proceedings were commenced without any court involvement by a vote of the company concerned and the "control or supervision" requirement is fulfilled by a body which has general oversight of the liquidators responsible for administering the collective proceeding on behalf of all creditors, e.g. the Australian Securities and Investment Commission?[44] Listing of these

41 Although in practice "Non-EU" may be clear, the term is not defined. One example of the ambiguity which may be encountered through the use of such terms without proper definition is the anomalous situation of Denmark in respect of the EU Regulation: as a non-participating state for the purposes of this EU legislation (see Recital 33), Denmark is arguably a "non-member state" in the eyes of the other 27 current EU members for any matter involving the Insolvency Regulation. It would reduce the potential for confusion among those trying to understand the true scope of application of the Regulation if this matter could be more explicitly declared in the revised text: otherwise, the frequent references throughout the Regulation to "Member State" can be a source of difficulty when there is a Danish dimension to a case. See, e.g. *Re Arena Corporation* [2003] EWHC 3032 (Ch), [2003] All E.R. (D) 277; affirmed (CA) [2004] EWCA Civ 371, [2004] B.P.I.R. 415.

42 *In re British American Insurance Company Ltd.*, 425 BR 885, 905 (Bankr SD Fla 2010).

43 See *Re Oversight and Control Commission of Avánzit, S.A.*, 385 BR 525 (Bankr. SDNY 2008), recognizing a Spanish *Convenio* proceeding, observing that Chapter 15's goals would be "frustrated if 'foreign proceeding' was interpreted in a manner that cut off assistance at a time when cooperation, certainty, fairness, assets values and financial relief [was] most needed, simply because the debtor successfully prosecuted its reorganization case."

44 Like in *Re Betcorp Ltd (in liquidation)* 400 B.R. 266 (Bankr. D. Nev 2009) [CLOUT case no. 927]. A similar view was held in *Re Tradex Swiss AG*, 384 B.R. 34 (Bankr. D. Mass. 2008), in which case the Swiss Federal Banking Commission was held to be a "foreign court" (Article 2(e) Model Law) because it controlled and supervised liquidation of entities in the brokerage trade.

questions alone suffices to note that simply following the text of the Model Law of some 15 years ago, without giving consideration to the way it has been interpreted in several other states is not the preferred way to go by.

124. For the purposes of discussion we submit that the requirement "a law relating to insolvency" means that a court has to be informed that a foreign proceeding is a collective proceeding pursuant to "a law relating to insolvency". We are of the opinion that such a duty for informing a court also within the Insolvency Regulation should be adopted for a person filing for the opening of a collective insolvency proceeding in the meaning of Article 1 InsReg, to provide sufficient information to enable the court to assess whether it has international jurisdiction.[45] However, it is important to avoid an unduly formalistic approach to such matters. In certain legal systems it is possible to find collective proceedings which are applicable to insolvent or financially challenged debtors, but which are not contained in a code or statute whose title includes any mention of "insolvency" or "bankruptcy". Some procedures may be contained in the corporations law, or in the general commercial (for example, the court-based procedure under Part 26 of the UK Companies Act 2006 whereby an insolvent company can conclude a scheme of arrangement with its creditors) or civil code. If possible, a common sense approach should be adopted in which the true nature and substance of the foreign proceeding is appraised, rather than a mere mechanical reliance on the title borne by the law in question.

6.3.2 EXCLUDED PROCEEDINGS

125. The drafters have used only a few words to designate the scope of their proposed Chapter VII. Article 1(2) of the Model Law provides: "This Law does not apply to a proceeding concerning *[designate any types of entities, such as banks or insurance companies, that are subject to a special insolvency regime in this State and that this State wishes to exclude from this Law]*". The drafters suggest Article 58(2), with the text: "This Chapter does not apply to a proceeding concerning insurance undertakings and credit institutions." The basis for an exception makes sense where banks or insurance companies in many countries may be subject to special insolvency regimes. Generally, in Europe this is the case.[46]

45 The Netherlands included a similar provision in Articles 4(4), Article 214(2), and Article 284(2) Netherlands Bankruptcy Act, albeit without a sanction. In Germany Court of Cologne 1 December 2005, EWiR 2006, 109, decided that filing for a secondary proceeding of a subsidiary presupposes that the applicant discloses all relevant facts to enable the court to assess whether it has international jurisdiction, including whether or not main proceedings have already been opened in another Member State. Mankowski, in his comments, is in favour of such an obligation. In Australia such a provision of providing evidence has been suggested by Scott Atkins and Rosalind Mason, Australia, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 15ff., at 22.

46 See Article 1(2) InsReg.

126. The formulation of the scope of the area of application is however not unproblematic. In the USA Section 1501(c) excludes three categories, shortly: proceedings concerning foreign banks (having branches or agencies in the USA) and other entities (including railroads), other than a foreign insurance company, (in general) natural persons and entities subject to proceedings under the Securities Investor Protection Act, and certain stockbrokers and commodity brokers.[47] In England Article 1(2) of Schedule 1 to the Cross-Border Insolvency Regulations 2006 contains a list of thirteen exclusions, being persons or companies which have their own particular insolvency regimes. In England (as well as in the INSOL Europe proposal) the exclusion does include certain credit institutions and insurance undertakings, where these are classified as either UK, EEA or third country institutions for the purposes of British regulatory law.[48] Therefore in England Swiss bankruptcy proceedings concerning Lehman Brothers Finance AG, US Chapter 11 proceedings regarding Lehman Brothers Special Financing Inc., and Australian liquidation proceedings against Lehman Brothers Australia Ltd. have been recognised under the Schedule[49] as were administration proceedings against the Bahrain incorporated Awal Bank BSC[50] and also Antigua-initiated insolvency proceedings relating to Stanford International Bank Ltd., a bank incorporated under the laws of Antigua.[51]

As an aside we submit that the uncertain and inconsequent position of these legal entities, still four years after the start of the global financial crisis, is a mockery and a clear sign of either unwillingness or incompetence for the authorities in charge of providing clarity.

We feel that such an exclusion can perhaps be accepted as valid for matters of recognition of proceedings concerning these entities. However, the exclusion does not seem to be justified for certain other matters, such as a foreign insolvency proceeding relating to the insolvency of a branch or of the assets of the foreign entity in the enacting State when these do not fall under the national regulatory scheme. The exclusion may therefore be limited in such a way that the

47 Section 1501(c) U.S. BC: "(c) This chapter does not apply to:
(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);
(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or
(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title."

48 We leave aside that INSOL Europe proposes to include unregulated investment undertakings within the scope of Article 1(1) InsReg.

49 For sources, see Look Chan Ho, England, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 141ff., at 145.

50 Opened by order of Mr Registrar Jaques on 23 September 2009, see *Awal Bank BSC v. Al-Sanea* [2011] EWHC 1354 (Comm.).

51 Re *Stanford International Bank Ltd* [2011] Ch. 33 (CA).

foreign administrator could make use of the provision regarding access or the cooperation provisions.[52]

6.3.3 EXISTING INTERNATIONAL TREATIES AND AGREEMENTS

127. In the proposal the intention of the Model Law's Article 3 ("To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail") is mirrored in Article 59 ("Relations with existing international conventions and agreements"): "This Regulation shall not affect the application of bilateral or multilateral conventions and agreements to which one or more Member States are party at the time of adoption of this Regulation and which concern matters governed by this Regulation, without prejudice to the obligations of Member States under Article 307 of the Treaty Establishing the European Community."[53] Where in the proposal the existing Article 44 InsReg ("Relationship to Conventions") literally has been kept (in prospective Article 89), it is uncertain whether the term ("Regulation") in the proposal of Article 59 must be read as "Chapter VII" or indeed as "Regulation".

128. We wonder too whether in the presented formulation it is clear enough that Chapter VII is applicable in the event that the EU Regulation does not apply and in the event that Chapter VII does not conflict with the EU Regulation. To avoid the possibility of a gap, and to ensure seamless alignment between the Insolvency Regulation and the proposed Chapter VII a more flexible formulation could be chosen to allow a court to apply Chapter VII even in cases involving a debtor with its COMI in Europe, provided that the EU Regulation is not breached. As a suggestion we offer the following: "To the extent that this Chapter VII conflicts with an obligation of a Member State arising out of the Insolvency Regulation, the requirements of the Insolvency Regulation prevail". Here follows an illustration in which this suggestion could be applied. A company, having its COMI in Germany, possesses a non-EU branch in Norway, which branch is subject to insolvency proceedings in that country. The Norwegian foreign representative seeks the assistance of the British courts in relation to a specific asset, located in Great Britain which he believes should be dealt with in those proceedings. In such a case relief can be granted or modified in a way that it is not limited to the relief as expressed in Article 17 – 19 or 21, which will nevertheless be in compliance with the EU Insolvency Regulation and, most

52 See in the same way Guide to Enactment (1997), nr. 63ff.

53 In interpreting Section 1503 US B.C., in the case of *Daewoo Motor America*, 459 F.3d 1249 (11th Cir. 2006) the court found that the Treaty of Friendship, Commerce and Navigation between USA and Korea (Nov. 28, 1956, 8 U.S.T. 2217) required that a U.S. court should give full faith and credit to a Korean court order confirming a Korean business reorganisation plan.

likely, in alignment with, for instance, methods of communication and coordination between liquidators, which are already taking place.

6.3.4 COMPETENT COURT

129. In matters involving the scope of Chapter VII, the proposal suggests (as equivalent of Article 4 of the Model Law) Article 60 ("Competent court"): "The functions referred to in this Chapter relating to recognition of non-EU proceedings and cooperation with courts from non-Member States shall be performed by the courts of the Member States as specified in their legislation." Here the choice has been to allocate matters of dispute according to the scheme of jurisdiction as provided in the Member State concerned. It is unclear whether the drafters have given thoughts on the possibility of centralising these matters to specified courts, as is the case in England (High Court), Scotland (the Court of Session in Edinburgh), Australia (Federal Court of Australia for individuals; the Supreme Courts and the Federal Court as for other debtors), Mauritius (Supreme Court), the Netherlands (draft: Court of The Hague) and New Zealand (High Court). The pros for such an approach are obvious: concentration of cases results in available know how and experience, which heightens the strength and efficiency of such a court. We do not see any necessity of bothering all smaller domestic courts with sometimes rather complex issues, the foreign language being only one of them.

