REFORM OF THE EUROPEAN INSOLVENCY REGULATION ON CROSS-BORDER INSOLVENCY PROCEEDINGS: A FRENCH POINT OF VIEW*

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1. - The European Union regulation on insolvability proceedings was adopted on May 29, 2000 and has been in place for the past 8 years.

An assessment of its effects was due to be carried out after a ten-year period[1]. The ensuing jurisprudence among the EU members that had signed the Regulation[2] has shown the progress and the efficiency of the rules that had been set up, guaranteeing the collective proceedings opened by each of the member State immediate efficacy and efficient universality in other member States[3]. The regulation also entailed changes in approaches and practices in the economic and judiciary spheres, whose attention became more focused on locating debtors and goods and more careful of proceeding rules as they apply in other member States, marking a greater open-mindedness towards foreign rights.

2. – Over the ten-year period, however, several limitations to the ruling have also emerged:

First of all the evolution in companies' capitals and the setting up of corporations and groups have increased dramatically in the past decade;

Secondly there has been a more favorable approach to recovery projects in every European country, whether through amicable agreements, preventive or collective proceedings.

Thirdly because of the emergence of new factors, such as investment funds, or of new safety proceedings, such as trust deeds, as well as a more flexible handling of collective proceedings which are now more easily used in debt restructuring mechanisms, without the debtor being insolvent.

Lastly because of the expansion of the EU, which led to the implementation of this particular EU regulation along with the implementation of other community rules making up "the EU acquis". In the process, varied collective proceedings which had been ignored by the original authors of the regulation had to be automatically recognized with universal effects[4].

It is then time to deal with the necessary changes that would make this ruling a more efficient tool, more in adequacy with the economic demands of the 21st century.

3. – From an international relations viewpoint, it is worth mentioning other organizations, be they private or public, which have jointly been looking for ways to improve the efficiency of collective proceedings and to enhance their recognition and enforcement on

[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 46.
[2] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Recital 12.
[3] Council Regulation (EC) No 1791/2006 of 20 November 2006.
[4] Court of Justice of the European Union, 21 January 2010, MG Probud, C-444/07.

an international scale. The goal has been to come up with more effective debt treatment mechanisms.

Besides, the International Monetary Fund[5], The World Bank[6] and The United Nations Commission on International Trade Law[7], devised provisions pertaining to cross-border proceedings which they then presented to the states. Despite their non binding effect for national legislators, the rules adopted by these international organizations have been an inspirational reference, in that they take into account the evolution of the structure and the legal organisation of trade activities. Of course, they do not trump the EU rules, which still apply in intra-community relationships, but their scope of application and claim to universality must be reckoned with when looking into a possible updating of this regulation.

4. – In the meantime, lawyers and insolvency practitioners set up coordination rules which were set into motion through draft voluntary agreements. Such is the case of the agreement reached by the International Bar Association in 1995, resulting from collective transnational proceedings. It established terms of cooperation which helped facilitate and improve the international handling of collective proceedings. Similarly, outside the EU territory, the Institute of American Law devised rules of cooperation, meant for NAFTA member states, which can apply to "transnational" insolvencies[8]. Finally, the French "Conseil national des administrateurs judiciaires et des mandataires judiciaries" recently reached an agreement with its Italian body of practitioners in Rome. It involves a cooperation treaty based on the observation and experience of legal experts in both countries. From their observations coordination rules for the treatment of debt and assets of insolvent companies were developed.

All these elements contribute to deepen and qualify a study on the revising of the EU regulation.

5. – The following remarks point out several areas in which an improvement of the present rules might emerge. It may be necessary to recall that the EU rules are only a step towards establishing actual uniform national legislative bodies – the only factor that may create a truly integrated market.

Together with the improvements already mentioned, now would be the right time to suggest the general shape that universally applied rules could take.

1. GENERAL OUTLINE OF THE REFORM

A. – Collective proceedings under the EU regulation to be redefined

6. – Several objective factors can be put forward: the inadequate nature of the current regulation when it comes to dealing with increasing numbers of recovery proceedings based on insolvency and on insolvency risks, sometimes even on simple financial difficulties[9].

