REGIONAL TRAINING WORKSHOP
on THEORETICAL and PRACTICAL ASPECTS of JURISDICTION and the RECOGNITION of INSOLVENCY PROCEEDINGS

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The working materials are mostly excerpts from the following book: Miguel Virgos (Professor, School of Law, Universidad Autonoma de Madrid, Spain) and Francisco Garcimartin (Professor, School of Law, Universidad de Castilla-La Mancha, Spain): »The European Insolvency Regulation: Law and Practice«, 2004 Kluwer Law International

SPHERE OF APPLICATION OF COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 ON INSOLVENCY PROCEEDINGS

SPHERE OF TERRITORIAL APPLICATION

(1) **Article 3.1 of the Insolvency Regulation:** ***»The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.«***

(2) 'The centre of main interests' fulfils a double function: it determines when the Insolvency Regulation is applicable and which Member State has international jurisdiction to open main insolvency proceedings.

(3) In order for the Insolvency Regulation to apply, the location of the debtor's main interests in a Member State is enough. The nationality of the debtor or, in the case of companies and legal persons, the place of incorporation is irrelevant. The Insolvency Regulation applies to debtors whose centre of main interests are in a Member State even if they are nationals of non-Member States or companies incorporated in non-Member States. In the case of debtors whose centre of main interests is not in a Member State the Private International Law rules of each State will apply. The fact that they have an establishment (or assets) in a Member State is not sufficient for the Insolvency Regulation to apply.

(4) **Example**: When a company has its centre of main interests in a Member State the Insolvency Regulation is applicable even if the company has been incorporated under the laws of a non-Member State and has its registered office there. But the fact that the company has its registered office in a Member State shall create a simple presumption iuris tantum that the company also has the centre of main interests there.

(5) When the debtor's centre of main interests is located within the European Community, the Insolvency Regulation establishes the international jurisdiction of the courts of the Member States to open insolvency proceedings, regardless of the debtor's nationality or place of incorporation. Namely, the objective of the Insolvency Regulation is to encompass all of assets of the debtor, whether they are inside or outside the European Community.

(6) The Insolvency Regulation only governs conflict of laws with Member States (intra-Community conflicts). With regard to conflicts of laws with non-Member States, including Denmark (extra-Community conflicts), the Insolvency Regulation defers to the national Private International Law on insolvency matters of the Member States themselves.

(7) The rules of the Insolvency Regulation on recognition and enforcement apply to all insolvency decisions handed down by the courts of a Member State. But a decision rendered in a Member State in insolvency proceedings opened against an extra-Community debtor (i.e. a debtor whose centre of main interests is not located in a Member State) is not recognised in the other Member States.

(8) The rules of the Insolvency Regulation concerning the information due to the creditors and the lodgement of their claims only apply to creditors whose habitual residence, domicile or registered office is located in a Member State other than the one in which the proceedings are opened (intra-Community creditors). For creditors with habitual residence, domicile or registered office in a non-Member State (extra-Community creditors) the rules of national law apply.

SPHERE OF SUBJECTIVE APPLICATION (ELIGIBILITY)

(9) The Insolvency Regulation does not provide a definition of 'debtor' but refers this to the applicable national law. So the national law (lex fori concursus) determines who or what can be subject to insolvency proceedings. In addition to natural and juridical person the concept of debtor includes partnership and other unincorporated associations and even separate funds or assets, provided that they can be subject to insolvency proceedings under the applicable national law.

(10) The Insolvency Regulation does not contain any specific rule with regard to group of companies. So, for International Regulation, each person or legal entity is a separate debtor.

(11) The Insolvency Regulation expressly excludes from the subjective sphere of application insurance undertakings, credit institutions and investment undertakings which provide services involving the holding of funds or securities for third parties or qualify as collective investment undertakings.

SPHERE OF SUBSTANTIVE APPLICATION
(INSOLVENCY PROCEEDINGS INCLUDED)

(12) The Insolvency Regulation applies both to winding-up procedures and reorganisation proceedings. Pre-insolvency voluntary restructuring negotiations and schemes aimed at preventing insolvency proceedings remain outside the sphere of application of the Insolvency Regulation. However, the Insolvency Regulation only applies to those national insolvency proceedings that are expressly listed in the Annexes of the Insolvency Regulation.

(13) **Article 1.1 of the Insolvency Regulation:** ***»This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.«***

(14) The proceedings must be collective (on a joint bases), i.e. the Insolvency Regulation does not apply to procedures for the enforcement of individual claims.

(15) The proceedings must be based on the insolvency of the debtor but the Insolvency Regulation does not specify this situation. So the exact nature of the conditions by which the 'financial crisis' of the debtor manifests itself is established by national law.

(16) The proceedings must involve a total or partial divestment of the debtor, with regard to the assets or with regard to the debtor's powers. The Insolvency Regulation excludes any type of proceedings that leave the debtor in full control of his estate.

(17) Finally, the proceedings must entail the appointment of a liquidator (so called administrator, supervisor, trustee, commissioner or 'insolvency representative'), i.e. the person or body responsible for administering the estate or supervising the debtor's business.

(18) Only the proceedings expressly designated in the list (i.e. Annexes) are considered as insolvency proceedings for the purposes of the Insolvency Regulation. Once the proceedings have been included in the list, the Insolvency Regulation applies without any further review by the courts of other Member States. It is not necessary for the national courts to determine in every case whether or not the particular insolvency proceedings satisfy the relevant conditions. National courts will only have to examine whether or not the foreign proceedings are included in the list.

SPHERE OF APPLICATION IN TIME

(19) **Article 2.f of the Insolvency Regulation:** ***»The time of the opening of proceedings shall mean the time at which the judgement opening proceedings becomes effective, whether it is final judgement or not.«***

(20) The Insolvency Regulation only applies to insolvency proceedings opened after its entry into force, which means that where insolvency proceedings against a specific debtor have been opened before the Insolvency Regulation enters into force in a Member State, the proceedings which are thereafter opened against the same debtor and for the same situation shall not be subject to the provision of the Insolvency Regulation, regardless of whether the said latter proceedings are main or secondary.

(21) **Example**: If territorial proceedings have been opened against the debtor in a Member State before the Insolvency Regulation enters into force and main proceedings are opened in another (different) State after the Insolvency Regulation enters into force, the Insolvency Regulation will not apply to either of the two proceedings. And vice versa, if main proceedings have been opened in a State prior to the Insolvency Regulation entering into force and then territorial proceedings are opened in another, the Insolvency Regulation will not apply either. The Insolvency Regulation will only apply when the first insolvency proceedings against specific debtor have been opened after the Insolvency Regulation has come into force.

(22) The Insolvency Regulation does not modify the law applicable to acts carried out by the debtor before the entry into force of the Insolvency Regulation. That law continue to apply in determining their judicial regime. Namely, in no system are the effects of the insolvency determined by reference to the moment the act is carried out, but (with some exceptions) by reference to the moment when the insolvency proceedings are opened.

RELATIONSHIP WITH THE INTERNATIONAL CONVENTIONS

(23) The Insolvency Regulation replaces the International Conventions signed between two or more Member States in insolvency matters. But the Insolvency Regulation does not replace the International Conventions between Member States and non-Member States concluded before its entry into force.

RELATIONSHIP WITH THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

(24) The UNCITRAL Model Law on cross-border insolvency is not a law with legal force but rather a law that States can use as a model for designing their own international insolvency law. In this respect there is no risk of incompatibility or direct collision with the Insolvency Regulation.

THE MAIN INSOLVENCY PROCEEDINGS

INTERNAL JURISDICTION

THE CENTRE OF MAIN INTERESTS (COMI)

(25) The COMI is an autonomous concept, i.e. concept peculiar to the Insolvency Regulation. Its meaning is uniform and independent of the national law of the Member States. The method to determine the COMI must be the same for all Member States.

(26) The COMI is a concept of open character that can be applied to any class of debtor and to any type of organisational structure of the debtor.

(27) The Insolvency Regulation provides the concept with a legal definition (***»the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties«***), which furnishes a single meaning for all Member States.

(28) The term 'on a regular basis' indicates a quality of presence (continuity and normality). The term 'regular' indicates a degree of permanence but not impose a minimum time of prior presence in the market.

(29) The Insolvency Regulation establishes a presumption (***»in the case of a company or legal person the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary«)***, which simplifies the application of the COMI.