6.3.5 INTERPRETATION

130. Finally, Article 64 ("Interpretation"). The following text is proposed: "In the interpretation of this Chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith." The suggested provision, although closely following Article 8 Model Law, may create several problems. The first remark to make is that the Insolvency Regulation, including a Chapter VII as suggested, contains generally two methods for interpreting. For intra-Union cases courts should follow a purposive interpretation, to allow the Regulation to meet its goals[54], such as the efficiency and effectiveness of cross-border proceedings[55], to guarantee judicial certainty

54 CJEU 20 October 2011, Case C-396/09 (*Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA*), at 42: "The Court has consistently held that it follows from the need for uniform application of European Union law and from the principle of equality that the terms of a provision of that law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Union, having regard to the context of the provision and the objective pursued by the legislation in question ....".

55 CJEU 19 April 2012, C-213/10 (*F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"*), at 27: "The Court deduced that, taking into account ..... the effectiveness of the regulation, Article 3(1) thereof must be interpreted as meaning that it also confers on the courts of the Member State which has jurisdiction to open insolvency proceedings international jurisdiction to hear and determine actions which derive directly from those proceedings and which are closely connected with them."

for creditors[56] or to create a coherent system of the Regulation.[57] Not all these goals will be (fully) taken into account when a court follows an interpretation as formulated in Article 8 of the Model Law.

131. Secondly, it should be understood that certain concepts, although formulated in a similar way when viewed from a literary perspective, can play out rather differently in practice. In literature it has been stressed that for instance the term "centre of main interests" (COMI) in Article 17 of the Model Law is only decisive for the type of recognition which a court from an enacting state is giving: when foreign proceedings take place where the debtor has its COMI, the foreign proceeding shall be recognised as a "main" proceeding. In the Insolvency Regulation the term COMI has a much wider significance. It is decisive for a court's international jurisdiction (Article 3), with the further consequence that in principle the court's laws are applicable in the rest of the EU (lex concursus, Articles 4 and 17 InsReg) and its decision of opening insolvency proceedings must automatically be recognised (Article 16 InsReg). In 2010 however, the Chancellor in Re Stanford submits that the same expression used in different documents may bear different meanings because of their respective contexts, but then adds: "I can see nothing in the respective contexts of Uncitral and the EC Regulation to require different meanings to be given to the phrase COMI" ..... "It would be absurd if the COMI of a company with its registered office in, say, Spain which is being wound up both there and in the US should differ according to whether the court in England was applying UNCITRAL on an application by the US liquidators for recognition as a foreign main proceeding or the EC Regulation in deciding whether the court in England may entertain a petition to wind up the Spanish company here. It follows that if there is any difference in the test promulgated by the ECJ in Eurofood and that applied by the courts in the US then it is right that the court in England should apply the Eurofood test."[58] We feel that the better view is taken by the High Court of New Zealand in: Williams v Simpson, in which the court observes: "[32] In considering the authorities, it is necessary to bear in mind that the Model Law and the EC Regulation use the term centre of main interests for different purposes. The EC Regulation uses the term to provide jurisdiction for the opening of a main

56 ECJ 17 January 2006, Case-C-1/04 (*Susanne Staubitz-Schreiber*), at 27, ensuring "greater judicial certainty for creditors".

57 CJEU 5 July 2012, Case C-527/10 (*ERSTE bank Hungary Nyrt v Magyar Állam et al.*), at 45: "....., in order to maintain the cohesion of the system established by the Regulation and the effectiveness of insolvency proceedings, Article 5(1) thereof must be interpreted as meaning that that provision is applicable even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union in a case, such as that in the main proceedings, when, on 1 May 2004, the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain."

58 See *Re Stanford International Bank Ltd.* [2010] EWCA Civ 137; [2011] Ch 33 at 54. The "absurdity" notion is heavily criticised by Bob Wessels, International Insolvency Law, Deventer: Kluwer, 3rd ed., 2012, para. 10283bff and Look Chan Ho, England, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 141ff., at 184ff.

insolvency proceeding in a Member State. Such proceedings have universal scope and encompass all the debtor's assets within the European Union. On the other hand, the expression is used in the Model Law purely for recognition purposes."[59] In the Australian case of 2010 In Ackers v Saad Investment Co Ltd. the Federal Court of Australia considers: "49. Given the importance to international commerce and, to third parties, of having an objective ascertainable basis upon which to commence and decide proceedings that will govern winding up and insolvency of a debtor under the Model Law, in my opinion, the approach adopted in Eurofood ... and Stanford Bank ... should be followed here .... That approach leads to a more predictable and orderly international outcome than the less certain approach adopted by some of the Bankruptcy District Courts in the United States ...."[60]

132. A last remark relates to the intention of Article 8 / Article 64 (proposal). With the exception of Poland (at least in the chosen formulation) in all mentioned Member States Article 8 of the Model Law is followed verbatim. Given this position we agree with Ho that such an approach to interpretation and its international origin as well as the need to promote uniformity in its application makes it imperative for national courts to consider in which way the Model Law is enacted and interpreted in other jurisdictions.[61] With Chapter VII the same would apply.

6.4 The type of legal instrument

133. INSOL Europe is of the opinion that it is desirable that these provisions be incorporated within the Regulation, in an aim to present a unified approach to insolvency to the non-EU world. It has chosen to include its proposal in the existing Regulation. We feel that the nature and the initial effect of the Model Law, as well as the fact that certain matters already have been included in national legislation of Member States (be they followers of the Model Law or having drafted their own systems) only justifies the use of a Directive as the medium for bringing about the harmonisation of the laws of the Member States in relation to insolvency proceedings originating in non-EU states.

134. In the concluding chapter we will further elaborate on the question whether harmonisation is desirable and if so, how to go forward with it.

59 In re *Williams v Simpson*, HC HAM CIV 2010-419-1174 [12 October 2010], Heath J.
60 In *Ackers v Saad Investment Co Ltd.* [2010] FCA 1221 (22 October 2010).
61 Look Chan Ho, Overview, in: Look Chan Ho (ed.), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 3rd ed., London: Globe Business Publishing, 2012, 7ff.

7 Perspectives on harmonisation of insolvency law in Europe

135. In this Chapter we summarise our findings and present our conclusions.

136. "Harmonization is a euphemism for forcing commercially less important countries to adopt the remedies and priorities of the commercially more important countries", asserts Lynn LoPucki in one of his challenging publications.[1] Although the author claims "global" application for his quote, he clearly misunderstands the situation in Europe, which for "insolvency" does not have (unlike the USA) a "federal" Bankruptcy Code, nor a federal system of bankruptcy courts.[2] The starting point in the European Union is that every Member State has its sovereign power to draft, amend and put into force binding legislation, by its very nature confined to the borders of its own territory and that the Treaty on the Functioning of the European Union (TFEU) does not contain an explicit legal basis authorising the Union to adopt measures which aim at the harmonisation or approximation of insolvency laws.

137. A second observation for the EU is that the governance structure of the Union, as well as the subjects to be regulated (bearing in mind such notions as the principles of subsidiarity and proportionality) stop short in where individual Member States are able to assert sovereignty rights, also in matters related to insolvency law. In fact, in the area of insolvency law until some twenty years ago, the overwhelming view of the Member States (at that time) was, as articulated in the Virgós / Schmit Report (1996), nr. 12 (in present day terms): "The idea of a single exclusive universal form of insolvency proceedings for the whole of the [Union] is difficult to implement without modifying, by the application of the law of the State of the opening of proceedings, pre-existing rights created before insolvency under the different national laws of other [Member] States. The

1 Lynn M. LoPucki, Global and Out of Control?, in: 79 American Bankruptcy Law Journal 2005, 79ff.
2 In the USA, Article I, section 8, clause 4 of the U.S. Constitution explicitly vests the authority to regulate "bankruptcy" in the federal Congress, which – fully different compared to the European Union – established a network of federal bankruptcy courts to decide even on matters of state law, without having to defer to state courts, see Jason Kilborn, National Report fot the United States, in: Dennis Faber, Niels Vermunt, Jason Kilborn and Thomas Richter (eds.), Commencement of Insolvency Proceedings, Oxford International and Comparative Insolvency Law Series, Oxford University Press, 2012, 753ff and 762.

reason for this lies in the absence of a uniform system of security rights in Europe, and in the great diversity of national insolvency laws as regards criteria for the priority to be given to the different classes of creditors."[3] Given this background, thinking about "harmonisation of insolvency laws in Europe" indeed is a challenging one.

138. In Chapter 1 we outline and demarcate the subject of this Report. Both the European legislature (European Parliament) as well as representatives of European insolvency practice (INSOL Europe) very recently have issued proposals for harmonisation of several topics of insolvency law in Europe. In Europe, after a decade of introducing and applying vast changes in cross-border and international insolvency law, both proposals may turn the page to a new chapter in the development of insolvency law.

139. We analysed the motion of the European Parliament of November 2011, expressed some doubts as to its basis and criticised several of the reasons for the EP's proposals, laid down in 31 recitals. The claim that "insolvency law should be a tool for the rescue of companies at Union level" is, in the absence of any substantiation, rather meaningless and woefully vague on the meaning of "tool" as well as "rescue". Considerations in relation to insolvency of (cross-border) groups of companies without giving evidence of taking into account (other) developments in the field of the further creation and the future of European Company Law is a misconception. "Insolvency" seems to be cast in the role of Cinderella in the ongoing drama of European commercial law, where we note with sorrow that the European Commission in its work plans for company law, despite calls in literature[4], still is silent on this important theme of business life. From the European Parliament's proposals we decided to concentrate on certain matters related to harmonisation of national insolvency laws.

140. Furthermore, another theme for harmonisation of insolvency law in Europe was introduced for treatment in our Report. It has a strong component of private international law (conflict of laws), namely the June 2012 proposals of INSOL Europe for the incorporation of the UNCITRAL Model Law on Cross-border Insolvency into the Insolvency Regulation. It is the subject of review in Chapter 6.

141. We note that our Report focuses on harmonisation of specific aspects of insolvency law for businesses and their insolvency (commonly known as the theme of corporate insolvency) and that our observations make no claim to be of

3 A nearly similar view has been laid down in Recital 11 of the EU Insolvency Regulation, which therefore clearly underlines that it is concerned with cross-border issues and disputes in insolvency cases.