It is also worth mentioning the growingly apparent contradiction between collective proceedings as defined in the regulation and proceedings mentioned in the appendices of the regulation.

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[5] Text available at : http://www.imf.org/external/pubs/ft/orderly/fre/

[6] Text available at : http://web.worldbank.org

[7] Text available at : http://www.uncitral.org/uncitral/fr/uncitral_texts/insolvency/1997Model.html

8 See for instance J.L. Westbrook, Multinational enterprises in general default: Chapter 15, The ALI Principles and the EU Insolvency regulation, The American Law Journal 2002, p. 1.

[9] For instance: England & Wales, France, Germany, Belgium, Spain and Italy.

This contradiction hails from the normative bend of the regulation, which defined the proceedings it entails as "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator"[10]. Yet, the appendixed lists which were added to the regulation, which each state is allowed to appreciate freely, comprise one or several proceedings meant to correspond to the quoted definition without necessarily meeting the prerequisite conditions for it. The gap has increased when countries from Central and Eastern Europe joined the EU. Because of the "EU acquis", those countries have mentioned the insolvency proceedings used in their national legislative body, without prior review by the EU Commission and other member states[11].

7. – Neither the World Bank nor the United Nations Commission on International Trade Law (UNCITRAL) have come up with a competing definition of the notion of insolvency proceedings. Yet, interestingly enough, a new definition was devised in 2009 by UNIDROIT for treatment of intermediated securities. In the so called Geneva convention, the collective proceeding was defined as "a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the debtor are subject to control or supervision by a court or other competent authority for the purpose of reorganisation or liquidation"[12].

Contrary to European Law which must face a variety of legislative systems[13], the opening criterion is less strictly approached, the setting of objectives is clear and the mention of an administrative or judiciary authority in charge of controlling its efficiency is apparent. All these elements, which are not to be found in the regulation, represent valuable contributions when it comes to finding a definition more in tune with current collective proceedings.

8. – France has already added to the Annex A list the safeguard proceeding, even in the absence of insolvency and the debtor's divestment[14]. It could also add excessive debt proceedings for consumers ("*procédures de surendettement*") insofar as such proceedings, considered by the Cour de cassation as real collective proceedings[15], have similar effects. This would put France in a similar situation such as Belgium[16], where proceedings applied to consumers are mentioned or Germany[17], where there is no distinction (except through secondary provisions within each law) between proceedings meant for business and retailers and those aimed at particular individuals.

Another difficulty needs to be addressed. Is the aim the recognition of a proceeding in which debtors are placed under external court oversight, along the lines of American

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[10] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 1 compared with Annex A & Annex C.

[11] It is important to note that the European Court of Justice seems to be in favour of the priority of the proceedings mentioned in the Appendices rather than with those which are supposed to comply with Article 1 of the EC regulation.

[12] Text available at:
http://www.unidroit.org/english/conventions/2009intermediatedsecurities/convention.pdf

[13] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Recital 11 where: "this Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community (…)".

[14] Council Regulation (EC) No 694/2006 of 27 April 2006.

[15] Civil Court of the Supreme Court, 10 July 2001, n°00-04.104 available at:
http://www.legifrance.gouv.fr

[16] Act of 5 July 1998 on collective settlement of debts proceedings.

[17] Act of 5 October 1994 on insolvency proceedings.

bankruptcy reorganization proceedings which keep them as debtors "*in possession*"? A necessary minimum control should be ensured in order to give the effective universal effect of the opening proceeding in a given state. In 2007, such considerations led France to step away from the conciliation proceeding of the perimeter of EU regulation.

9. – Suggestion: the EU regulation would therefore apply to proceedings opened on the basis of economic difficulties requiring the supervision of some legally established authority that would implement surveillance procedure of the debtor's assets or the transfer of the debtor's powers over to an appointed administrator whose job would be either the recovery of the ailing business or the liquidation of its assets. Such a criterion would be assumed to correspond to the additional proceedings listed in the appendix and applying to a specific law on insolvency.