(30) The objective ascertainability of the COMI enables creditors to calculate the commercial or financial risk they face in the event of the debtor's insolvency.

TEST OF APPLICATION OF THE COMI

(31) The important factor when determining the COMI is the place where the interests are administered, not the place where those concrete interests are located. It is therefore the place from where the debtor conducts a certain activity. Consequently, the administrative connection (which is established in the place of management and control) must take precedence over the operational connection (which is established in the place of business or operations) and the asset connection (which is established in the place where the property is located). What matters is where the 'head' (the directing power) is located, not the 'muscles' (the assets, the factors of production, the market etc.).

(32) The relevant factor is the place where the administration of the company or legal person in question is situated, not the place where the people or the shareholders who possess the control over the company are located. In the case of subsidiary companies the relevant connection will be the place where the centre of administration (the head of the subsidiary company) is located. In the case of debtors who have a mobile organisational structure that transfers its management to the country of operations or rotates it periodically the centre of interests is the one established at the moment the request for the opening of the proceedings is presented.

(33) The important factor when determining the COMI is also the external organisation of the debtor, how the debtor manifests itself on a regular basis in the market. In the case of companies and legal persons the Insolvency Regulation does not expressly require any physical connection (premises or operational facilities). However, the legal definition presupposes a certain degree of material presence of the entity within the market. The representative (i.e. external) sphere is prevailing over the internal organisational sphere. The debtor cannot assert as his COMI a place other than the place from which he is seen in the market as taking his decisions and centralising the management of his affairs.

(34) If a corporate debtor has two or more places of management, it must be determined which of them appears as the directing centre, denoting the place where the executive or head office functions are carried out (i.e. the place of central administration), as opposed to the day to day operation of the business. Where the debtor's interests include activities of different types that are run from different places, the term 'main' requires consideration of both the scale and importance of the interests administered at each place. The one from which he administers his principal interests is the relevant one.

APPLICATION OF THE TEST

(35) In the case of corporate debtors the COMI will correspond to the place that appears as its central administration, i.e. the place from which the main activities of the entity are controlled and the ultimate decisions at the highest level are actually made.

(36) In the case of partnership and unincorporated associations (provided that they can be subject to insolvency proceedings) if no place of administration can be identified, the operational connections will regain relevance and the COMI will normally lead to the principal place of business or operations.

(37) In the case of individuals if the debtor is engaged in an independent business or professional activity the COMI will normally correspond to the State where he has his business or professional centre (i.e. his professional domicile), provided that it is

the business or professional activity that is at the root of the insolvency. In other cases it will be the individual's habitual residence.

(38) **Example**: If an independent professional has his personal habitual residence in one State and his place of business in another State, the latter is considered to be the COMI. If a person has his habitual residence in one State and his dependent work in another State, the former is considered to be his COMI.

(39) In the case of separate funds or estates (provided that they can be subject to insolvency proceedings) the COMI will normally be the place where their external administration is located.

COMPANIES AND LEGAL PERSONS

(40) **Article 3.1 of the Insolvency Regulation:** ***»In the case of a company or legal persons the place of the registered office shall be presumed to be the centre of the main interests in the absence of proof to the contrary.«***

(41) The presumption is a presumption iuris tantum that accepts proof to the contrary. The possibility of proof to the contrary means that the divergence between the functional realities (the reality test) and the registered office (the formal test) will be resolved in favour of the former.

(42) The presumption is a key instrument for legal certainty. It provides a rule on the burden of proof that rests upon any party wishing to displace its application. Namely, in the absence of elements in favour of another different location the presumption is taken as valid and it is the registered office connection that counts. It also provides a rule for resolving doubts. Although other connections are claimed and proven, if the overall assessment of that connection does not provide a reasonably clear result in favour of the location of the COMI in a State other than the State of the registered office, the presumption prevails.

(43) The Insolvency Regulation contains no rule concerning jurisdiction in the case of group of companies, so that each debtor must be considered separately. Under the Insolvency Regulation the concept of COMI refers to each debtor, not to the group. COMI should not be determined by third parties by investigating the group structure. Namely, this would make it much more difficult for potential creditors to determine beforehand which insolvency regime would apply to insolvency of a company. In addition, a simple change in control would automatically modify that regime and the rights of all creditors, creating strong incentives for forum shopping.

(44) Concentration of COMI in the same Member State: when the subsidiary companies are incorporated in different States but their COMI can be considered to be located at the group's centre (i.e. where the parent company has its own COMI).

(45) Dispersion of COMI: when the companies forming part of a group have their respective COMI in different Member States. In a parent-subsidiary setting the problem can be dealt downwards, by taking immediate control of the subsidiaries, or upwards, by means of possible liability actions against the parent company or its directors. In a brother-sister setting (if parallel insolvency proceedings are opened against two or more affiliated companies) the problem can be dealt by applying by analogy some of the rules of the Insolvency Regulation on the coordination of proceedings.

INTERNAL TERRITORIAL JURISDICTION

(46) Territorial jurisdiction is determined by the law of each State. In practice this means a double consultation to identify the competent courts: first to identify to which Member State the Insolvency Regulation points and second to turn to the law of that Member State to determine the relevant territorial unit.

(47) **Example**: If a debtor's COMI is located in Scotland but his registered office is situated in England, then the Insolvency Regulation does not bar the possibility of opening the main insolvency proceedings in England, provided the internal rules of the United Kingdom allow it.

(INTERNATIONAL) JURISDICTION

(48) An examination of the grounds of jurisdiction must be conducted on its own motion (i.e. ex officio) by the national courts. If the judge concludes that the COMI is not in his State, this does not mean that he cannot open insolvency proceedings against the debtor. If the connection is valid as an establishment, he can open territorial proceedings. If the COMI is not located in the European Community, he will follow the national rules of his State regarding international jurisdiction (the Insolvency Regulation does not apply).

(49) The national judge cannot refuse the jurisdiction conferred upon him by Article 3 of the Insolvency regulation on the grounds that he considers it more advisable for the proceedings to open in another State.

(50) The relevant moment to establish international jurisdiction is when the application to open insolvency proceedings is filed. The principle of perpetuatio fori applies, i.e. a later transfer of the debtor to a different State does not alter the jurisdiction of the court.

(51) The Insolvency Regulation does not establish a fixed time limit for transfer of the COMI from one State to another prior to the application for insolvency proceedings. Accordingly, the judge must look at the facts and circumstances in each case. A reality test is implied which means that the new location should be genuine, i.e. it should be based on real facts. The new location should be the place where the debtor 'conducts' a certain activity ('the administration of his main interests') in a certain way ('on a regular basis').

CONFLICTS OF JURISDICTION

(52) Only a single main insolvency procedure may be opened with regard to the same debtor in the Community. International jurisdiction corresponds, exclusively, to the Member State where the COMI of the debtor is located. In the case of positive conflict (when two States consider the debtor's COMI to be located in their territory) the principle of temporal priority applies. When two national courts consider themselves competent to open main insolvency proceedings the first procedure opened takes the precedence over the second.

(53) Once the court that deals with the matter first adopts the decision to open proceedings on the basis of the location of the COMI in its territory the courts of all other Member States are obliged to acknowledge this decision without these courts having the power to control the jurisdiction of the court of origin. If a party in interest does not agree with the jurisdiction of the courts of the Member State that has opened the proceedings, then it must contest that jurisdiction through the means of appeal that exist in that State. The correct application of the Insolvency Regulation by courts of justice of that State is guaranteed by possibility of requesting a preliminary ruling on interpretation to the European Court of Justice.

(54) **Example**: If, once main proceedings have been opened in Member State A, the opening of main proceedings are requested in another State (Member State B), then this second petition must be rejected. If, lacking knowledge of the first proceedings, main proceedings are opened in Member State B, then these second proceedings must be dismissed or transformed into territorial proceedings. If the petition is first made in Member State A and, before the proceedings are opened, it is also requested in Member State B, then the courts of the second State (Member State B) must wait to hear the decision of the courts in the first State (Member State A).

(55) In the case of negative conflict, when the court of a Member State rejects the request to open proceedings on the grounds of its lack of international jurisdiction, the courts of the other States can not reject their own jurisdiction by claiming that, in their opinion, the court of the first State was competent one to seize the case.