4 See e.g. Mads Andenas, Insolvency Proceedings in Europe, 20 Company Lawyer 1999, 253; Paul J. Omar, The Convergence of Company and Insolvency Initiatives within the European Union, in: European Company Law, June 2005, Issue 2, 59.

significance of the treatment of insolvency of natural persons, financial institutions or States (or: sovereign debtors).

142. In Chapter 2 we draw on general sources to clarify terms that variously have been used in aligning certain matters of law, including insolvency law, such as "convergence", "harmonization", "approximation" and "unification". These are used either in the TFEU or in literature.

143. In short, convergence is to be understood as a more generic term referring to the growing together of laws either through an institutionalised process or through voluntary or even spontaneous action – and therefore not necessarily on the basis of a legal obligation, but for reasons of consistency, pragmatic efficiency or natural justice. As such, convergence refers to a global phenomenon that transcends different legal orders within and without the legal or geographic borders of the EU (in the words of Van Gerven). Convergence serves as an umbrella term for all processes that contribute to a higher degree of similarity; terms such as unification, approximation, harmonization or coordination are its manifestations.

144. Unification is an expression used for a deliberate process to remove disparities between different legal systems, whereas harmonisation is a process in which diverse elements of legal systems are combined or adapted to each other in an aim to create a coherent body of rules or principles.

145. Within the European Union these terms matter as for certain powers of the Union legal acts are allowed, but for instance these acts "shall not entail harmonisation of Member States' laws or regulations" (Article 2(5) TFEU). We then observe that within a European context the terms "harmonisation" and "approximation" have been used to describe active (often legislative) means of convergence, although it has been submitted that approximation and harmonisation have a different emphasis: approximation accents a certain result; harmonisation implies purpose (Van Gerven). We note that harmonisation refers to a legislative activity that is intended to remove disparities, while approximation rather refers to the result of a process, which also can be the result of incremental convergence through case law, through soft law guidances and principles, which find their way to legislature, courts or insolvency practice. We suggest that in theory a distinction between harmonisation and approximation may flow from a different *animus harmonisandi*.

146. We also refer to a legislative method at EU level which acknowledges certain benchmarks of national sovereignty (such as the principles of subsidiarity and proportionality) and is open for initiatives from groups that ultimately are the destined addressees of certain legislative norms. As such, this method leaves

Member States with more flexibility and discretion in shaping national legislation. It is termed Open Method of Coordination (OMC), which is a means of governance based on soft law mechanisms, including the establishment of an agenda for achieving certain goals in the short, medium and long terms, setting benchmarks against (international) best practices of creating European guidelines and converting these into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences and adding an evaluation process, the results of which should be used to improve these policies or the skills of the players that are working with them. OMC as a method was introduced not only to increase compliance of Member States with EU legislation, but also to achieve greater convergence towards the main EU goals, whilst overcoming the dilemma encountered by Member States which desire a closer cooperation in certain issues, but are not willing to resort to supranational decision-making ("joint decision trap"). This method has inspired us in using it for our suggestions for the further development of harmonisation of certain matters of insolvency law, which we will further explain below.

147. During the last three years especially the theme of harmonisation of insolvency laws in Europe is on the rise. Chapter 3 describes the Note of the Directorate-General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs (C) on "Harmonisation of Insolvency Law at EU level." It sets out several reasons for harmonisation, but it most importantly lacks any reference to what the "EU" would have in mind as the goals for insolvency law, both as a perspective and as a result of any harmonisation. We offer as a common understanding of these goals, and therefore as a general basis for further discussion, the following.

148. The goal of any insolvency law in Europe is the maximisation of the assets of the estate of the debtor for the benefit of the body of creditors, in a transparent, predictable and efficient way. We have suggested in our ALI-III Report on Global Principles for Cooperation in International Insolvency Cases ("Global Principles") that for insolvency in an international context the overriding objective is twofold: the maximisation of value of the insolvency estate and the furthering of the just administration of the proceedings.

149. The goal of maximizing the value of the debtor's global assets includes the preservation where appropriate of the debtor's business. This goal contains any form of the available variations of administration or reorganisation of activities and assets of an insolvent debtor that can contribute to that primary goal. The aim of such maximization should be beneficial to the debtor's creditors, as well as other parties concerned, which includes other interests involved in a national

or international case, such as the interests of maintaining employment or, exceptionally, the interest of shareholders.

150. We just mention here that the other goal of the furthering of the just administration of the proceedings includes such desiderata as the application of the principle of equality of arms, so that there should be no substantial disadvantage to a party concerned, and the active management of an insolvency case, preferably in a way which accommodates the legitimate concerns of parties of interest, insolvency administrators and other courts involved.[5]

151. We then continue to discuss the reasons given to support harmonisation of certain matters of national insolvency laws. The European Parliament lists 4 of such reasons.

152. The argument that such harmonisation is beneficial for the "level playing field" is hard to assess, where it uses a legally vague concept of "stakeholders" and is puzzling where it argues that insolvency law should protect the value of the assets of the estate, thereby returning greater value to (creditors and) "shareholders". This latter group in many legal systems are not treated on the same footing as (unsecured) creditors. Although there may be little doubt that differences in national insolvency laws hinder efficient and effective restructuring of companies to the detriment of the internal market, the causal relationship in that "disparities in national laws" form "obstacles" to a successful restructuring of insolvent companies is unclear, whilst the claim that the internal market would benefit from a level playing field is idle, lacking any research of data and statistics that could support this assertion.

153. The argument of preventing forum shopping may gain more support, although it can not provide a solid anchor without a clear understanding of what "good" or "bad" forum shopping is, which is only possible if the interests to be taken into account when drafting or applying insolvency law are much more clarified than they are now.

154. We would be supportive to the argument that harmonisation of certain areas of insolvency law is "worthwhile and achievable", where the results of efforts of harmonisation may increase transparency and lead to a better understanding by the parties involved of the means and methods that are available to address the

5 See Global Principles 5 and 4 respectively, including our explanatory Notes. The case for applying the equality or arms principle in international insolvency cases convincingly has been made by Samuel Bufford, Center of Main Interests, International Insolvency Case Venue and Equality of Arms: The Eurofood Decision of the European Court of Justice, 27 Northwestern Journal of International Law and Business, at 351 ff. (2007). It has been applied further to the European situation by Alan J. Stomel, Answering the Call of the European Court of Justice in Eurofoods, Institute for European Studies Working Paper 3/2011, www.ies.be/files/WP%203:2011%Alan%20J%20Stomel.pdf.

needs of companies confronted with financial difficulty and of the remedies available to e.g. the creditors of these companies. In our opinion it would also be worthwhile to promote harmonisation of areas that would ensure equitable treatment of similarly situated creditors, including transparent rules for gathering and dispensing information, predictable steps in administration processes and guaranteeing equitable distribution to these creditors. Moreover, if increased harmonisation were achieved in respect of timely, efficient and impartial resolution of any matter of insolvency, this would most assuredly enhance confidence in Member States' insolvency law and in those who have to apply it.

155. Progressive convergence in the national insolvency laws of the Member States, as the fourth and last argument, was not substantiated. The overview we provided of initiatives by academics, some common trends in developing prominent principles of insolvency law, a large spectrum of soft law documents to facilitate the realisation of the ongoing globalisation of commercial activity in the insolvency area, and the raised awareness internationally in nearly all circles (NGOs, global and regional associations, practitioners, judges, academics, and indeed central bodies of the EU), combined with several countries' national needs to actually change their existing legal framework to achieve economic results that are potentially better than those that might be achieved under liquidation, generally all point at convergence. However, whether that development is strong enough to support acts of harmonisation is another question, which is addressed in part of the remainder of our Report.

156. We then continue in Chapter 3 by posing the question: aren't there any disadvantages to harmonisation of national insolvency laws? In insolvency law related literature of the last five years this question has not been thoroughly addressed, but in the course of analysing and discussing other related matters authors have identified a quartet of disadvantages.

157. The first one is that harmonisation results in the loss of national peculiarities of insolvency law. This is – at least for company's insolvency – not a convincing argument. Law, also insolvency law, should facilitate business processes. Where in certain solutions public moneys (the taxpayers' contributions) are not at stake or can balance out with certain benefits that can be achieved, only certain well defined interests (such as a certain protection for employment or secured financing) should be protected by national insolvency laws.

158. Harmonisation – so runs the second argument – will also result in losing the dynamic possibilities associated with regular competition between countries to create better law systems, in which they can learn from each other. In the doctrinal literature it is debated whether states can in reality compete with each

other to attract insolvency cases. We are not aware of a balanced study with empiric data to test this hypothesis. Conversely, the pessimists are of the opinion that such competition too readily degenerates into a "race to the bottom". "Delawarisation" may be beneficial for certain countries for matters of corporate law, but in the area of insolvency the consensus among experts tends to the contrary. Recent German legislation however seems an answer to such competition. There are no data yet whether this legislation brings the fruits it expects. In those countries on the other hand where calls for improving insolvency law fall foul to vested interests and passiveness of a country's government, the level playing field easily becomes an unfair battlefield in that companies in financial distress are caged inside undeveloped insolvency systems, established in a period prior to the invention of cars and planes, to say nothing of "credit swaps", "derivatives" and "synthetic collateralised debt obligations" or the true desire of creditors to be able to influence the appointment of an insolvency office holder, to receive adequate information and to be involved in the chosen course of action in the administration of the estate.

159. Related to the second argument is the other alleged disadvantage that individual countries will also be confronted with an extreme slowing down of the process of amending the law and the possibility of adapting it due to the need to maintain conformity with the harmonised "norm". This argument is not persuasive as it is based on the assumption that these and other processes themselves could otherwise be amended at greater speed. Both arguments, moreover, seem to purely focus on (hard) law, overlooking the fact that the legal rules surrounding businesses in financial distress also could be drafted in a more flexible way, allowing judicial discretion, in a field where there is seldom one single solution. No one single solution indeed, but many times a solution reached in a process in which many parties with interest in the case participate, where only private money is involved and therefore based on voluntary agreement, rather outside of the scope of any "hard law" rules.