This broadening approach would not preclude a review of the proceedings listed in the appendices. This would entail a global negotiation on the characteristics of all the various proceedings, which would have to be thoroughly examined.

If reciprocity is obviously not a prerequisite to the recognition and implementation of a foreign collective proceeding, a minimal bridging between the rules in terms of scope of application of the EU regulation could help avoid *forum shopping* and would limit the emergence of legal grey areas, detrimental to institutional creditors. Those are often baffled by the differences in treatment, dealing as they are with expatriation and mobility issues of debtors. Such an approach would also make it possible to update the connection between long titles of laws and their contents. That was how the UK managed to modify the effects of some of its laws without changing its titles…

B. – Reviewing the criteria of jurisdiction

10. – With a view to centralizing and harmonizing proceedings and measures applicable to a same business and referring explicitly to the unity and universality principle, the regulation adopted one direct jurisdiction criterion, that is, the centre of main interests[18]. It thus enabled courts to open insolvency proceedings on the basis of this one criterion, with a universal and uniform effect in every member state in the EU that signed the regulation[19].

Although this criterion was not defined in the regulation itself, one of the recitals shed some light on it: it is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties[20].

As the Court of Justice of the European Union pointed out, this is a specific concept[21], which takes precedence over national definitions, including that of the law of the opening state.

When applied to a company or legal entity, there is another important clause in the

[18] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 3 (1).
[19] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 16 & Article 17.
[20] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Recital 13.
See in contrast Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 60: " For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:(a) statutory seat, or (b) central administration, or (c) principal place of business".
[21] Court of Justice of the European Union, 21 May 2006, *Eurofood*, C-341/04.

regulation. The debtor's centre of main interests is presumed to be the same as the registered office of the legal entity[22].

By choosing a criterion based on the reality of trade and business operations, the regulation takes into account the contemporary evolution of the European law which enables, thanks to European Court of Justice's liberal jurisprudence, to transfer the registered office and facilitate real mobility of businesses and companies via the freedom of Establishment principle. The centre of main interests criterion aims at counterbalancing the risk inherent in *forum* s*hopping*, which results from such freedom of establishment.

11. – The European courts have managed to apply those criteria both cautiously and boldly. Cautiously, thanks to the rules of interpretation set up by the Court of Justice in Luxemburg, which ruled that presumption in favour of the head office is not just one criterion among others but a solid presumption. Only objective factors, ascertainable by third parties, can lead courts to overrule the presumption in favour of the head office and consider another localisation[23].

It is, however, a bold application of the rule, in case of insolvency proceedings opened against companies belonging to a same group. Courts have often ruled for locating the subsidiaries' centre of main interests where the head office of the parent company where located. The criterion was not originally meant to apply to corporate groups, yet it did not preclude its applicability to subsidiaries of one particular ailing group.

Thanks to this loophole, several member state's courts have decided their jurisdiction in respect of companies whose registered offices were within their territory but also in respect of companies where the decision-making centre was located within their jurisdiction. There were cases, for instance, where this interpretation was applied to a French company...[24]

Such a supple interpretation of the jurisdiction criterion made way for a better coordination of proceedings involving corporate groups. One single administrator could thus be appointed for every company within the group.

12. – Admittedly the regulation has deliberately left the issue of corporate groups quite confuse. One single proceeding can only concern one corporate body and groups themselves, even in the states where the group contract is recognized and regulated[25], are still not acknowledged as legal entities.

Furthermore, there are practical difficulties in terms of centralizing proceedings regarding the implementation of the measures made in one State must be applied to assets located in another State. Questioning the security interests and contracts which had been signed abroad, according to the law prevailing in the state where the opening proceeding takes place, putting into action the rules applicable to the agreements concluded before the opening of an insolvency proceeding in other member states and to the financial operations within the various subsidiaries of a corporate group. Such difficulties could only lead to a limitation of the perimeter of the Community regulation to companies as legal entities.