(56) **Example**: The court considered that a debtor, who was stated that his habitual residence was in Spain and who according to the Swedish Register Office was recorded as emigrated to Spain, had no COMI in Sweden. So, if a request for proceedings is made in Spain, the Spanish courts will have to accept this 'no' and resolve the doubt on whether the COMI was in Sweden or Spain in favour of the latter.

(57) Foreign decisions (decisions of the courts of non-Member States) and proceedings that infringe on the exclusive jurisdiction established in favour of Member States can not be recognized.

INSIOLVENCY MATTERS

(58) Article 3 of the Insolvency Regulation confers international jurisdiction on the courts of the debtor's COMI in relation to insolvency proceedings but does not define the extent of this jurisdiction. However, the gap is only apparent. This silence simply means that the criteria already established by Article 1.2.b of the 1968 Brussels Convention (on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters) as interpreted by the European Court of Justice for the demarcation of civil and commercial disputes from insolvency matters will continue to operate. Namely, Article 1.2.b of the Brussels Convention excluded the core insolvency proceedings themselves (i.e. proceedings that are integral to the administration of the estate) and the European Court of Justice clarified that other proceedings arising in the context of an insolvency will also be excluded, if they derive directly from the bankruptcy or winding-up and are closely connected with the insolvency proceedings. This criterion is now applicable to Regulation 44/2001 (on Civil Jurisdiction and Enforcement). Namely, the test of exclusion of 'insolvency matters' from the Regulation 44/2001 is the same as the test of inclusion in the Insolvency Regulation.

(59) The Insolvency Regulation does not apply to all kinds of insolvency proceedings but only to those listed in Annexes. Furthermore, certain debtors (credit institutions, insurance undertakings and investment undertakings) are excluded from its scope. If the insolvency proceedings opened are not included in Annexes or the debtor is not eligible debtor, the test of exclusion from the Regulation 44/2001 will be satisfied, but not the test of inclusion in the Insolvency Regulation. In such cases the Directives of restructuring and winding-up of credit institutions, insurance undertakings and investment undertakings (regarding unlisted proceedings) or the Private International Law rules of the Member State (regarding non-eligible debtors) will be applicable.

(60) The matters under the jurisdiction of the court of opening:

- the opening, conduct and closure of insolvency proceedings and all questions strictly forming part of the core insolvency procedure itself (the divestment of the debtor; the appointment of a liquidator; the formation and administration of the estate; the modification or termination of the stay; the admission, verification and ranking of the claims; the confirmation of compositions or plans; the collection and liquidation of assets of the estate; the distribution; the closure and discharge)

- actions which, without forming part of the insolvency procedure itself, derive directly from the insolvency proceedings and which are closely linked with them

- preservation measures.

(61) The matters that may be considered as insolvency matters that fall under the jurisdiction of the court of opening:

- disputes between the liquidator and the debtor related to whether or not an asset belongs to the estate

- disputes related to the exercise of the powers of the liquidator, including any liability which may arise there from

- proceedings to determine, avoid or recover preferences, fraudulent conveyances or other acts which are detrimental to the general body of creditors

- disputes concerning the ability of the liquidators to assume or reject executory contracts

- applications which, within the context of insolvency proceedings opened against a body-corporate, permit the court to decide, in the benefit of the general body of creditors, that the debts of the body-corporate will be borne, wholly or in part, by the managers of the business, and which make it possible to open insolvency proceedings against them without having to verify whether they are unable to meet their liabilities

- those actions that are based on insolvency law and are only possible while the insolvency proceedings are opened (i.e. inside insolvency).

(62) The matters that fall under the jurisdiction of the national courts (in all these matters related to the specific relationships between the debtor and the creditor or other interested parties, i.e. the debtor's debtors, jurisdiction is not modified by the Insolvency Regulation):

- actions which seek to determine the extent, content, validity or amount of a claim
- actions to recover debts owing to the insolvent debtor
- actions for the recovery of another's property in possession of the debtor
- claims to separate assets from the estate based on a right in rem
- disputes concerning the right to set-off (except in cases of insolvency set-off of procedural nature)
- all actions that could have been undertaken even without the opening of insolvency proceedings.

(63) Once the administrator or liquidator comes into play the contracts and transactions he concludes on behalf of the estate are also subject to ordinary rules on international jurisdiction (i.e. under the Regulation 44/2001), but not disputes concerning the use of his powers or the avoidance of his acts, which fall under the jurisdiction of the court of opening (under the Article 3.1 of the Insolvency Regulation).

(64) Proceedings related to restructuring schemes and compositions entered into by the debtor and his creditors before the commencement of insolvency proceedings fall outside the scope of article 3.1 of the Insolvency Regulation. These agreements are subject to the ordinary rules regarding international jurisdiction.

(65) The Insolvency Regulation confers jurisdiction over insolvency-derived actions on the courts of opening, but does not prevent the liquidator (or other empowered person) from deciding to waiver the possibility offered by the Insolvency Regulation and to bring the action before the normally competent court, for the purposes of avoiding feared added costs or delays or for any other reason.

PRESERVATION MEASURES

(66) Preservation measures are of the auxiliary nature. The Court of Justice has already pointed out that their regime is not determined by their own nature but by the nature of the rights they serve to protect. In the case of insolvency proceedings

subject to the Insolvency Regulation the same Regulation will also apply to the preservation measures. In the case of insolvency proceedings subject to national law (i.e. when the debtor's COMI is in a non-Member State) the same law will also apply to the preservation measures.

(67) Preservation measures can be ordered either by the courts with jurisdiction to open the main insolvency proceedings or by courts of the Member State where the measure has to be put into effect.

(68) The jurisdiction of the courts of the debtor's COMI encompasses jurisdiction to adopt preservation measures regardless of where the assets or the persons affected are located. These measures will be recognised and enforced in the other Member States. It falls to national law to decide which preservation (or provisional) measures can be adopted.

(69) Preservation measures may be ordered from the moment the request for the opening of insolvency proceedings is filed. Such measures may be demanded by the liquidator (including the temporary administrator) or any other person authorised according to the law of the State of opening.

(70) The courts of the place where the preservation measures (or the provisional orders) have to be put into effect (i.e. the courts of the place where the assets are located) also have jurisdiction to adopt them. In this case the measures will have territorial scope and will be subject to the law of the State in question. As the aim of the preservation measures is to ensure the effectiveness of the main proceedings they are subordinated to the decisions of the courts of opening of the main proceedings that may order the lifting, modification or continuation of those preservation measures.

(71) Article 38 of the Insolvency Regulation expressly empowers the temporary liquidator of the main proceedings to request preservation measures of a general nature that specifically protect the effects of the opening of insolvency proceedings. In the case of territorial insolvency proceedings jurisdiction to adopt preservation measures corresponds to the courts of the State that opens those proceedings.

(72) If the credit institution has its head office inside the European Community, jurisdiction to adopt restructuring measures or initiate winding-up procedures belongs exclusively to the authorities of the Member State of origin (i.e. the State that authorised the credit institution to take up its activities). If the credit institution has its head office outside the European Community, but has a branch (i.e. a place of business which forms a legally dependent part of a credit institution and which carries out transactions inherent in the business of a credit institution) in a Member State,

jurisdiction to adopt restructuring measures or initiate winding-up procedures in connection with that branch belongs to the host Member State of the branch.

(73) If the insurance undertakings have its head office inside the European community, jurisdiction to adopt restructuring measures or initiate winding-up procedures belongs exclusively to the authorities of the Member State of origin (i.e. the State that authorised the insurance undertakings to take up its activities). If the insurance undertakings has its head office outside the European Community, but has a branch office in a Member State, jurisdiction to adopt restructuring measures or initiate winding-up procedures in connection with that branch belongs to the host Member State of the branch.

APPLICABLE LAW:
THE LEX FORI CONCURSUS AS GENERAL RULE

(74) Any problems of applicable law that may arise in insolvency proceedings are resolved in all of the Member States in accordance with the same rules. The law of the State of opening (lex fori concursus) governs the insolvency proceedings in all of its stages and in all of its effects. The exceptions to the lex fori concursus are contained in Articles 5-15 of the Insolvency Regulation which point to the application of a different national law, for example to the law governing the right in question itself (lex causae), or directly exempt certain rights from the effects of the insolvency proceedings.

(75) When the conflict of laws rules contained in the Insolvency Regulation refer to the law of a Member State, they make reference to the domestic law of that State, irrespective of its rules of Private International Law.