160. The fourth and final point made (harmonization between legal systems of Member States often leads to differences within the national systems themselves) clearly is a fair one. The answer most probably is to look for flexibility in legal norms to overcome these differences, whilst on the other hand ensuring as far as possible that situations in comparable circumstances receive an equal treatment.

161. In Chapter 4 we continue our research with an assessment of the legal basis in the EU Treaties for actions, including acts of harmonisation of insolvency laws. Our starting point is, as indicated earlier, that the TFEU does not contain an explicit legal basis authorising the Union to adopt measures which aim at the

approximation of insolvency law. Two strong indirect candidates, also mentioned by the European Parliament, are Article 81(2) TFEU (concerning cross-border judicial cooperation) and Article 114 TFEU (measures "for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market").

162. After explaining the basis in the TFEU of the Directives 2001/17 and 2001/24 (winding-up and reorganisation of financial institutions) and the yin-yang position of the Insolvency Regulation with the Brussels I Regulation, we point to the former Regulation's basis in Title V TFEU ("Area of Freedom, Security and Justice"), more specifically in Article 67 TFEU (ex Article 61 ECT) and Title V, Chapter 3 TFEU ("Judicial Cooperation in Civil Matters") Article 81 TFEU (ex Article 65 ECT). On this legal foundation the Union "shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States", see Article 65(1).

163. We submit that on a plain reading of the text the provision is sufficiently broad to cover any topic in the area of judicial cooperation in civil, and therefore also insolvency matters. Article 81(2) TFEU then continues by providing that for the purposes of Article 81(2) measures are allowed to be taken "….. particularly when necessary for the proper functioning of the internal market, aimed at ensuring" the specific goals mentioned in Article 81(2) (a) – (h). It is our point of view that Article 81 discloses cross-border judicial cooperation's basis (mutual trust between Member States), provides what it may include (approximation etc.) and where it should have its focus (goals of Article 81(2)), but the term "judicial cooperation" itself remains rather vague.

164. Article 81 TFEU (and its predecessor Article 65 EC Treaty) has been exclusively used for the adoption of rules on cross-border civil procedure and conflict of law matters in some fifteen Regulations and Directives. All these measures have an international element, so it seems that approximation of substantive laws in general, and more specific harmonisation of certain matters of national insolvency laws, is only covered by it where the matters to be harmonised contain this international element. Support for this view can be found in several recitals of the Insolvency Regulation.

165. Although arguments for the contrary can be made, we adhere to the view (expressed by Kuipers) that there is nothing in the wording of Article 81 that would exclude the adoption of measures envisaged at the approximation or

unification of substantive law, and therefore substantive insolvency law, as long as the measure contributes to the general goal of judicial cooperation in civil proceedings. This means that the matters to be included are justified by the policy objectives listed in Article 81(2), such as (e) effective access to justice, (f) the elimination of obstacles to the proper functioning of civil proceedings, and (h) support for the training of the judiciary and judicial staff.

166. We then continue to explain the necessity of developing mechanisms for judicial cooperation. It is at this juncture that EU legislature and developing (international) practice can amalgamate, where the latter has produced such examples as the use of protocols and cross-border insolvency agreements, and during the last few years also in Europe there have emerged the 2007 European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines), and the authors' 2012 ALI-III Global Principles Global Principles for Cooperation in International Insolvency Cases. In the earlier part of our Report we did however observe that these non-binding principles and guidelines may have several disadvantages, relating to the ascertainability of the texts, their possible lack of legitimacy, quality and clarity or their effectiveness. A call for comparative research was made.

167. Within the described context we submitted that the central principle of cooperation in cross-border cases could lead to a set of Guidelines, as an addition to the Insolvency Regulation: (i) ensuring as far as possible that this Regulation works in practice, so that the debtor's estate is dealt with efficiently and effectively, (ii) fitting the current environment where efficient and effective solutions have been developed based on models reflecting cooperation and communication, and (iii) guaranteeing the organisation and conduct of a fair legal process and ensuring the fair representation of all parties concerned in insolvency processes. This then should be followed by training, which will aim to build capacity amongst the judges and practitioners, with the delivery of tools to be able to give full effect to the Insolvency Regulation, to develop autonomous and uniform interpretation of insolvency terms and concepts having regard to the objective of the Insolvency Regulation and to enable the development and familiarity with the developed Guidelines. An evaluation process of these Guidelines in a well-planned and structured way could in a term of say five years lead to additional rules and practices, which would reflect harmonisation of certain matters as these are felt or applied in European insolvency practice.

168. Article 114 TFEU may serve as a legal basis for harmonisation as it allows the adoption of measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. Our main conclusion, derived from literature, is that the meaning and scope of "internal

market" is not fully clear and that its application may require further study regarding the question which measure of harmonisation of any matter of insolvency is genuinely aimed at improving market conditions and actually contributes to the elimination or prevention of existing or future obstacles to the right of free movement.

169. We finalised Chapter 4 by indicating that, in making insolvency law, Article 288 TFEU provides five mechanisms: regulations, directives, decisions, recommendations and opinions, and we briefly explain these mechanisms. We maintain that in efforts to harmonise insolvency all these measures may be employed.

170. In Chapter 5 – after some introductory remarks on the stage of scholarly development of comparative insolvency law – we lay two rather contradictory topics under the magnifying glass, a rather substantive topic (the "insolvency" test) and a topic related to one of the crucial and active role-players in practically any insolvency proceeding, the insolvency office holder, especially the supervisory system which applies to its function.

171. We explain that presently the EU, in as far as the Insolvency Regulation will apply, has the possibility of the "opening" of some 100 different collective insolvency proceedings in 26 Member States. In any given Member State the number of available insolvency proceedings can range between one and seven. Both for the Netherlands as for the UK with short characteristics, in addition to the insolvency tests used, a broad spectrum of principal and detailed differences in requirements and legal consequences was displayed.

172. Recommendation 1.1 of the European Parliament suggests that a directive should harmonise aspects of the opening of proceedings. We submit that the preferred way is opposite: first the topic, then the preferred EU measure.

173. The European Parliament continues by listing ten groups of differences, largely relating to matters of a pre-opening nature, the opening itself, the opening test and post-opening matters. After explaining some considerations in terminology and approach, we submit that a sensible formulation of "opening" and its surrounding different treatment of requirements to adhere to, is only possible when a clear view has been developed of what the goals of insolvency law in general are and what the nature (or: goal) of a certain insolvency proceeding and the person who has the ability to invoke such proceedings, is. We will not delve into these matters now.

174. We then continue this treatment with an overview and explanation of "commencement"-criteria, as developed in soft law documents or literature, the

most prominent being: (i) the "liquidity", "cash flow" or "general cessation of payments" test, (ii) the "balance sheet" test, and (iii) the "imminent insolvency (prospective illiquidity)" test. Many of these tests, sometimes with different requirements, including the query of who has the right to initiate insolvency proceedings and whether a court is involved, are applied in the limited group of Member States that were subject of our research. Our provisional conclusion of this part of Chapter 5 is that the Note is fairly quick in its conclusion that overall, the liquidity test seems to be the most commonly used test in the EU Member States.

175. In the latter part of Chapter 5 the focus is on the professional position of an insolvency office holder. The European Parliament sets out six requirements which are recommended for harmonisation, four of which make sense in this category of aspects. We just look into only a part of the first requirement, wondering though why the European Parliament has not addressed a similar approach to the other important actor in insolvency cases, namely the court. Where the fundamental principle in cross-border insolvency matters within the EU is that recognition of judgments delivered by the courts of the Member States is automatic and is based on the principle of mutual trust, mutual trust serves as the cornerstone for confidence in the Member State's judicial capacity. We recommend systematic examination in this specific field in an aim to obtain accurate and comparative data on aspects of the functioning of courts in insolvency matters.

176. Contrary to the opinion expressed in the Note we place the accent not so much on what an insolvency office holder does, but on her or his inherent professional and personal qualities, both in an international as well as in a national context. In cross-border cases in the EU an insolvency office holder may have either a dominant role in concurrent proceedings or he/she is – on the contrary – subject to the dominant position of his counterpart in the other interdependent proceeding. Not only in finding a fair balance in its complex role, which reflects the key of the model the Insolvency Regulation is built on, but also his or her other tasks and functions require certain specific qualities and skills.

177. In our proposals we are guided by a vision which was already expressed over thirty years ago: "The success of any insolvency system .... is very largely dependent upon those who administer it. If they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse".[6] More broad than

6 Cork-Report Insolvency Law and Practice – Report of the Review Committee, Chairman Sir Kenneth Cork, June 1982, [Cmnd. 8558], para. 732.

creditors' confidence, the trust the market and the general public puts in the insolvency office holders' functioning is crucial for any insolvency system. We submit that this position translates in her/his ability to be able to exercise a transparent process, e.g. for unsecured creditors to be informed in a clear way about any steps that influence their position and allows them to be able to influence any administration, to understand the way the profession is regulated, which would include a mechanism to maintain trust in any regulatory regime, such as a post-action review or a complaints procedure.

178. Although the available data and literature is not overwhelming, they provide an indication that the qualification, licensing, appointment, replacement and remuneration of insolvency office holders as well as their standards of work and conduct in several countries are arranged in quite a number of ways. As said, the available data could be more complete, but the vision expressed above brings us to suggest that the attempt be made to align and improve the professional standards and ethical guidelines applicable to insolvency office holders.

179. The third and last theme of harmonisation of insolvency laws has an international dimension and is a part of INSOL Europe's Revision Report 2012, which includes the proposal that the UNCITRAL Model Law on Cross-border Insolvency will be incorporated into the Insolvency Regulation. We discuss this theme in Chapter 6. The main reason for the proposal is that the UNCITRAL Model Law (as such a soft law document) provides a system which is supported by the global community and contains a two staged system of recognition in an aim to ensure the interests of all parties concerned are adequately protected. INSOL Europe considers, with its suggestion of incorporation, that a unified approach to insolvency proceedings opened outside the European Union will enhance the proper functioning of the internal market and support a unified external trade policy.