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[22] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 3 (1).
[23] Court of Justice of the European Union, 21 May 2006, *Eurofood*, C-341/04, pt 22.
[24] The main problem of the member states case-law is that it endangers the principle of the legal independence of each entity within a group.
[25] As do German Law.

13. – Another objection has been raised, which claims that the centre of main interests criterion does not prevent *forum shopping*, contrary to what the original authors of the regulations expected, as expressed by one of the first recitals[26]. But none of the critics of this regulation came up with an alternative and operative definition providing better guarantees in terms of opportunate localisation face to widely differing substantive laws.

Given the increased mobility of companies in the European economic space, the return to a rigid criterion such as a conclusive presumption in favour of either the head office or where the company is implemented – another suggested solution – would not avoid any risk.

Therefore it may be asserted that the centre of main interests criterion, as it was defined by the regulation, could be maintained with several improvements, one of which would be the addition of a stability principle – not explicitly mentioned so far.

Suggestion: To the definitions featuring in Article 2 of the regulation could be added the one dealing with the debtor's centre of main interests, which could be referred to as the location where the debtor usually conducts his business and administers his company, in a manner ascertainable by third parties.

14. – Regarding groups of companies, an additional provision could be considered. Its aim would be to locate the centre of main interest according to specific criteria – the place where strategic commercial decisions are made concerning the subsidiaries – especially where groups are strongly integrated.[27]

One solution would be to circumscribe the perimeter of the group under consideration. It would be necessary to take into account enough predictable criteria such as the amount of effective capital or shareholding in said perimeter (50 per cent?) or the actual decision-making process of a subsidiary of a corporate group.

But the parallelism with the current EU rules cannot exceed such a criterion. Once the main proceeding has been opened on the basis of this criterion, the universality of the proceeding could not be accepted as far as subsidiaries are concerned, not without protection regulations of the various interests involved – the rights of the creditors as well as those of the minority shareholders, the rights of the affiliates' debtors (since the rules affect the affiliates' assets), etc. Similarly, the coordination rules as established by the EU regulation in order to facilitate the management and the liquidation of foreign assets of one insolvent company[28] could not be applied as such in a group situation. The presumption of insolvency, for instance, meant to open a secondary proceeding, could not apply[29], nor could apply the subordination between main proceeding and territorial or secondary proceedings, which ought to be handled with caution, especially the rules dealing with credit building mechanisms and transfer of remaining assets. Only the rule regarding the suspension of operations would be relevant, for

[26] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Recital 4.
[27] Court of Justice of the European Union, 10 September 2009, *Akzo Nobel NV*, C-97/08 where the "Head Office Functions" were taken into account to make the parent company responsible for the criminal offense of one of its subsidiary.
[28] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 27.
[29] The author has to precise that a subsidiary has a legal personality whereas the establishment has not.

the purpose to coordinate proceedings[30].

15. – Another way to tackle the problem would be to sever the issue of jurisdiction from the administrative gathering of separate proceedings applied to entities of a group. It would not be so much a matter of bringing all the proceedings or all the assets and debt of the different subsidiaries of a group as establishing genuine coordination rules between each and every proceedings of the ailing group.

Obviously the creation of an independent jurisdiction rule regarding the centre of main interests did not prevent *forum shopping*. The reasons are well known: competition between different legal systems led hard pressed managers to choose jurisdictions that reputedly offered a better protection of their interests.

Another explanation, connected with the variety of jurisdiction criteria and often causing dispute, is that it may happen that two courts claim they have competent jurisdictions given that the centre of main interests lies within their scope. Such a "positive dispute" had been anticipated by the EU regulation, which had suggested that only the court that had initiated the proceeding was to be considered.[31]

Suggestion: in the case of corporate groups, the centre of main interests could be defined by the EU regulation as currently mentioned, completed with factors marking the location as the place where decisions concerning subsidiaries are made.