THE LAW OF THE STATE OF OPENING OF PROCEEDINGS

(76) **Article 4.1 of the Insolvency Regulation:** ***»Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.«*** This rule (lex fori concursus) determines the competent jurisdiction directly and the applicable law indirectly.

(77) Article 4.2 of the Insolvency Regulation contains a list of specific matters that are subject to the law of the State of opening. This list is not exclusive. Its function is to facilitate the interpretation of the general rule contained in Article 4.1 of the Insolvency Regulation and to resolve any problems of characterisation or doubts that may arise with regard to its application.

(78) The fact that the Insolvency Regulation bases the jurisdiction to open insolvency proceedings on the debtor's COMI has no bearing on the question of the law applicable to the company. Companies maintain their original status (lex societatis remains the same) even if the COMI lies within the forum for the purposes of commencing insolvency proceedings. For **example**, the question of whether a company incorporated in a Member State should be treated as a limited company has to be determined according to the law of its incorporation.

(79) Once insolvency proceedings have been opened in accordance with the Insolvency Regulation all of the available alternatives with regard to that procedure are governed by the law of the State of opening. The lex fori concursus will determine whether and under what conditions it is possible to propose, approve and implement a reorganisation plan, a composition or a comparable measure.

(80) In principle, a reorganisation plan or a composition does not affect the rights of creditors against third parties, such as joint debtors or guarantors. Such rights may have been created precisely to protect creditors against the event of the insolvency of the debtor. The general rule is that the consequences that the insolvency of the debtor may have on those rights are determined by the law governing the right in question (lex causae). But in the case when the rights of recourse that those third parties may have against the insolvent debtor are affected by the plan, the consequences are determined by the lex fori concursus.

(81) The composition approved by the court or competent authority is recognised automatically in other Member States. It extends its effects there without any additional formalities. The effect that the reorganisation plan can have on the insolvent company or firm is governed by the law of the State of opening (lex fori concursus). The plan can establish any corporate measure (e.g. capital increases or reductions, modifications of the articles of association, mergers) known to the lex societatis (provided that measure is necessary for reorganisation purposes), but not the others. Corporate measures are not suitable to be adopted in territorial proceedings.

(82) Consensual restructurings and private workouts remain outside the scope of the Insolvency Regulation. Also corporate workouts (financial restructuring agreements between the company and its principal creditors) that take place outside the confines of insolvency law.

EXCEPTIONS TO THE LEX FORI CONCURSUS

(83) They enable the legal certainty and protection of legitimate expectations: the preservation of rights or interests specially protected by the laws of Member States from the uncertainties or inconsistencies in policy that may result from the application of a foreign lex concursus. They also minimize costs and reduce the overall complexity of the insolvency proceedings.

(84) In the case of Articles 5 and 7 the Insolvency Regulation excludes from the effects of the insolvency proceedings certain rights located abroad. By means of 'negative' conflict of laws rule it treats the rights as if there was no insolvency. In the case of Articles 8-10 the Insolvency Regulation subjects the effects of the insolvency proceedings not to the law of the State of opening (lex concursus) but to the national law that governs the right in question (lex causae). In this way the effects of insolvency proceedings opened in a Member State on a right whose applicable law is that of a different Member State will be the same as if the insolvency proceedings had been opened in this latter State. In the case of Articles 11 and 13 the Insolvency Regulation combines the application of the law of the State of opening with the national law that governs the right in question.

RIGHTS IN REM OF CREDITORS OR THIRD PARTIES

(85) **Article 5.1 of the Insolvency Regulation:** ***»The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets - both specific assets and collection 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 opening of proceeding.«***

(86) Article 5.1 of the Insolvency Regulation establishes a rule of non-alteration of the rights in rem of creditors or third parties in respect of those assets of the debtor that are located in a State other than the State of opening. This Article is not a rule which attributes new right; it is a rule which simply recognises and protects rights in rem acquired before the opening, according to the applicable non-insolvency national law. This Article only recognises authentic rights in rem. And finally, this Article cannot be used to confer more powers upon the holder of a right in rem than those that he would have according to non-insolvency law.

(87) Article 5.1 of the Insolvency Regulation only applies to those rights in rem constituted before the proceedings were opened. This Article would require, when various steps are necessary for perfection according to the applicable law, that all of the necessary acts be completed prior to the opening of the proceedings, bearing in mind **Article 5.3 of the Insolvency Regulation:** ***»The right, recorded in a public***

register and enforceable against third parties, under which a right in rem …….. may be obtained, shall be considered a right in rem.«

(88) Creditors who have not succeeded in perfecting a pre-insolvency right in rem under the national applicable law before the opening of insolvency proceedings in another Member State will not benefit from the 'non-effects' rule established in Article 5.1 of the Insolvency Regulation. Consequently, the lex fori concursus will determine the effects of the insolvency proceedings on subsequently created rights.

(89) The relevant time at which the situation of an asset is to be determined is the opening of insolvency proceedings. Article 5.1 of the Insolvency Regulation comes into play if the asset (i.e. collateral) is situated in another Member State at that time. Subsequent changes of location do not alter this result.

(90) Article 5.2 of the Insolvency Regulation recognises rights in rem over all types of property: intellectual and industrial property rights, claims and receivables; shifting pool of assets (e.g. the floating charges of the laws of Great Britain and Ireland); the beneficial use of an asset.

(91) In principle, present property is considered to include potential property (property not yet in existence but growing out of property which is in existence). So, the grant of security over the potential property will be treated as present assignment of existing property.

(92) **Example**: An assignment by way of guarantee of the right to receive sums payable in the future under a contract already concluded by the time the insolvency proceedings are opened benefits from Article 5 of the Insolvency Regulation; but not the assignment of sums payable under future contracts (or other claims that may arise from a future activity of the assignor).

(93) A clam is a right to payment of a monetary sum or to performance of a non-monetary obligation. Claims are located at the place where the third party required to meet them (debitor debitoris) has his COMI. In practice this will be the domicile of that party. The concept of control underlies this location. Article 5 of the Insolvency Regulation applies to liens in respect of claims (e.g. debt charges and receivables) and assignment of claims by way of guarantee, when the debtor's debtor (debitor debitoris) has his domicile in a State other than the State of opening.

(94) **Example**: A Spanish company A is the holder of a claim against a German company B. According to the rules on the location of assets this claim is considered to be located in Germany. The Spanish company then assigns the claim by way of guarantee to a third party C. If insolvency proceedings against company A are opened

in Spain, the assignee of the claim C is protected by Article 5 of the Insolvency Regulation.

(95) When the debtor's debtor has his domicile in the State of opening, the lex fori concursus will determine the effects of the insolvency on that lien or assignment, even if the law applicable to that lien or assignment is not the law of the State of opening. In this case an extensive interpretation of Article 5 of the Insolvency Regulation is not justified.

(96) The legal consequence provided for by Article 5 of the Insolvency Regulation is that the main insolvency proceedings cannot interfere with security rights held over assets located outside the State where the insolvency proceedings are opened. This means, e.g. that the holder of a security right can exercise and enforce that security in accordance with the proper law of the security regardless of whether or not the law of the State of opening permits this. The holders of rights in rem are not subject to insolvency-law restrictions arising from either the law governing the main insolvency proceedings or the law governing the security interest (e.g. the law of the place where the collateral is located).

(97) The rule of 'non-alteration' only covers the right in rem over an asset, not the asset itself. But, due to the fact that the asset itself forms part of the estate, the creditor is obliged to surrender to the estate any surplus arising from the enforcement in respect of the asset. On the other hand, when the value of the asset does not cover the whole of the claim, the position of the creditor is subject to the lex fori concursus.

SET-OFF

(98) Set-off my be described as the discharge of reciprocal obligations to the extent of the smaller obligation. Set-off presupposes the existence of two distinct claims, the primary claim, which is the claim owed to the insolvent debtor, and the cross claim, which is the claim owed to the creditor, that are set against each other to produce a single balance.

(99) **Article 6.1 of the Insolvency Regulation:** ***»The opening of the insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.«***

(100) Article 4 of the Insolvency Regulation establishes the application of the lex fori concursus as the basic rule, but Article 6 establishes an exception to Article 4 in order to protect legitimate expectations and the certainty of transactions. Article 6 of the Insolvency Regulation permits set-off if this is possible, in cases of insolvency, in accordance with the law governing the claim where the insolvent debtor is the

creditor in relation to the other party (i.e. insolvent debtor's claim). This provision crystallizes the right to set-off in a national law which is predictable from the very moment of contracting, even though the debtor may become insolvent at a later date under a different national law.