180. For several reasons we criticise the proposal.

181. In a period of over ten years, some twenty countries throughout the world have enacted legislation that includes the adopting of the text of the UNCITRAL Model Law, either rather literally or in an amended version. Five of these countries are EU Member States, in chronological order of enactment: Romania (2003), Poland (2003) (both prior to EU Membership), Great Britain (England, Wales and Scotland, 2006, Northern Ireland, 2007), Slovenia (2008) and Greece (2010). In our Report a brief survey of these Member States' enactments follows, as well as a short account of the characteristics of international insolvency legislation in Germany, Belgium and (the volatile pre-draft of) the Netherlands.

182. From our short survey we conclude that quite a number of Member States since the coming into force of the EU Insolvency Regulation (2002) have included rules for international insolvency law to be applied beyond the scope of the Insolvency Regulation. A notable difference with the approach the Model Law takes is that Austria, Belgium, Germany, Spain, Romania and the Dutch pre-draft include an extension of the core of the conflict of law rules as laid down in the EU Insolvency Regulation, to be applicable to non-EU Member States. INSOL Europe's proposal does likewise, but it fails to take into account other notable differences, of which we list: (i) that in the UK, Germany and Greece cross-border cooperation in international cases is discretionary for a court (the court "may"), (ii) that Romania and Spain use reciprocity provisions (related to recognition), as Belgium does (more limited, related to cross-border cooperation), (iii) that in England and Wales, Scotland and Northern Ireland and also Slovenia a concentration of cases to specific courts has been included, taking the decisions in international cases away from the general national rules for jurisdiction of domestic courts, and (iv) that Slovenia as well as Greece integrate in their legislative framework as a form of judicial cooperation the possibility of formalisation by the court of cross-border protocols or insolvency agreements.

183. Already at this juncture it can be observed that the choice for incorporating the Model Law in a Regulation must be regarded as an error. Both the nature and the original effect of the Model Law, as well as the fact that certain matters already have been included in national legislation of Member States (be they followers of the Model Law or having drafted their own systems) in our opinion would only justify the use of a Directive as the medium for bringing about harmonisation of the laws of the Member States in relation to insolvency proceedings originating in non-EU states.

184. After having executed a brief test of selected general provisions in INSOL Europe's proposal the overall conclusion is that it should go back to the drawing board (leaving aside for now the question of who will follow up on this call). Although in the proposed Chapter VII of the Regulation the chosen numbering of articles makes comparison with the numbering of the Model Law burdensome, the text of Chapter VII INSOL Europe proposes is nearly verbatim the text of the Model Law. However, in its proposed relation to the Insolvency Regulation and in the light of over five years of experience in case law in several of the enacting States (we only took a short look at the USA, UK, Australia and New Zealand) the proposal falls short on several points.

185. Some of the drawbacks we observe relate to (i) inconsistency with the Insolvency Regulation (non-equal treatment of tax claims), (ii) an underdeveloped term "a law relating to insolvency" as part of the definition of "non-EU proceeding", (iii) an uncertain exclusion of certain proceedings relating to

financial institutions from the scope of Chapter VII, (iv) the omission to give consideration to a partial exclusion from its scope (allowing foreign non-EU insolvency office holders and others in proceedings in relation to financial institutions to make use of the provision regarding access or the cooperation provisions), (v) an unbalanced provision regarding the relation between the Insolvency Regulation, the proposed Chapter VII and existing international treaties and agreements, (vi) a debatable choice for the competent courts in non-EU matters, being the courts of the Member States with general jurisdiction, where centralising the court's competence in these international, mostly complex matters (such as in England (High Court), Scotland (the Court of Session in Edinburgh), Australia (Federal Court of Australia for individuals; the Supreme courts and the Federal Court as for other debtors), Mauritius (Supreme Court), the Netherlands (draft: Court of The Hague) and New Zealand (High Court), seems much more logical, and (vii) an interpretation provision which is not unproblematic in its application, given the purposive, sometimes autonomous interpretation which has to be given to EU-matters, as well as the fact that the originally intended "unity" of terms (such as the bothersome "COMI") only a few years after enactments have resulted in "diversity" in several jurisdictions all over the world.

7.2 Conclusions

186. Insolvency has human traits. In early American literature "bankruptcy" was depicted as a gloomy, depressing and discouraging topic.[7] This may be true for insolvent debtors or in the eye of the general public. We however feel that the law, the legal profession and the legal system surrounding insolvency pulses the heartbeat of an economy, be it a national economy which will have a gamut of possibilities of being connected (influenced) by the outside world of trade and finance, resulting in variations of an open, interconnected economy. A transparent and solid national insolvency system has several advantages. It provides local lenders and foreign investors with confidence in the rules that govern economic development, which includes the possibility of failure. A good insolvency law is beneficial for such goals as the protection of certain groups of people against the penetrating consequences of over-indebtedness in today's credit society.[8] As far as businesses are concerned we see insolvency law as a key component in any country's legal and financial infrastructure, in well-developed

7 Charles Warren, Bankruptcy in United States History, 1935, reprinted by Beard Book, 1999, p. 3.
8 On this topic: Julia M. Davis, Incorporating Social Justice Concerns into the New Law and Development Movement: The Importance of Insolvency Law (August 25, 2011), http://ssrn.com/abstract=2006105.

ones as well as in economies in transition.[9] The themes covered in many insolvency laws cannot be missed for such aims as the support of modern economic processes which inherently include continuous change of the circumstances and market conditions in which businesses are operating and the challenge to adapt to these in timely fashion. Such processes should include rules for the facilitation of the rehabilitation of a business or for the orderly market exit of a business that is inefficient. When insolvency law includes rules which foster discipline and honesty in financial management it provides adequate protection to creditors. Not all these goals will be equally recognizable in a country's legislation, and some elements of these goals seem to contradict each other. Insolvency law, nevertheless, is a vivid and important part of the legal framework both for market economies and for economies in transition. Based on our experiences we believe that insolvency law ultimately is the litmus test for a well functioning civil and company law system, and even more broadly, for the entire economic structure of a country.

187. Insolvency law has a long history and it has changed its face during the last centuries from systems in which debtors were imprisoned and the debtor's failure was stigmatised to systems in which insolvency has gradually grown out of its criminalisation. After the introduction, in many European countries over a century and a half ago, of a separation between a person's assets and those of a company (with limited liability) in business life, insolvency has grown to become a calculable and acceptable risk.[10] In most more developed legal systems insolvency law has grown in importance, although most countries continue to discuss and struggle with the desirable approach and therefore the goals of insolvency law.

188. Companies and businesses operate best in a challenging environment, which is beneficial for all parties concerned, such as suppliers, the companies' management, employees, creditors, customers and shareholders. This logically means that uninterrupted continuity of any business is a desideratum in itself, as it means: (i) the possibilities of continuing employment, (ii) job security for management, (iii) the (guided by good management) possibility of efficiently employing all the available means to run a good business (e.g. natural resources, technical equipment), (iv) a share in the profits (dividend) for shareholders and (v) the possibility to continue all other relations, with small suppliers of goods and services and buyers/customers of these products and services. In this respect, insolvency law is the vital core and provider of strength and resilience

9 See Manfred Balz and Henry N. Schiffman, Insolvency Law Reform for Economies in Transition – A Comparative Law Perspective, Butterworth Journal of International Banking and Financial Law 1996, 2ff.

10 See Jay Lawrence Westbrook, Charles D. Booth, Christoph G. Paulus & Harry Rajak, A Global View of Business Insolvency Systems, The World Bank, Washington DC, 2010, 143, submitting that insolvency is an enterprise risk.

of an economic system. If the financial difficulties go from bad to worse, insolvency laws should have available rules to timely respond to these difficulties, to formulate an optimum approach to a solution, which takes into account all rules of company law, contract law, the law on securities, employment law, and of course insolvency procedural law itself.[11]

189. The creation of a European community and the further establishment of the European Union, including its four freedoms, strongly fostering and enhancing trade, business and investments across national boundaries can not be regarded as complete without such a transparent and solid insolvency system. We only can repeat the point made by one of the architects of what now is the EU Insolvency Regulation, in that a "functioning bankruptcy system is essential to any economy that aspires to achieve the freedoms of establishment of business and the free flow of goods, services and capital, and to integrate national markets into a unitary internal market."[12]

190. In addition to the acknowledgment of the necessity to include insolvency law within the achievements to develop such an internal market, another argument accounts for the relative decline of the autonomy of national legal systems to regulate matters of insolvency. The ongoing globalisation keeps on challenging national sovereignty. The problems confronting countries – from international terrorism, to such themes as financially distressed global businesses and collapsing banks, or libel tourism[13], – increasingly transcend national boundaries, either because the problems do not lend themselves to solely national regulation or because they involve the interests of the international community as a whole. In this new environment the traditional areas of national law (such as private law, criminal law, administrative law or insolvency law) acquire an increasingly internationalised character, in which its content is formed on different levels, with different legal measures (including soft law mechanisms), established either "top-down" the legislation-ladder or "bottom-up", initiated by private actors or a mix of such modes of operating.[14]

11 See e.g. M. Didier, *Problématique du droit de la faillite internationale*, in: Revue de droit des affaires internationales 1989, 201 ("*la legislation de la faillite est une carrefour où se croisent et se rencontrent toutes les composantes du système juridique considéré*"; insolvency law is an intersection where all components of any law meet and affect eachother).

12 Manfred Balz, The European Convention on Insolvency Proceedings, in: 70 American Bankruptcy Law Journal 1996, 485ff, at 490.

13 See the 4 July 2012 Declaration of the Committee of Ministers of the Council of Europe on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation, "Libel Tourism", to Ensure Freedom of Expression, https://wcd.coe.int/ViewDoc.jsp?id=1958787&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

14 See e.g. Petra Buck-Heeb / Andeas Dieckmann, *Selbstreguliering im Privatrecht*, Mohr Siebeck, 2010; Matthias Knauf, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*, Mohr Siebeck, 2010; Jan M. Smits, The Complexity of Transnational Law: Coherence and Fragmentation of →

191. Several developments point at what might be a solid basis for harmonization of certain aspects of insolvency law: the emergence of some common principles in the field of insolvency law shows that there is convergence of certain themes, not as a result of a deliberate process but a growing into a similar direction spontaneously, as for instance in several member States' introduction of "rescue" procedures and provisions of international insolvency law.

7.3 An Agenda for future work

192. Although the reporters are not specialists in the area of "law-making", we conclude our Report with the development of seven key indicators which may assist in identifying situations in which harmonisation may be beneficial, and the working method to achieve such harmonisation. These seven criteria – not necessarily in this order and overlaps could occur – may point at a direction to take in the process of developing a legislative skeleton for harmonisation of insolvency law in the near future.