16. – Such a suggestion would imply that the secondary "court" gives up its own jurisdiction although the regulation does not compel it to do so. It would also clarify a general process enmeshed in a variety of legislative systems which are faced with determining the moment a collective proceeding actually opens. Such a problem was the main reason for the EU Court of Justice to rule in its *Eurofood* case that the nomination of a temporary liquidator was synonymous with the opening of a collective proceeding[32].

Suggestion:
Even if it falls under the general frame of Article 4 of the EU regulation placing any proceeding under the jurisdiction of the state where the proceeding is initiated, it would perhaps be worth mentioning, in the definitions of Article 2 of the same regulation, that the moment the proceeding is initiated is determined by the law of the member state. It would also be useful to insert within the regulation itself a *lis pendens* provision and devise a clause detailing how the time the proceeding opens must be tied to a legal decision providing that the national law holds a similar measure as that implying the nomination of a liquidator or temporary administrator.

C. - Establishing a real judicial cooperation

17. – The EIR on insolvency proceedings has set general principles of cooperation and information exchange between the liquidator in charge of the main proceeding and the ones handling the secondary or territorial proceedings, as well as coordination rules between said

[30] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 32 & 35.
[31] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Recital 22.
[32] Court of Justice of the European Union, 21 May 2006, *Eurofood*, C-341/04.

proceedings[33], which comprise the opening of a secondary at the request of the main proceeding's liquidator, the right of intervention by the main proceeding's liquidator in the secondary proceedings, the request to stay of operations in the secondary proceedings, a focus on the debtors' interests in the main proceeding before reaching in the secondary proceeding, the transfer of assets remaining to the liquidator in the main proceeding after the secondary proceeding's creditors' have been paid off, etc[34].

All these rules often turned out to be inadequate, although their deliberate brevity was meant to leave some room and flexibility for their applicability and possible self-fashioning in terms of coordination within the frame of general outline sketched by the regulation.

18. - Suggestion: In the case of an insolvency proceeding initiated against a company belonging to an international group, courts which have jurisdiction should engage in an exchange of information with legal or administrative authorities having jurisdiction regarding the other companies in the group and postpone measures such as the opening of a proceeding (except for provisional measures) or any operations having to do with the company's future and its debt.

Similarly, a closer connection between the jurisdiction criteria could only be beneficial to a coordinated approach to proceedings initiated regarding companies which are settled across different states.

19. – If the centre of main interests, an independent concept common to different member states, usually covers the debtor's domicile or the registered office of the company, the appreciation of the concept still varies dramatically according to the states and the definition of domicile, a notion which is still nationally interpreted[35]. Furthermore, a number of states, namely the United Kingdom, assess connecting factors rather flexibly. For instance, they allow local courts to extend their jurisdiction even on the basis of limited effective presence on the territory such as mere property ownership[36]. Such a range of interpretation can only bring about highly contrasted decisions, further enhanced by the lack of automatic publication of the judgments opening proceedings across the EU.

Before considering a possible harmonisation, it seems therefore necessary to establish at the very least rules of coordination prior to the opening of an insolvency proceeding in member states and to define minimum rules to courts in order to check their jurisdiction.

Once proceedings have been opened, cooperation between liquidators and administrators as it is now prescribed should be extended to courts and applied in the same terms, as recommended by the UNCITRAL Model law on international insolvency. Up to now, many courts have refused to cooperate in any way on the ground that the EIR does not explicitly advocate cooperation, which is marked concretely with the lack of authorization.

D. - Improving the coordination between proceedings

20. – Courts could be deemed accountable for determining themselves, via jurisdiction agreements, which court(s) will handle the various entities of a same group. Similarly, through a legal cooperation agreement, it would be possible to appoint a single administrator

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[33] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 31. – See R. Dammann and G. Podeur, La coordination des procédures d'insolvabilité principale et secondaire au sens du règlement européen n° 1346/2000, in Les faillites internationale : éd. Législation comparée, 2008, p. 41.

[34] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Articles 27 and 32 to 35.

[35] French Civil Code, Article 102. Compare with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 59.