(101) Article 6 of the Insolvency Regulation permits the acquisition of a right to set-off in accordance with a law that can be determined at the very moment of contracting or incurring the obligation (the law governing the primary claim) and ensures that this right will be recognised in the insolvency of the debtor.

(102) Article 6 of the Insolvency Regulation applies when the claims arose out of contracts or other dealings entered prior to the opening of the insolvency proceedings, even if they were, at that moment, mature or unmature, contingent or not.

(103) The insolvency proceedings and their effects are governed by the lex fori concursus. It will govern both the possibility and the conditions of set-off in the event of insolvency. If the lex concursus does not allow for set-off (e.g. since it requires both claims to be liquidated, matured and payable prior to a certain date), then Article 6 of the Insolvency Regulation constitutes an exception to the general application of that law in this respect.

(104) The lex fori concursus only governs the possibility of enforcing the right to set-off in the insolvency, but not the existence of this right. The right to set-off constitutes a 'preliminary question' to be decided by the national law which governs the claim to be set off. Consequently, if in accordance with the non-insolvency rules of the national law that governs this claim, the creditor can discharge his obligation by way of a set-off, the conditions under which this right may be invoked in the insolvency of the debtor are determined by the lex fori concursus.

(105) Even when set-off is not possible through the application of the lex fori concursus, it would still be possible when the law which governs the insolvency debtor's claim (or 'prior claim') permits set-off in spite of the insolvency of the debtor (or precisely because of it).

(106) The pre-insolvency right to set-off is subject to its applicable law, but whether this right can be invoked or not in the insolvency of the counterpart (and whether or not specific conditions are required for this to be possible) is subject to the lex fori concursus.

(107) The regime of actions to set-aside (i.e. the actions of voidness, voidability or unenforceability of those acts which are detrimental to the creditors as a whole) that might affect a set-off protected by Article 6 of the Insolvency Regulation is subject to the lex fori concursus. However, Article 13 of the Insolvency Regulation permits the

application to be excluded if the beneficiary of the act in question proves that the said act is legally unquestionable according to the national law that governs it (i.e. the lex causae).

(108) Contractual set-off enables parties dealing with each other to combine an account in credit with an account in debt and to restrict liabilities to the payment of the resulting balance. Contractual set-off is governed by the law applicable to the contract establishing the set-off arrangement. Actions to set-aside detrimental acts would remain the competence of the law lex fori concursus.

(109) The conditions for applying the set-off will be those agreed by the parties within the framework of the autonomy that the national applicable law allows them. Article 6 of the Insolvency Regulation does not establish any specific condition or limit to set-off agreements different from those established by the national applicable law.

CONTRACTS

(110) In the event of insolvency the lex fori concursus will determine, for example, whether the declaration of opening modifies the possibilities of terminating the contract (e.g. whether or not 'ipso facto' clauses cancelling the contract in the event of insolvency are effective) and the powers of the liquidator to choose to continue or disclaim contracts.

(111) Unless the lex fori concursus provides otherwise for insolvency reasons the termination of individual contracts due to their personal or intuitu pesonae nature is subject to the lew concursus. The dissolution of partnership or a corporate body is subject to the lex societatis. In the case of contracts subject to a public law regime (e.g. administrative contracts) the law of the State in question must be taken into account.

(112) The effects of the insolvency on current contract relating to immovable property (Article 8 of the Insolvency Regulation) and on contracts of employment (Article 10 of the Insolvency Regulation) are not subject to the lex fori concursus but to the insolvency rules of the law where the property is located or of the lex contractus. The purpose of exceptions is to prevent conflicts between legislative policies. In the majority of Member States these two types of contracts are subject to mandatory rules whose aim is to protect general or social interests linked to a particular State.

(113) **Article 8 of the Insolvency Regulation:** ***»The effects of insolvency proceedings on a contract conferring the right to acquire or make use of***

immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated.«

(114) This provision applies not only to contracts covering the use of the property (e.g. rental or leasing) but also to those covering the transfer of the asset (e.g. purchase and sale).

(115) **Article 10 of the Insolvency Regulation:** ***»The effects of insolvency proceedings on employment contracts and relationship shall be governed solely by the law of the Member State applicable to the contract of employment.«***

(116) The continuance of the business either in the State of the opening or in the other Member State will be decided in the main proceedings. However, the law governing the employment contracts or relationship will be the one to determine the effects of the insolvency proceedings on these contracts or relationships, as if the insolvency proceedings had been open in that State. The expression 'on employment contracts and relationship' makes it clear that the special connection protects not only the effects on the contract itself but also on the rights and obligations as a whole.

(117) The characterisation of a relationship as an employment relationship for the purpose of the Article 10 of the Insolvency Regulation is the 'autonomous characterisation', i.e. a characterisation that derives from the sense and purpose of the Regulation itself and from the EC context. And it is not the Insolvency Regulation that determines the law applicable to this relationship but the ordinary rules of Private International Law of the Member State, specially the 1980 Rome Convention on the law applicable to contractual obligations.

RIGHTS SUBJECT TO REGISTRATION

(118) **Article 11 of the Insolvency Regulation:** ***»The effects of insolvency proceedings on the rights of the debtor in immovable property, a ship or an aircraft subject to registration in a public register, shall be determined by the law of the Member State under the authority of which the register is kept.«***

(119) Article 11 of the Insolvency Regulation does not protect creditors or third parties' right but the system of registration as such and the level of legal certainty that it ensures. Article 11 only governs the effects of the insolvency proceedings on the rights of the debtor.

(120) Article 11 of the Insolvency Regulation gives competence to the law of the State of the Register but does not exclude the application of the law of opening (lex fori concursus). The law of the State of the Register can not impose effects which are

not required by the lex fori concursus and the lex fori concursus can not order effects which are inadmissible or do not exist in the law of the State of the Register.

(121) The lex fori concursus determines what effects the insolvency proceedings seek to produce on the debtor's rights over registered assets. The law of the Register determines the admissibility and registrability of those effects: where or not such effects can actually be admitted; which entries are to be made when insolvency proceedings are opened; the legal consequences of such an entry (or the absence thereof).

DETRIMENTAL ACTS

(122) **Article 4.2.m of the Insolvency Regulation:** ***»The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.«*** The reason is clear. These rules seek to protect the estate from transfers that diminish the estate available to the general body of creditors (e.g. fraudulent or undervalued transfers) and ensure that creditors are treated equally when the debtor is insolvent.

(123) **Article 13 of the Insolvency Regulation:** ***»Article 4.2.m shall not apply where the person who benefited from an act detrimental to all creditors provides proof that: the said act is subject to the law of a Member State other than that of the State of the opening of proceedings and that law does not allow any means of challenging that act in the relevant case.«***

(124) This rule seeks to uphold the legitimate expectations of creditors or third parties regarding the validity of the act. This is a question that the court cannot decide on its own motion. The beneficiary must allege. The burden of proof falls upon him.

(125) The act is open to challenge in fact, i.e. after taking into account all of the specific circumstances of the case. It is not enough to determine that it can be challenged in the abstract.

(126) The act must not be capable of being challenged using either the insolvency rules or the general rules of the national law applicable to the said act. The act should be really unassailable according to the law that governs it.

(127) **Example**: If the act was capable of being challenged according to the lex causae but the time for bringing an action has elapsed, there is no reason to consider the act as challengeable.

(128) The law governing the act in question should be that of a Member State. This law seeks solely to determine whether or not the act is challengeable. If the beneficiary of the act proves that, according to this law, there are no specific means allowing the act in question to be challenged, the application of the lex fori concursus is discarded and the validity of the act is respected. Otherwise, Article 4 of the Insolvency Regulation operates normally and the lex fori concursus apply (all the conditions for and consequences of the avoidance are determined by the lex fori concursus).

(129) In the case of territorial insolvency proceedings the rules of the local lex fori concursus on the set-aside of detrimental acts only apply insofar as damage has been caused to the debtor's assets which were located in the State in question at the relevant time.