193. These indicators are:

1. Consistency with international norms: strive for consistency with international norms, so any rules will be generally applied in the same way in any member State and/or across the EU;
2. Goals for the EU: agree on the basis allowing the European legislator to act and on the goals that the European legislator set himself to achieve;
3. Take stock: map the present level of harmonisation in all areas of law related to insolvency;
4. Overriding objectives: formulate overriding objectives to take into account, such as offering any involved party a sufficient degree of legal certainty;
5. Flexible legislation: draft a legal skeleton which is sustainable, including a process which is sufficiently flexible and capable of adapting to changing circumstances in which businesses operate;
6. Need for action: examine whether there is a specific need for a certain action or legislative intervention, and if so, what would be the most suitable course of action and ensure that its result be supported by a wider group that will have to work with it;
7. Balance: any rules of such a skeleton should reflect a fair balance between the (often competing) interests of creditors and other parties concerned.

Private Law, in: Netherlands Reports to the Eighteenth International Congress of Comparative Law (Washington 2010), Antwerpen-Oxford 2010, 113ff.; Jan M. Smits, Private Law 2.0. On the Role of Private Actors in a Post-National Society, Eleven International Publishing, The Hague, 2011; Sam Muller et al. (Eds), The Law of the Future and the Future of Law, Torkel Opsahl Academic Epublisher, Oslo, 2011.

Several of these indicators may demand empirical input, a point we now leave aside.

194. In para. 4.5. we explained the set of legal measures available to the Commission to exercise its powers. In addition to the well-known regulations and directives, the legislative toolbox contains the "decision", which is binding in its entirety, but specifying those to whom it is addressed, and the "recommendation" and "opinion", both of which have no binding force. As an example, it would be conceivable that a "decision" could be used towards the group of insolvency office holders, after they have drafted themselves a non-binding set of best practices with professional and ethical rules. The chances may increase if such best practices (i) (consistency with international norms) are based on studies regarding the professional and ethical rules for insolvency office holders, as provided for by regional and global institutions, such as UNCITRAL, American Law Institute, European Bank for Reconstruction and Development, International Bar Association, IFAC (International Federation of Accountants) or TMA (Turn Around Management Association), (ii) (goals for the EU) fit within the EU context (e.g. such best practices further detail the general duties of insolvency office holders to communicate and cooperate cross-border in parallel proceedings, see Article 31 InsReg), (iii) (take stock) take into account the results of study of the professional and ethical rules for insolvency office holders in a representative number of EU Member States), and (iv) involve insolvency practice (courts, agencies and especially practitioners) into its development.[15]

195. We now turn to the seven key indicators we presented above, explaining these. We will do this rather briefly, not only because of limitations of space, but also with the aim of presenting building blocks for a sufficiently open agenda, to allow for a further discussion with non-insolvency specialists, such as specialists in contract law, securities law or company law. With their input the key indicators should also be a matter of further debate.

196. *Consistency with international norms.* We are not hesitant to bring forward the UNCITRAL Legislative Guide as a non-binding guidance and standard setter for the organisation and furnishing of a national insolvency system. Under the heading "Provision of certainty in the market to promote economic stability and growth" the Guide observes that insolvency laws and its institutions (such as insolvency office holders, courts or supervising agencies) are critical to enabling a state to achieve "the benefits and avoid the pitfalls of integration of national financial systems with the international financial system. Those laws and institutions should promote restructuring of viable business and efficient closure

15 On the collaborate effort of creating insolvency law and rules in practice by academics, judges, practitioners and the legislator, see Paul Omar, The building blocks of insolvency reform: Is law enough?, in: eurofenix Summer 2012, 32ff.

and transfer of assets of failed businesses, facilitate the provision of finance for start-up and reorganization of businesses and enable assessment of credit risk, both domestically and internationally."[16] As the first of its (presently) over 250 recommendations the Guide then suggests that in a national effective insolvency law the following key objectives should be implemented "..... with a view to enhancing certainty in the market and promoting economic stability and growth":

> "(a) Provide certainty in the market to promote economic stability and growth;
> (b) Maximize value of assets;
> (c) Strike a balance between liquidation and reorganization;
> (d) Ensure equitable treatment of similarly situated creditors;
> (e) Provide for timely, efficient and impartial resolution of insolvency;
> (f) Preserve the insolvency estate to allow equitable distribution to creditors;
> (g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
> (h) Recognize existing creditors' rights and establish clear rules for ranking of priority claims."

197. With as a starting point the assumption that an "internal market" within the EU is the equivalent of any national market (transposed "without borders" to a regional grouping of nations) we submit that Recommendation 1 could be a point of departure for a debate on the objectives and the position of "insolvency" within the internal market.

198. *Goals for the EU*. Rather recently within the EU supportive measures have been taken for the benefit of "delivering an area of freedom, security and justice for Europe's citizens" with the object of guaranteeing ".... respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal and technological change", see the so-called Stockholm Programme.[17] After the entry into force of the Lisbon Treaty, in December 2009, an Action Plan Implementing the Stockholm Programme has been published aiming actively at strengthening confidence in the European judicial area.[18] It is clear that it focuses on the area of freedom, security and justice, and therefore stays within the (perceived) restrictions of Article 81 TFEU.[19]

16 UNCITRAL Legislative Guide on Insolvency Law (2004), see part 1.I.A.1.4.
17 European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF).
18 Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20.4.2010 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF).
19 "The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods." (p. 4).

199. The European Council in the 2009 Stockholm Programme acknowledges the need to adopt measures in the field of justice which support economic activity[20] and, in the Action Plan, specifically provides for a proposal of amending the EU Insolvency Regulation. To this end, the Action Plan provides:

> "Union law can make a concrete and powerful contribution to the implementation of the Europe 2020 strategy and mitigating the damage caused by the financial crisis. New EU legislation will be proposed whenever necessary and appropriate to strengthen our single market, helping businesses by removing administrative burdens and reducing transaction costs." The Plan then continues with a bucket full of ambitions: "Cutting red tape for business is a clear priority and the cumbersome and costly exequatur process that is required to recognise and enforce a judgment in another jurisdiction should systematically be consigned to history whilst maintaining the necessary safeguards. Ensuring that cross-border debt can be recovered as easily as domestically will help businesses trust our single market and *efficient insolvency proceedings can help recovery from the economic crisis* (italics by the authors). Cross-border transactions can be made easier by increasing the coherence of European contract law. Businesses are not taking sufficient advantage of the internet's potential to boost sales: Union law can help by increasing businesses' need for legal certainty and at the same time guaranteeing the highest level of consumer protection. Consumers need to be aware of their rights and provided with access to redress in cross-border cases. Finally, the increased use of alternative dispute resolution can contribute to the efficient administration of justice."[21]

200. What is interesting in this approach in this 2020 strategy is that it seems to contain an integrated approach, including many areas of law, such as civil procedural law, law of obligations, insolvency law, sales law, consumer law. Yet, most probably the suggestion that efficient insolvency proceedings can help recovery from the economic crisis is made within the context of cross-border judicial cooperation in insolvency cases (Article 81 TFEU). This also follows from EU Justice Commissioner Viviane Reding's address of February 2012, setting out policies to provide the EU Insolvency Regulation with a face-lift.[22]

201. We however submit that this would be much too narrow to satisfy the requirement of including "insolvency" as a true part of the legal skeleton for an internal market in the meaning of Article 114 TFEU. A design for an insolvency law that will meet the key objectives within the focus of EU policies on the longer term must in its substantial and procedural forms be brought into alignment with norms and principles which are predominant in non-insolvency law area

20 Concerning e-Justice, the Stockholm Programme specifically provides for the gradual interconnection of insolvency registers (paragraph 3.4.1.).

21 Action Plan Implementing the Stockholm Programme, at p. 5.

22 Speech of Viviane Reding, Vice-President of the European Commission. EU Justice Commissioner, with the title "Taking Insolvency Law into the 21st Century to Ensure Justice for Growth", 1st European Insolvency & Restructuring Congress, Brussels, 9 February 2012, available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/108&format=HTML&aged=0&language=EN&guiLanguage=en.

and which may fundamentally differ from those within insolvency laws, such as in the area of securities law (rights in rem), contract law, including e.g. employment contracts, IP-contracts and contracts with consumers), company law (e.g. position of shareholders, position of management) or the rules applicable to avoidance of antecedent acts.[23]

202. We recommend that a further study be undertaken to clarify the basis within the Treaties of the EU to assess the core of the provisions which could form the foundation of an "internal market insolvency law". In our opinion this study should include further research into the present limits the Treaties may pose, such as the principles of subsidiarity and proportionality, as well as a provision like Article 345 TFEU ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership") and its consequences for the allocation of powers between the EU and the Member States as well as for its meaning for developing a European property law or the influence "insolvency" may have on "property".[24] Such a study obviously will include research into the consequences for a suggested insolvency skeleton, which would flow from any provisions of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.[25]

203. *Take stock*. In many areas in which the EU is competent, it has dealt with measures related to insolvency law, most prominently in excluding the winding-up of insolvent companies or other debtors, judicial arrangements, compositions and analogous proceedings in what is now the Brussels I Regulation containing the rules on jurisdiction and enforcement of judgments in civil and commercial matters. The EU Insolvency Regulation aims to fill up the gap, whilst for insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties, and collective investment undertakings, which are excluded from the scope of the Insolvency Regulation, separate Directives have been produced (Directive 2001/17 for the reorganisation and winding-up of insurance undertakings and Directive 2001/24 for the same regarding banks (with measures concerning reorganisation and winding-up of (collective) investment undertakings still missing). Several years after their subsequent implementation into national legal systems it seems that

23 For a start, see "The European Legal Order in Insolvency", Chapter 11 in: Paul J. Omar, European Insolvency Law, Ashgate, Aldershot, England, 2004, 169ff, who includes employment law and company law.

24 For an overview of an emerging European property law, see Sjef van Erp & Bram Akkermans, European Union property law, in: Christian Twigg-Flesner (ed.), The Cambridge Companion to European Union Private Law, Cambridge University Press, 2010, 174ff.