[36] See R. Calnan, Cross border insolvency in England: a haven for European insolvencies?, in Les faillites international, Centre français de droit comparé : éd. Législation comparée, 2008, p. 105.

in charge of supervising, managing and liquidating the assets of the entities of a group, provided precautionary measures meant to safeguard the third parties' interests are taken. The necessary appointment of an administrator or liquidator by the other states' jurisdictions in the context of secondary proceedings, namely in the case of conflicts of interests, the setting up of exchange regulations on debts incurred outside the group, the definition of a minimum cooperation protocol for debt treatment within the group as well as a joint search for necessary funding to allow distressed companies belonging to the group to stay afloat, via financial support mechanisms if need be. In that respect, UNCITRAL suggest that companies from a given group be allowed to financially assist another company from the same group provided they are authorized to do so by order of a court whose jurisdiction covers the company with funds[37]. If such an approach may cause understandable concerns because of the risk on bank guarantees and disposal of securities, the preliminary legal coordination is meant to supervise such practices with no harm done to the interests of the creditors from the subsidiaries. If, ultimately, the recovery of the distressed group is achieved, there will be no prejudice to creditors.

21. – The differences between restructuring and liquidation plans or recovery plans could also be made more distinct, as far as asset sharing is concerned. In this particular case, securities interests and preferential law covering the various properties and assets of the group's companies would have to be taken into account. In that perspective, the cooperation would be limited to the joint supervision of the external and internal debt treatment as well as of possible asset pooling. The goal would be to reach an optimal use of the assets at the disposal date. Such measures would result in significant cost cuts.

22. – Another angle to be considered would be to make territorial proceedings easier. In the general mind of the EIR, territorial and secondary proceedings had been originally limited in order to guarantee unity in proceedings concerning one company. It implied a more efficient treatment of the main proceeding. One of the qualifications consisted in the obligation of a liquidation procedure to any insolvency proceeding involving the establishment of a distressed debtor, involving realising the assets of the debtor including where the proceeding have been closed by a composition or any other measure terminating the insolvency or closing by reason of insufficiency of the assets[38]. The aim was at first to help the recovery of the head office company, by liquidating secondary assets if necessary – including its establishments, "cutting the branches in order to save the trunk"[39]. This rule has proved somewhat questionable over the years, first whenever the distressed company was still making profits in a branch abroad, then in the case when the pursuit of territorial proceedings actually hampered the setting up of a global restructuring plan. As a consequence, the rule turned out to be a deterrent for creditors to request the opening of territorial proceedings.

23. – It turns out that the EIR could be modified through the suppression of that particular rule. The debtor would thus be able to request the opening of a territorial proceeding and a provision could be added, guaranteeing that a locally recovery procedure would depend on its level of coordination with a possible foreign proceeding located in the centre of main interests of the company.

Finally, the proceedings coordination should come with more stipulations and details

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[37] See UNCITRAL Working Group Documents: www.uncitral.org, doc. A/CN.9/WG.V/WP.90/add.1 A/CN.9/WG.V/WP.90/add. 2.

[38] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 2, c).

[39] Y. Chaput, Le droit européen de l'insolvabilité, de prometteuses lacunes : Rev. Lamy dr. aff. juill. 2002, suppl. p. 30.

regarding information exchange over debt, operation coordination and development of joint compromises[40].

E. - Improving information of third parties by publication of judgements

24. – For an insolvency proceeding to work effectively, full information of the creditors as well as transparency of operations are necessary. The EIR stated that it fell to the liquidator, if the latter deemed it useful, to make the judgments opening insolvency proceedings, appointing the liquidator in the member state or the member states, known in public registers if necessary[41]. The optional nature of that aspect of the ruling was meant to avoid useless expenses.

It must be noted that this approach was different from that simultaneously chosen by the EU in the Directives on the reorganisation and winding-up of credit institutions and insurance undertakings[42].

25. – With the development of electronic devices, such a qualification is no longer justified. The storage capacity of electronic data as well as hyperlinks make it possible to access every legal information issued in any EU member states. If a data medium for the publication of European judgments is to be wished for, it could also be useful to mention, in an annex that could be easily modified, the official structure in every member state where judgments and appointments of liquidators are published[43].