THIRD PARTY PURCHASERS

(130) **Article 14 of the Insolvency Regulation:** ***»Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of an immovable asset, or a ship or an aircraft subject to registration in a public register, or securities whose existence presupposes registration in a register laid down by law, the validity of that act shall be governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.«***

(131) The sense and purpose of this exception to the lex fori concursus is to uphold the confidence of third parties in the content of public registers vis-a-vis the effects of the lex fori concursus (e.g. restrictions upon the debtor's power of disposal).

(132) If the declaration of insolvency in another Member State has still not been reflected in the local register and the debtor disposes of an asset to a third party who is unaware of the opening of the insolvency proceedings, it seems reasonable that protection of the third party acting in good faith from the risks resulting from the debtor's insolvency be no different in respect of foreign insolvency proceedings than of domestic ones. In other words: the protection provided in the event of foreign insolvency proceedings can not go beyond the protection provided in the case of comparable domestic insolvency proceedings.

(133) The difference between the provisions of Article 24 and Article 14 (both of the Insolvency Regulation) is that in Article 24 the Insolvency Regulation establishes a substantive rule: the good faith of the third-party debtor of the insolvent is upheld by means of a presumption iuris tantum: the person honouring the obligation to the insolvent is presumed to have been unaware of the opening of insolvency proceedings as long as the foreign declaration of insolvency has not been made public

there, while in Article 14 the Insolvency Regulation establishes a conflict of laws rule: it is the law of the State where the immovable asset is located or under the authority of which the register is kept which will determine who is protected when the opening of the insolvency proceedings or the restrictions on the debtor have not yet been entered or referred to in the register in question.

(134) The provision of Article 14 of the Insolvency Regulation only applies to acts of disposal for consideration, not those that are free of charge.

LAWSUITS PENDING

(135) **Article 15 of the Insolvency Regulation:** ***»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.«***

(136) The effects of the opening of insolvency proceedings on individual enforcement actions by creditors (such as distress, execution, attachment or sequestration) are governed by the law of the State of the opening (according to Article 4.2.f of the Insolvency Regulation). The main insolvency proceedings can stay (if they have already started) or prevent (if not yet started) any individual enforcement actions brought by the creditors against the debtor's assets in other States. However, the effects of the insolvency proceedings on lawsuits pending regarding assets or rights of which the debtor has been divested are subject to the law of the State where the lawsuit is pending (lex fori processus). This law will decide whether the proceedings are to be suspended or may continue subject to any procedural modification necessary in order to reflect the loss or the restriction of the powers of disposal and administration of the debtor and the intervention of the liquidator in his place.

(137) The decision opening insolvency proceedings does not affect the jurisdiction of the court which is dealing with the lawsuit pending, even when the national law of the litigation forum (lex fori processus) provides for the concentration of all litigation involving the debtor in the insolvency court (vis attractiva concursus).

(138) Article 15 of the Insolvency Regulation refers to lawsuits pending at the time the insolvency proceedings are declared open. The concept of 'pending' means that the plaintiff has concluded the necessary actions, that depend on him, for the process to begin prior to the opening of the insolvency proceedings.

(139) Article 15 of the Insolvency Proceedings only contemplates lawsuits pending in Member States. Arbitration proceedings are equivalent substitutes to ordinary legal proceedings in all Member States.

(140) The effects of reorganisation measures or winding-up proceedings (under the Directives on credit institutions and insurance companies) on lawsuits pending will be governed by the law of the Member State in which the process is pending, as an exception to the lex fori concursus, but the effects of such measures and proceedings on the enforcement of the decisions resulting from those lawsuits will be governed by the law of Member State of origin (i.e. the lex fori concursus).

APPLICABLE LAW:
UNIFORM RULES

PUBLICATION

(141) Publication of the declaration in the State of opening and in non-Member States is determined by the lex fori concursus. Publication in other Member States is optional and is governed by the provisions of Article 21.1 of the Insolvency Regulation.

(142) **Article 21.1 of the Insolvency Regulation:** ***»The liquidator may request the notice of the judgement opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Such publication shall also specify the liquidator appointed and whether the jurisdiction rule applied is that pursuant to Article 3.1 or Article 3.2.«***

(143) The Insolvency Regulation leaves the publication decision to the liquidator. It falls to him to decide whether or not it is appropriate to publish in other States the decision opening insolvency proceedings and his appointment as liquidator. But this does not prevent the courts of the State of opening from ordering, in their own motivation, this publication to take place, if their national law so permits.

(144) Publication in a Member State where the debtor has an establishment may be obligatory, if the law of the Member State in question expressly requires this. But the Council Directive 89/666/EEC of 21 December 1989 provides for the mandatory disclosure in the Member State in which a branch is situated of any insolvency proceedings to which the company is subject.

(145) The mandatory publication required by the law of the State where the debtor has an establishment must be arranged by the liquidator or by the authority empowered to that effect in the Member State where the main insolvency proceedings have been opened. The States cannot make publication a pre-condition for the recognition of the decision opening the proceedings. The sanction for the breach of this requirement cannot be a refusal to recognise but can lead to liability on

the part of the liquidator according to the rules of the State which imposes this obligation upon him.

(146) The mandatory content required by the Member State of the establishment may not go beyond the information mentioned in Article 21.1 of the Insolvency Regulation. While for the State of the opening of the insolvency proceedings it constituted the minimum content to be published in other member States, for the Member State where the debtor has an establishment it is the maximum content of the obligation which that State can impose.

REGISTRATION

(147) Registration in the State of opening and in non-Member State is governed by the lex fori concursus. Registration in other Member States is, in principle, optional and is governed by the provisions of Article 22.1 of the Insolvency Regulation. However, registration in a Member State may be mandatory if the law of this Member State expressly requires it.

(148) **Article 22.1 of the Insolvency Regulation:** ***»The liquidator may request that the judgment opening the proceedings referred to in Article 3.1 be registered in the land register, the trade register and any other public register kept in the other Member States.«***

(149) This possibility only refers to the main insolvency proceedings, because territorial proceedings do not produce effects on assets located outside the opening proceedings.

(150) **Article 22.2 of the Insolvency Regulation:** ***»However, any Member State may require mandatory registration. In such cases, the liquidator or any authority empowered to that effect in the Member State where the proceedings referred to Article 3.1 have been opened shall take all necessary measures to ensure such registration.«***

(151) The States cannot make prior registration in their registers a pre-condition for recognition of the decision opening proceedings. The sanction for the breach of the duty to register cannot be a refusal to recognise the foreign decision but can lead to liability on the part of the liquidator according to the rules of the State that imposes this obligation upon him.

DUTY TO INFORM

(152) **Article 40.1 of the Insolvency Regulation:** ***»As soon as insolvency proceedings are opened in a Member State, the court of that State having***

jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.«

(153) 'Known creditors' are those creditors that appear in the debtor's books and documents such as they are received or found by the liquidator.

(154) **Article 40.2 of the Insolvency Regulation:** ***»That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.«***

(155) As this is a rule of minimum uniform content national law may stipulate the inclusion of additional information for the benefit of the creditors.

(156) **Example**: If the creditor fails to inform the liquidator of the proceedings of his right and of the asset covered by that right, he runs the risk that errors may occur (e.g. the collateral may be realised); but national law can not 'penalise' him with the loss or alteration of his right in rem.

LODGEMENT OF CLAIMS

(157) **Article 39 of the Insolvency Regulation:** ***»Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.«*** This rule does not prevent national law from permitting claims to be filed in another more favourable form.

(158) The position of non-EC creditors (i.e. those who have their habitual residence, domicile or registered office in a non-Member State or in Denmark, and the authorities of non-Member States) is determined by national law, not by the Insolvency Regulation.

(159) Article 39 of the Insolvency Regulation applies to the lodgement of claims. The evidence that may be requested for the verification of claims or the procedures for contesting claims is governed by the lex fori concursus.

(160) **Article 41 of the Insolvency Regulation:** ***»A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preferences,***

security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.«

(161) The requirements of Article 41 of the Insolvency Regulation vis-a-vis content are of a maximum character. National law cannot impose supplementary conditions.