25 See the reports published in: J. Laffranque (ed.), The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions, Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: Estonian Lawyers Association 2012. For a shortened version of the Dutch report, see J.H. Gerards en M. Claes, *Bescherming van fundamentele rechten post-Lissabon*, Sociaal-Economische Wetgeving (SEW), 2012, 270ff.

time is ripe to study and analyse interpretation by courts, and any uncertainties that have been detected, to take these into account in future work. Regretfully, the number of cases is large, e.g. Icelandic banks, AA Mutual Insurance, Phoenix Kapitaldienst, Fortis, Anglo Irish Bank, Dexia, Lehman Brothers.

204. Leaving these financial institutions outside our scope, in other areas "insolvency" has been taken into account, although most likely as a topic of additional concern or not with an aim to align certain matters of "insolvency", e.g. Directive 77/187/EC with regard to Safeguarding of Employees' Rights in the event of Transfer of Undertakings, Directive 90/314/EC re the insolvency of a Tour Operator, Directive 97/9/EC re Investor Compensation Schemes, Directive 2000/35 with regard to Late Payments in Commercial Transactions, Directive 2000/74 on the Protection of Employees in the Event of Insolvency of their Employer (updating Directives 77/187 and 80/987), Regulation 2001/2157 with regard to the European Company Statute, in which Article 67 provides that an ECS will have the same treatment as public limited liability company set up in accordance with law of the Member State in which its registered office is situated. The aim of taking stock is to assess whether EU policies are aligned, that certain norms and terminology are consistent and whether in certain other areas similar provisions regarding insolvency could be included. Moreover, we estimate that a legal skeleton for future harmonisation of insolvency law could be inspired by the results of such a stock taking and suggest comparable provisions in certain matters in cases where the underlying ratio or approach a court has taken in its interpretation has led to satisfactory solutions.

205. *Overriding objectives*. We have provided an overriding objective for the goals of insolvency law and noted that in an international context the overriding objective is the maximisation of value and the furthering of the just administration of the proceedings, see para. 46 and 148. Most probably it will be necessary to make a distinction in the form of administering an insolvent estate, i.e. liquidation and reorganisation. Liquidation is the general name for proceedings to sell and dispose of assets for distribution to creditors in accordance with the applicable (national) insolvency law.[26] A "reorganization" is the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern. This is the term used in the UNCITRAL Legislative Guide[27], which formulates a "reorganization plan" (or: plan of

26 Compare UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".
27 UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

reorganization) as thus a plan by which the financial well-being and viability of the debtor's business can be restored.[28]

206. In both methods of administration it is possible that a debtor in Member State A possesses assets in other Member States, such as real estate in Member State B, non-registered movables (machinery) in Member State B, non-registered means of transport or goods in transit in Member State C, registered movables listed in the Member State D, which holds the registry, shares in subsidiaries, incorporated in Member States E, F and G and so on. A challenging task is to devise a system in which creditors of similar categories receive an equal treatment. Would it be possible to create a European legal instrument providing a certain specific security, for fresh money that has been borrowed in certain well defined situations of financial distress?

207. In para. 9 we made some critical remarks about the European Parliament's unsubstantiated statement that "insolvency law should be a tool for the rescue of companies at Union level". We observed that indeed insolvency law can have as a goal the possibility to allow an insolvent debtor a fresh start or a business rehabilitation, to save for instance the value of the ongoing enterprise and/or as many of the workforce as possible. Where so many interests are at stake (contractual position of providers of goods and services, the interests of clients or customers in the uninterrupted provision of goods or services, continuity of jobs and carrying on of payments to the state of e.g. company taxes and VAT), further study would be able to clarify what "the rescue of companies at Union level" really implicates. The implications relate to two areas of assessment: (i) the influence of "opening" of "rescue" on pre-existing rights, as well as (ii) the consequences of "rescue" ex post.

208. In the first area (i) the basis assumption of some 15 years ago – as laid down in Recital 11 of the EU Insolvency Regulation – has to be analysed whether it still holds that due to the fact "that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community", with as given examples "the widely differing laws on security interests" and "the preferential rights enjoyed by some creditors in the insolvency proceedings are, in some cases, completely different."

209. In this second area (ii) it may very well be that the debate will concentrate on questions such as (a) the necessity of the requirement of an impending insolvency, (b) which interests to take into account for such a rescue, (c) the (possible) rights and duties the holders of these interests have during the process

28 UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions". UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations".

of negotiation of a reorganisation plan (which is, in its core, a multi-party agreement), and (d) the relative contexts between these interests. Such a debate will have to assess too the criteria to use to come to the result that maximisation of value indeed can be successfully achieved compared to the estimated result of a form of piece meal liquidation of assets, whilst the requirement of the furthering of the just administration of the proceedings should include measures to create and guard the right of unsecured creditors, mostly small businesses or consumers, to receive information timely and a level of involvement of these creditors in the furthering of such a rescue. These matters clearly need the input of non-insolvency specialists, such as corporate and contract lawyers (e.g. for creating rules for a Debt-Equity-Swap, a (partly) conversion of a contractual creditors-position into a shareholders-position), contract and trade lawyers (e.g. for such activities as the trade in poor claims, e.g. Non Performing Loans), corporate and financial lawyers (to discuss the desirability of rules applicable to the relation of the distressed debtor and certain reorganisations specialists, such as Private-Equity Funds) or employments and pension lawyers (for the rights and duties regarding termination or continuation of employment as well as the ramifications on pension rights or other retirement benefits).[29]

210. *Flexible legislation*. Any regulation or rules of governance for these complex, multi-disciplinary and sometimes cross-border insolvency issues is to be dealt with in an efficient and predictable way. These last requirements many times flow from the very nature of a financial distressed position. Individual legal measures as well as the full legal skeleton of such measures should, on the other hand be sufficiently flexible and capable of adapting to changes in circumstances and market conditions in which businesses operate. The inherent tension between "predictability" and "flexibility" will result in including discretionary powers, both for insolvency office holders as well as for a court involved. The legal skeleton may not only lead to hard law measures, but certainly – as a result of the quite ordinary way of creating (international) insolvency law in the last two decades – include (European) insolvency soft law instruments. It should therefore be assessed which topics call for which legal measure as well as whether some results may be better achieved with soft law alternatives.[30]

211. Here we provide the example of a "protocol". During the last two decades in several cases the experience has been that existing legislation, or the lack of it or

29 For an overview of interests and how these should be taken into account, see Vanessa Finch, Corporate rescue: Who is Interested?, Journal of Business Law 2012, Issue 3, 190ff. For related topics, see Alan Kornberg and Sarah Paterson, Out-of-Court vs Court-Supervised restructurings, in: Rodrigo Olivares-Caminal et al., Debt Restructuring, Oxford University Press 2011, 35ff.; Reinhart Bork, Rescuing Companies in England and Germany, Oxford University Press, 2012.

30 On such matters as fragmentation, coherency and integration of a interlocking, multifaceted legal order, see Roger Brownsword et al. (eds.), The foundations of European private law, Oxford: Hart, 2011.

its conflicting rules have resulted in efforts of insolvency practitioners to negotiate and tailor-make specific, *ad hoc* solutions, many times including the approval of the courts involved. This development has led to the use of an instrument called "protocol" or cross-border insolvency agreement. In his inaugural lecture of 2008 Wessels has submitted that the stage of a non-binding recommended approach of working with protocols could be regarded as the Lex Mercatoria in international insolvency cases. He posed the question whether the experience that several parts of such protocols as these were applied in international practice seem to reflect a certain pattern, these could now be regarded as "customary international law" and therefore in terms of international public law could have the status of a source of law within the meaning of Article 38 of the Statute of the UN International Court of Justice.[31] He concluded however that the merit of a protocol lies in the individuality of every case and the necessity to resolve practical matters. These observations more recently have found support in countries such as Brazil[32] and Australia.[33]

212. In a European context, especially in German literature, the debate is rather ongoing about the hybrid legal nature (contractual, procedural) of a protocol concluded between insolvency office holders in different jurisdictions (concluded in their "public" function, resulting in a "public law" contract?) and the way such a protocol can be arranged into German (insolvency) law.[34] In literature published in the Netherlands similar questions have been raised: can a cross-border insolvency agreement arrange for provisions which are contrary to the mandatory rules that apply to each of the insolvency office holders? Can it be enforced against the whole body of creditors? Which rules apply when such an agreement is countersigned by the court? Is the legal context of mutual duties so strong that it also establishes a claim from one insolvency office holder versus

31 Article 38:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

32 See Francisco Satiro and Paulo Fernando Campana Filho, Transnational insolvency: Beyond state regulation and towards cooperation agreements, http://ssrn.com/abstract=1858968, signalling that developments in both pragmatic and academic fields "..... have been valuable in the construction of a contract-driven transnational law of international insolvencies which is much more resourceful and customizable than "hard law" mechanisms could ever envision – and, therefore, more suitable for facing the challenges imposed by the failure of companies scattered over an unpredictable, multifaceted, globalized world."

33 See Rosalind Mason, Cross-border Insolvency and Legal Transnationalisation, 21 International Insolvency Review 2012, 105ff, concluding that CBI (Cross-border Insolvency Agreements) may well prove to be one of the most useful strategies for resolving complex CBI issues.

34 Most recently see Moritz Becker, *Kooperationspflichten in der konzerninsolvenz*, Beiträge zum Insolvenzrecht, RWS Verlag Kommunikationsforum, 2012, 109ff.

the other in main and secondary proceedings to indeed conclude such an agreement? Will an agreement in itself be binding also against third parties who are not a creditor?[35] We note that the Rome I Regulation on the law applicable to contractual obligations, in addition to allowing for a specific choice of law, "..... does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention."[36] It could be debated whether such a reference could be made, for instance, to the "Principles of European Contract Law". In general a "reference" has to be understood as a reference to substantial law and not the provisions of conflict-of-laws. So such a reference can not deviate from mandatory provisions determined by the law, which has been indicated by objective conflict-of-law rules.[37] Without doubt, a "protocol" or a cross-border insolvency agreement now is at the forefront of creating a workable solution in many complex matters, some of which we have described above. If the use of protocols is the preferred way to go forward, this will arouse another set of legal problems and discussions as for instance to the law applicable. We recall that legislation in Slovenia and in Greece already makes reference to such an instrument. It is submitted that it should be discussed, within a European context, to start to think about "Principles for Insolvency Protocols", to at least prevent some of the disputes and to create a certain level of predictability and certainty in an area which in itself is interesting, but not without problems. It goes without saying the participants to the debate certainly will include non-insolvency specialists.