2. IMPLEMENTING UNIFORM RULES

A. – Creating efficient rules for conflicts of laws

26. – In a series of provisions, the EIR has attempted to settle conflicts of laws, according to one main principle, the law of the state of the opening of proceedings, and a few exceptions, the competing application of foreign laws[44]. In spirit, those provisions are in keeping with the general principles at work in international private law, and as such, they stand beyond criticism. However, a literal interpretation of those items may lead to legal deadlocks.

That is why it would be necessary to rewrite the rules of conflicts regarding consequences of insolvency for the rights on immoveable property, the rights of the employees and the rights subject to registration[45], so that the law of the state of the opening of proceeding may not be undermined in favour of another law. It thus becomes necessary to create a genuine European private international law in the perimeter of insolvency

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[40] See F. Mélin, Le règlement n° 1346/2000 du 29 mai 2000 et la coordination des procédures d'insolvabilité : JCP E 2009, 1022, p. 23 and G. Jazotte & M. Sénéchal, L'ouverture d'une « faillite européenne » : Rev. proc. coll. 2008, dossier 4.

[41] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Articles 21 & 22 and Recital n° 29. Regarding this specific point, see circ. min. just. n° CIV 19/06 of 15 December 2006, n° 2.1.1.: JCP E 2007, 1498.

[42] Directive 2001/24/EC of 4 April 2001 of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, Article 6, when these measures can affect the rights of third parties; Directive 2001/17/CE of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, Article 6, when an appeal is possible.

[43] Such measure, of marginal cost henceforth, would guarantee effective and current information and, in parallel, would make the consultation compulsory since the conclusion of commercial relations.

[44] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Articles 4 and 5 to 13.

[45] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Articles 8, 10 and 11.

proceedings in order to make easier the acceptance by national jurisdictions.

27. – There are a few areas where this thorough revision could materialise, given the increasing degree of communitisation of international private law and the slackening judicial control of foreign judgments. If *the lex fori concursus* principle is meant to last, the principle must be combined with other laws for the various situations mentioned in the regulation.

28. -What will become of the insolvent individual is dependent on another law than the law of the state of the opening of proceeding. If a commercial company is subject to a foreign law because its centre of main interests is situated in that state, the effects of the insolvency proceeding cannot ignore *lex societatis*, which can alone determine whether the liquidation, will automatically cause the winding up of a company, as is the case in the French law[46]. Such provisions could not be automatically applicable to a foreign company.

29. – Regarding current contracts, the appointed liquidator has the power - provided for by the law of the State of the opening of proceedings – to decide whether contracts should be terminated or continued[47]. However, the liquidator cannot ignore the mandatory provisions contained in the Regulation of 19 June 2008 that replaced the Rome Convention and that now determines the law applicable to contractual obligations. In that perspective, in order to determine whether a contract is current or not, one should look to the law of the contract first, and then to the law of the state of the opening of proceedings[48].

30. – As far as the debtor's immoveable property is concerned, the Regulation also steps away from the general principle whereby the law of the state of the opening of proceedings shall apply to the current contracts. The Regulation has indeed opted traditionally for the law of the place where the immovable property is situated[49]. The application of referral to the law of the place where the immovable property is situated to as "solely" in the Regulation, seems to exclude the contracts relating to immoveable property from the rules of the insolvency proceedings opened in another state, but it is not the case.

The law of the state of the opening of proceeding remains applicable to the debtor's powers over property, to his/her rights to prosecution in another member state, to the payment of the creditors registered to said property[50]. Similarly, the law of the state of the opening of proceeding would apply to a nullity action regarding a contract on said property[51].