TERRITORIAL PROCEEDINGS

(162) **Article 3.2 of the Insolvency Regulation:** ***»Where the centre of a debtor's main interest is situated within the territory of a Member State the courts of another Member State shall have jurisdiction to open insolvency proceedings against the debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.«***

(163) The effects of the insolvency will be determined not by the law of the State where the debtor's COMI is located but by the law of the State where the establishment (and assets) are situated. In this way the possibility of opening territorial proceedings ensures that foreign debtors who operate through a local establishment can be subject to the some insolvency rules as domestic debtors. Local proceedings can be used to facilitate the administration and realisation of the insolvent debtor's assets. Territorial proceedings also act as a defence against the 'mobility' of the debtor who can legitimately change his COMI from time to time.

(164) Once main insolvency proceedings have been opened in a Member State any territorial proceedings opened or due to open subsequently in other Member States are treated as secondary proceedings. If no main proceedings are opened (or until they are opened) the territorial proceedings are treated as independent proceedings.

(165) A subsequent opening of main insolvency proceedings converts the independent proceedings into secondary proceedings. **Article 36 of the Insolvency Regulation:** ***»Where the proceedings referred to in Article 3.1 are opened following the opening of the proceedings referred to in Article 3.2 in another Member State, Articles 31 to 35 shall apply to those opened first, in so far as the progress of those proceedings so permits.«***

ESTABLISHMENT

(166) The relevant moment to establish international jurisdiction is when the application for insolvency proceedings is filed. It is at this moment that the debtor's establishment must be located in the forum. A later modification (e.g. the closing of the establishment by the debtor) has no effect. The principle of perpetuatio fori applies.

(167) The Insolvency Regulation only determines the international jurisdiction of the courts of the State where the establishment is situated. The territorial jurisdiction within that State will be determined by its national law.

(168) **Example**: It may occur that the law of the country where the debtor's establishment is located does not contain rules for determining territorial jurisdiction. If this is the case what cannot be done is to invoke this gap in order not to open territorial proceedings. The courts of the place where the establishment is located can be considered to have territorial jurisdiction.

(169) **Example**: If the debtor has more than one establishment in the same State the most appropriate course of action is to consider that the courts of any of them have territorial jurisdiction, with the choice of court to be made by the person initiating the proceedings.

(170) While there can only be one COMI the same debtor may have several establishments located in different countries. In this case there is no risk of jurisdiction conflicts as each establishment only gives rise to proceedings with a territorial scope.

(171) The function of establishment is solely to confer jurisdiction upon the courts of the State in question and therefore, in principle, any natural or legal person, whether or not a trader, can have an establishment for the purposes of the Insolvency Regulation. This prevails over national rules that may reserve the use of the concept of establishment to specific persons (legal persons, traders etc.).

(172) **Article 2.h of the Insolvency Regulation:** ***»'Establishment' shall mean any place of operations where the debtor caries out a non-transitory economic activity with human means and goods.«*** This definition is based on following elements: a place of business or operations, a certain degree of organization and permanence in time.

(173) An establishment must involve a distinct presence on the part of the debtor in the market of the State in question. The reference to 'place of operations' expresses the requirement of place from which the debtor conduct commercial, industrial or professional activities in the market (i.e. externally). The reference to 'human means and goods' expresses the requirement of some form of organisational presence in the forum (a branch, an office, a factory, a workshop etc.).

(174) The requirement is that the place of operations represents a certain degree of external business activity on the part of the debtor, in or from that State. **Example**: For a debtor of any one State A what represents an establishment in another different State B is that the debtor is operating in the market not from his own State A but from the territory of that second State B.

(175) A place of business clearly set up for a short temporary purpose does not qualify as an establishment. But if the debtor opens a place of operations of a stable

nature it can qualify as an establishment although it has a limited time horizon (e.g. the time of a building project). The definition of establishment is fact-oriented and the test to determine when there is an establishment is a 'reality test'. Fictions that may exist in national laws are not applicable (e.g. the presumption that a person is treated as continuing the business in the forum until he settles his business debts).

(176) The following cannot be considered as establishments for the purposes of the Insolvency Regulation:

- the mere presence of assets of the debtor, even when they are immovable
- the presence of permanent elements which lack a certain degree of organisation (e.g. a postal address or an internet web site)
- the presence of permanent elements linked to the business activity but which do not have an external presence in the market of the State in question (e.g. a storage facility or a computer server used for storing data bases or web sites)
- the sporadic presence of the debtor or his representatives, even when in possession of assets and human resources (e.g. when attending an international trade fair).

(177) The establishment must form part of or be an extension of the operational structure of the debtor. It is immaterial whether the facilities are owned or rented by or otherwise at the disposal of the debtor. The establishment must be subject to a certain degree or control and direction on the part of the debtor.

(178) The external sphere prevails over the internal one. The decisive element is the external manifestation and not the subjective intention of the debtor. If the debtor appears by acting through an establishment and thus creates the impression in the market that the said establishment is an extension of or part of his organisational structure, it can be considered as an establishment for the purposes of the Insolvency Regulation.

(179) The Insolvency Regulation treats each legal entity as a different debtor. Therefore a subsidiary company or an independent agent acting in the ordinary course of their business cannot constitute an establishment of the parent company of the principal.

(180) **Example**: In the case if the subsidiary behaves in the market as a branch performing activities that belong in economic terms to the sphere of the parent rather than to their own business operations, the subsidiary appears in the market as an operational extension of the parent company.

JURISDICTION

(181) The jurisdiction is territorial. It only covers the assets of the debtor that are located in the territory of the State of opening. Whether or not the assets are linked to the economic activities of the establishment is irrelevant.

(182) The jurisdiction to adopt preservation measures in the case of territorial proceedings belongs solely to the courts of the State of opening. Territorial proceedings can only affect assets located in that State, so the State of opening is the same as the State where the preservation measure is to be implemented.

(183) The relevant point of time for determining the location of assets is the time the proceedings are opened.

(184) Tangible assets are located in the place where they are physically situated (the situs naturalis). This physical location prevails over any legal fiction.

(185) **Example** (regarding the location of goods in transit of the State of opening): If only independent territorial proceedings are opened then this State's rules regarding location will determine whether the goods are considered to be situated in this State or not. If main proceedings are opened while the goods are in transit then the rules regarding location of this State, which is the only State with universal jurisdiction, prevail in order to determine where those goods are deemed to be situated for the purposes of the Insolvency Regulation.

(186) Property and rights ownership of or entitlement to which must be entered in a public register (ships or aircraft, intellectual property rights and rights over securities represented through book-entry systems) are located in the Member State under the authority of which the register is kept.

(187) Claims and receivables are located in the territory where the COMI of the debtor of the claim (debitor debitoris or account debtor) is situated. The courts of the State where the debtor of the bankrupt has his COMI are those that are best situated to impose payment of the claim.

(188) In the case of current accounts and deposits in banking institutions, for the purposes of the Insolvency Regulation, each branch must be considered as an autonomous entity. Consequently the claim will be considered situated in the State where the office serving the customer's account is located.

(189) Negotiable instruments must be located, for the purposes of the Insolvency Regulation, (as documents) by their physical location (situs cartae sitae).

(190) Company shares must be located, for the purposes of the Insolvency Regulation, by the company's (i.e. the debtor's) COMI. In principle, it is the place of the registered office. In the case of shares incorporated in a document of title the same rules applies as to other negotiable instruments. In the case of shares represented through book entries what matters is the location of the register or relevant account.

LAW APPLICABLE

(191) **Article 28 of the Insolvency Regulation:** ***»Save as otherwise provided in the Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.«***

(192) It falls to the law of the State where the debtor has an establishment to determine the conditions that must be satisfied for the opening of insolvency proceedings. This law decides the insolvency test to be applied.

(193) **Example**: In the case of over-indebtedness the inadequacy of the debtor's assets to cover its liabilities must be established by reference to all of the debtor's assets, not only to those located in the forum. In the case of illiquidity the point of reference should also be the global situation of the debtor. In the case of 'external acts of bankruptcy' (i.e. specific observable events which allow a creditor to apply for insolvency proceedings) the point of reference may well be the State where the establishment is situated.

INDEPENDENT TERRITORIAL PROCEEDINGS

(194) The Insolvency Regulation allows territorial proceedings to be opened as independent proceedings prior to the commencement of main proceedings. These insolvency proceedings are governed by the applicable national law (lex fori concursus).

(195) Territorial proceedings may be opened in the case of impossibility of opening main insolvency proceedings. Interested parties can participate in territorial proceedings when they demonstrate that, given the conditions for opening established by the law of the State where the debtor has his COMI, they cannot obtain the opening of main insolvency proceedings. In this case territorial insolvency proceedings may be opened at the request of any creditor, whether or not a local creditor, or even of the debtor himself.