213. *Need for action.* Any topic that is a candidate for a form of regulation must be based on the real necessity for such regulation. Efficiency as such is not a very convincing argument as a cause for harmonization. We strongly feel that any development towards greater convergence should be supported by solid study and open exchange of ideas and a genuinely transparent dialogue. This would include the rationale or the specific need for a certain action or legislative intervention, and if so, what is the most suitable course of action ("top down" or "bottom up" regulation) and in the "bottom up" approach the clear inclusion of a wider group that will have to work with the results of such action. As indicated in para. 99, the regulation of the profession of insolvency office holders is based on the desirability of maintaining the confidence of creditors and the general public in the key role players in insolvency matters. A "bottom up" approach will also open the doors to surprising sources for further consideration, such as the work

35 See Bob Wessels, Cross-border insolvency agreements: what are they and are they here to stay?, in: N.E.D. Faber, J.J. van Hees, N.S.G.J. Vermunt (red.), Overeenkomsten en insolventie, Serie Onderneming en Recht, deel 72, Deventer: Kluwer 2012, 359ff.

36 Recital 13.

37 See P. Vlas, *Alle contracten leiden naar Rome I*, Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) (2009), 6824; S. van Dongen and A.P. Wenting, *Europa en internationale overeenkomst. EVO wordt Rome I*, Nederlands Tijdschrift voor Burgerlijk Recht (NTBR) 2009/3, 82ff, both referring to non-Dutch literature.

of the European Bank for Reconstruction and Development (EBRD), which is working alongside the Serbian Bankruptcy Supervisory Authority (BSA) on a project to improve the regulation, supervision and discipline of insolvency administrators.[38] The result coming from said dialogue could well be a set of non-binding best practices for insolvency office holders (either appointed in purely national cases or in cases to which the EU Insolvency Regulation applies) and could include a "comply or explain" mechanism, either for individuals which are candidates for appointment or a countries' association (or associations) for such professionals.[39]

214. Finally: *Balance*. Any rule within the envisaged legal skeleton should be based on a fair balance between the (often competing) interests of creditors and other parties concerned. We provide one example, the position of secured creditors in situations of "rescue" or "insolvency". Article 5(1) of the EU Insolvency Regulation reads: "The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings." A majority in literature follows the so-called "hard and fast"-rule. The opening of insolvency proceedings in Member State A does not affect whatsoever the right in rem on a insolvent debtor's assets located in Member State B, although it is fully acknowledged that this treatment given to holders of rights in rem in Article 5(1), leads to "excessive" overprotection[40] or is – against the background of the strong rise in Europe of rescue or reorganisation methods and proceedings during the last decade – regarded as a "conceptual failure of the Regulation."[41], which lead to a territorial split of the assets between these Member States, which is detrimental to its value[42], and to the sheer impossibility for the insolvency office holder in the main insolvency proceedings,

38 Together EBRD and BSA prepared a revised National Standards and Code of Ethics applicable to insolvency administrators in Serbia, adopted in early 2010. Both organisations have prepared a set of technical guidance notes designed to assist insolvency administrators, judges and the BSA in understanding and implementing the new National Standards and Code of Ethics, also published in 2010. See http://www.ebrd.com/pages/sector/legal/insolvency/legal_framework.shtml.

39 We will not further deal with topics such as supervision of these professionals or installing a complaints proceedings, either nationally or e.g. for insolvency practitioners which work under the application of the EU Insolvency Regulation on a European level.

40 Thus e.g. Philip Smart, Rights in Rem, Article 5 and the EC Insolvency Regulation, in: 15 International Insolvency Review, Spring 2006, Issue 1, 17ff; P.M. Veder, *Goederenrechtelijke zekerheidsrechten in de internationale handels- en financieringspraktijk*, in: R.W. Clumpkens et al., Zekerhedenrecht in ontwikkeling. Preadvies voor de Koninklijke Notariële Broederschap 2009, 307ff., at 309.

41 "*...ein konzeptioneller Fehler der Verordnung*" thus S. Reinhart, *EuInsVO*, in: Münchener Kommentar Insolvenzordnung, Band 3, 2. Auflage, München: Verlag C.H. Beck, 2008, Art. 5, nr. 14.

42 See Nina Scherber, *Europäische Grundpfandrechte in der nationalen und internationalen Insolvenz im Rechtsvergleich*, Europäische Hochschulschriften, Vol. 3865, Frankfurt am Main: Peter Lang, 2004, p. 147ff.

opened in Member State A, to administer the estate[43] or to implement a European wide rescue plan.[44] To find a right balance between the interests of the estate (including all unsecured creditors) and secured creditors abroad seems to be to include measures to prevent the creation of the unjustifiable bonus, only due to the internationality of the case for secured creditors in cross-border insolvencies. It does not do justice to the balance that in national insolvency laws is sought between the interests of the secured creditor on the one hand and the interests of the estate (and the unsecured creditors) on the other. Within the context of the Insolvency Regulation it seems appropriate to discuss as a solution to apply (in Member State B) the *lex rei sitae* (the insolvency law of the Member State in which the secured assets are located), therefore to confine the unlimited powers of a holder of a right in rem. But does such a solution in this (limited) cross-border context provide the right balance? Are secured creditors not overly protected on the whole, in legislations which have excluded or protected financial creditors from any consequences of insolvency? In 2007, Verougstraete (Chairman of the Belgian Court of Cassation) chastised the present state of such legal systems, characterising these as unreasonable and submitting that Europe deserves a new approach of collective insolvency proceedings. Here too securities law and insolvency law should walk hand in hand to find a fair balance.[45]

215. After a wide-ranging survey of the background to what we present as key indicators for a future legal skeleton of insolvent law, it is time to shut down the computer. One fact is undeniable: harmonisation of insolvency law in Europe is on the political agenda.[46] What should now be the most preferable approach? We consider it as of use to take a step back. In the introduction it was signalled that "harmonisation" and "insolvency law" for many centuries have been an awkward couple. A first observation for a future agenda is that insolvency lawyers should learn from the legislative process of the "Europeanisation" of contract law.[47] This process is still ongoing, but the first resolutions of the European Parliament date from over 20 years back. Would it be feasible and desirable to

43 Reinhart, o.c., Art. 5, 14; Sageart, review of Veder, o.c., in Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR) 6812 (2009).

44 Alexander Plappert, *Dingliche Sicherungsrechte in der Insolvenz*, Schriften zum Insolvenzrecht, Band 21, Baden-Baden 2008, 264.

45 Ivan Verougstraete, *Insolvabiliteit en zekerheden. 200 jaar Wetboek van Koophandel*, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 233ff, and the response to Verougstraete's report by Bob Wessels, Europe Deserves A New Approach To Insolvency Proceedings, in: A. Bruyneel et al., Bicentenaire du Code de Commerce – Tweehonderd jaar Wetboek van Koophandel, uitg. Larcier, Brussel, 2007, 267 et seq.

46 T.M. Bos, *Herziening van de Europese Insolventieverordening. Gedeeltelijke harmonisatie als wenkend perspectief?*, Nederlands Tijdschrift voor Handelsrecht 2012-3, 138ff.

47 For a (repeated) call to include property law in the debates on the future shape of European private law, see Sjef van Erp, Arthur Salomons, Bram Akkermans (eds), The Future of European Property Law, Munich: Sellier european law publishers, 2012.

work with a system of "options" in addition to existing norms within insolvency?[48] We feel that learning from successes and mistakes made in comparable processes may be beneficial for the drafting of any future agenda in this field.[49]

216. Secondly, we feel that what is needed for this first step in this area of harmonisation of law is genuine European legal scholarship, based on historic and comparative study, therefore too the establishment of multi-jurisdiction groups of researchers and practitioners.[50] The technique to be followed would reflect what earlier in the Report has been described as the Open Method of Coordination (OMC) which in addition to the use of the more traditional hierarchic forms of legislation, allows the use of other instruments (soft law). The OMC method includes certain common goals and the means to learn from one another how these goals should be achieved, which also take into account the development and spreading of best practices in an aim to achieve greater convergence towards the main EU goals. Where "harmonisation" of "insolvency law" in its combination will deal with complex, politically sensitive policy areas which involve a great degree of uncertainty as to which solution will achieve the results desired, the OMC could become the method of choice.[51]

What the next step will be is to be awaited. Our recommendations seem modest, but in the light of history and the experience of any process of reviewing insolvency legislation they seem sensible to us, meaning by baby steps.[52] Any grand achievement begins with a leap of faith and every 10 mile walk with a first step. *Dimidium facti, qui coepit, habet.*[53]

48 For instance the possibility of introducing an "option" of a "European Rescue Plan", for instance for the proposal of a plan covering a parent company and one or more subsidiaries incorporated in different Member States, as suggested in the INSOL Revision Report 2012, Chapter VI (The European Rescue Plan), 101ff.

49 For a comparable view ("Can administrative lawyers learn form private lawyers?"), Jan H. Jans, Towards a Draft Common Frame of Reference for *Public* Law, http://ssrn.com/abstract=1970307.

50 In this way for the process of "Europeanisation" of contract law Reinhard Zimmerman, The Present State of European Private Law, 57 The American Journal of Comparative Law, Spring 2009, 479ff.

51 See Jans, o.c., at 15. For an approach to draft "good" legislation, see Helen Xanthaki, Technical Considerations in Harmonisation and Approximation: Legislative Drafting Techniques for Full Transposition, in: Mads Andenas and Camilla Baasch Andersen (eds.), Theory and Practice of Harmonisation, Cheltenham: Edward Elgar, 2011, 536ff.

52 See for instance S. Block-Lieb and T. Halliday, Incrementalism in Global Lawmaking, Paper presented at the symposium 'Bankruptcy in The Global Village – The Second Decade, in: 32 Brooklyn Journal of International Law 2007, 851-903.

53 Horace, Epistles, Book I, Ep. 2, l. 40 (Freely translatable as: "Well begun is half done", or alternatively: "Once you've started, you're halfway there".).