(196) The reason for permitting creditors with residence, domicile or registered office in the State where the debtor has the establishment (these creditors are connected with the debtor through the establishment) to initiate territorial proceedings directly is

that the opposite rule would simply entail a greater access cost for these creditors but would not impede the opening of territorial proceedings. It would simply oblige them to first request the opening of main proceedings abroad and then secondary proceedings in the State of the establishment (i.e. to make two applications instead of one).

(197) **Example**: The relevant issue is that the claim has arisen on the basis of the activities of the establishment. It is not a requirement that the place of payment be located in the same State in which the establishment is located or, in the case of a claim in tort, that the damages have been produced in the territory of that State.

SECONDARY TERRITORIAL PROCEEDINGS

(198) Secondary insolvency proceedings are also governed by the national law of the State of opening (lex fori concursus).

(199) The requirement for the insolvency of the debtor established by national law does not need to be satisfied. The recognition of the decision opening the main proceedings makes any further examination of the debtor's insolvency in other Member State unnecessary. Any condition required for insolvency proceedings to be opened against the debtor is replaced by the condition that the main proceedings are already pending in another Member State and are recognised, regardless of the reason why the main proceedings were opened, even when that reason does not exist in the law of the State where the territorial proceedings are going to be opened.

(200) The Insolvency Regulation confers the right to request the opening of secondary proceedings directly upon the liquidator of the main proceedings.

(201) A secondary proceedings may make sense in cases where the estate of the debtor is too complex and the number of creditors too large to be administered as a unit and/or when the differences between national laws are so acute that difficulties may arise as a result of extending the effects of the main insolvency proceedings to other States. The liquidator of the main proceedings may also use secondary proceedings to palliate the effects of Articles 5 (rights in rem) and 7 (reservation of title) of the Insolvency Regulation.

WINDING-UP OR RESTRUCTURING

(202) The subsequent opening of main proceedings may trigger the conversion of independent territorial proceedings into winding-up proceedings if the liquidator of the main proceedings so requests.

(203) Secondary proceedings can only be winding-up proceedings. Secondary restructuring proceedings are not allowed, except where the territorial proceedings were opened before the main proceedings and that once these have been opened the conversion of the former has not been requested.

(204) Any secondary territorial proceedings opened after the main proceedings must necessarily be winding-up proceedings (insolvency proceedings involving the realisation of the debtor's assets, including those cases in which the proceedings are closed either as the result of a composition or other measures which bring the insolvency of the debtor to an end or due to the insufficiency of his assets). Member States must indicate expressly which national proceedings belong to this category.

(205) The reason why secondary proceedings may only be winding-up proceedings and not restructuring proceedings is the following one: Proceedings aimed at restructuring a company require global decisions that affect all of the debtor's assets. A complete restructuring of the debtor is only possible from a forum whose decisions also have a global scope. It is difficult to imagine a situation where an establishment that depends on an insolvent debtor can be restructured in isolation (except by selling it), because that establishment continues, as part of the debtor's organisation, to be responsible for all of the debtor's liabilities. Furthermore, coordination between the main proceedings and a territorial restructuring process would present significant technical difficulty.

(206) Consent by creditors to a territorial composition (a rescue plan or a comparable measure) can not be interpreted as a waiver of the realisation of their claims upon the debtor's assets located in other States.

PARTICIPATION OF CREDITORS

(207) All creditors who have their habitual residence, domicile or registered office in a Member State, regardless of their nationality, are entitled to participate in territorial proceedings. National law cannot restrict participation to local creditors or to those who enjoy a particular legal position (e.g. a privilege or preference) or whose claims arise from activities in the State where the secondary proceedings are opened.

PECULIARITIES OF TERRITORIAL PROCEEDINGS

(208) Articles 5 (rights in rem) and 7 (reservation of title) of the Insolvency Regulation, as both presuppose that the asset is located outside the State of opening and the effects of the proceedings are (ex lege) limited to the territory of the State of opening, will never apply. Also Articles 8 (contracts relating to immovable assets) and Article 11 (with regard to Article 2.g) of the Insolvency Regulation, as both are based upon the location of the immovable asset or register in a State other than the

State of opening and as the territorial proceedings cannot produce effects over assets located in other States.

(209) Article 6 (set-off) of the Insolvency Regulation will only apply when the primary claim (i.e. the insolvent debtor's claim) is subject to a law other than the law of the State of opening of territorial proceedings, but the COMI of the creditor who invokes a right to set-off (and who is the debtor of the primary claim) is located in that State.

(210) **Example**: The creditor has his COMI in State A where territorial proceedings are opened because the debtor has an establishment there. In turn, the insolvent debtor has a claim in his favour vis-a-vis that creditor. The law that governs this latter claim is that of a different State B. In these circumstances the creditor may use the right to set-off pursuant to law of State B.

(211) The regime of voidness, voidability or unenforceability of the lex concursus governing the territorial proceedings only applies when the asset that the liquidator is seeking to restore to the estate was located in the territory of the State in question at the time of the opening.

(212) **Example**: The insolvent debtor assigns a claim to a third party prior to the declaration of opening. The debtor of the assigned claim (debitior debitoris) has his COMI in the State A where the territorial proceedings are opened and the claim is therefore considered to be located there. In accordance with the ordinary conflict of laws rules the assignment is governed by the law of a different Member State B. If the liquidator of the territorial proceedings seeks to challenge that assignment pursuant to the lex fori concursus (of State A), the third party assignee may rely on the law of State B, in accordance with Article 13 of the Insolvency Regulation.

(213) Article 14 (protection of third parties) of the Insolvency Regulation may apply when the asset has left the State where the territorial proceedings were opened after the opening of the proceedings. In this case the asset was situated in the secondary forum at the time of the opening and belongs to its estate.

(214) Article 15 (effects on lawsuits pending) of the Insolvency Regulation will apply when the object of the proceedings is an asset located in the territory of the State of opening.

(215) **Example**: A third party claims in the debtor's domicile ownership of a movable good. The asset is, however, located in the State where the territorial proceedings have been opened. In this case the asset is subject to the territorial insolvency proceedings, but the effects of the declaration of opening on the lawsuit pending in the State where the debtor has his domicile are subject to the law of that State.

(216) Article 24 of the Insolvency Regulation in territorial proceedings will only apply if the obligation honoured was subject to the territorial insolvency pursuant to the rule regarding location (i.e. when the debitor debitoris has his COMI in the same State where the territorial proceedings are opened), but performance thereof, in contrast, is owed in another (different) State.

(217) Articles 21.2 and 22 of the Insolvency Regulation do not apply in the case of territorial proceedings.

RESTRICTIONS OF CREDITORS' RIGHTS

(218) In principle all creditors will be affected by the territorial proceedings (governed by the lex fori concursus), not only local creditors or creditors who lodged their claims in the territorial proceedings. The reason is that all creditors can participate in the territorial proceedings and benefit from them.

(219) **Article 17.2 of the Insolvency Regulation:** ***»The effects of the proceedings referred to in Article 3.2 may not be challenged in other Member States. Any restrictions of the creditors' rights, in particular a stay or discharge, shall produce effects vis-a-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.«***

(220) This restriction can be relied on only against creditors who have accepted it individually and not by a majority vote. Creditors' consent cannot be replaced by a decision of the court.

(221) **Article 34.2 of the Insolvency Regulation:** ***»Any restrictions of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the content of all the creditors having an interest.«***

(222) The majority rule does not apply but the unanimous consent of the creditors affected. Creditors' consent cannot be replaced by a decision of the court or be modified by national law.

(223) Liabilities are assignable to the capital as a whole, not to specific assets. This idea is reflected in the Insolvency Regulation when it allows all creditors to participate in all proceedings; it does not accept any restrictions based upon the location of the creditor or the origin of his claim; discharge of debt in a territorial proceedings has no effect in respect of assets located in other States (a discharge in the secondary forum can not reduce the liability of the debtor in the rest of the world).

(224) Any new assets in the secondary forum should serve to cover the remaining liabilities.

(225) The decision on the question of the discharge should correspond to the main proceedings. A discharge granted in the main proceedings has universal effect. Once the assets belonging to the secondary estate have been distributed or the proceedings closed the secondary proceedings will have exhausted their original function and the main proceedings regain their universal scope.

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