31. – As regards contracts of employment, the Regulation exclusively refers to the laws applicable to the contract, i.e. employees working for the insolvent company[52]. Through that rule, the EIR makes the application of the law as determined by the regulation of 19 June 2008 that defines the law applicable to contracts of employment via a reference to the law chosen by the different parties or, in the absence of agreement, via objective connecting criterion[53]. In point of fact, the law of the member state of the opening of the insolvency

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[46] French Civil Code, Article 1844-7, 7°.
[47] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 4-2, e).
[48] See F. Mélin, op. cit., p. 215.
[49] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 8.
[50] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 4-2, i).
[51] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 4-2, m): regarding this specific point, see F. Mélin, op. cit., p. 263.
[52] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 10.
[53] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 8. See C. Nourrissat, le nouveau droit des contrats internationaux et le règlement CE 593/2008 du 19 juin 2008: Rev. Lamy dr. aff. 2008/29, n° 1752 et 1758.

proceeding is not entirely ousted. It actually continues to define legally enforceable privileges in the insolvency proceeding, the ranking of claims of wages, the legal obligation (or lack thereof) to lodge a claim against the estate, the representation of their interests in the proceeding and their information.

What about dismissals? The law applicable to contracts of employment is presumed to determine solely the terms and conditions of the dismissals decided by the liquidators(s). The Ministry of Justice was seemingly in favour of such an approach[54]. As a matter of fact, the law of proceeding cannot be ousted either, for it alone defines both the debtor's powers and those of the liquidator(s)[55]. Such a combination makes sense. How could a legal administrator lay employees off without prior legal authorization? This would be a violation of the law of the state of the opening of proceeding, and on the only ground that the foreign law applicable to contracts of employment would not require such an authorisation. Surely such a dismissal would be deemed illegal, and the guarantees granted to employees would not be met, which would eventually entail accrued liability on the administrator's part.

32. – As for guarantee of wage claims, other rules than the law applicable to contracts of employment can also prevail. First of all, the privilege is, as was explained above, determined by the law of the state of the opening of proceedings. Only that law can also determine the terms of payment of wage claims, the extent and limitations applied to such debt and the possible participation of the different bodies and their potential requests in the proceeding. Besides, another law may apply, that of the state where the employee's actual workplace was located. The Directive of 23 September 2002 on the protection of employees determines the guarantee institution responsible for meeting wage claims by employees of an insolvent company. The criterion at work is the law of the member state in whose territory employees work or habitually work, independently from the law of the state of the opening of proceeding and possible laws applicable to contracts[56]. Those bodies can only apply the law of the state where they were appointed, hence different laws have to be commingled.

33. – As far as rights subject to registration are concerned, member states have similar laws on publication, which were devised to guarantee that the third parties be duly informed as well as that rights be opposable concerning certain assets, immoveable property, ships and aircraft. It also extends to businesses, liens, holding trusts, lease purchase property. The law of the member state is applicable, and it is under its authority that the register is kept[57].

In that respect, the referral rule contained in the regulation must be construed as a limited dispensation to the general principles establishing the main application of the law of the state of the opening of proceedings and the protection of *in rem* rights of third parties for assets located in another member state.

Similarly, if the law of the State where the register is kept is not mentioned as the sole applicable law, this rule could undermine the general provisions contained in the regulation. Such is not the case. The rules on the powers of debtors on assets and those on the liquidator's powers on the same assets, as well as the conditions and terms of disposal of assets and the payment of registered creditors will apply. Competence of the law of the state where the register is located is far to be exclusive.

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[54] Circ. Min. just. of 15 December 2006, § 3.2.2.2.

[55] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 4-2, c).

[56] Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer ; Directive 2008/94/EC, of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.

[57] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 11.

B. - Ensuring the recognition and enforcement of judgments handled down in the course of an insolvency proceeding.

34. – The regulation was intended to fill the void left by the 1968 Brussels Convention which excluded bankruptcies, compositions and similar proceedings from its jurisdiction[58]. In order to guarantee the consistency of the conditions of recognition and enforcement of judgements, the regulation on insolvency proceedings had – along with rules of recognition and instant efficiency of decisions opening the proceeding – referred to the Brussels Convention for the judgements handled down subsequently in the course of insolvency proceeding[59].

Yet the regulation also referred to a convention that was to be repealed, the EC regulation 44/2001 dated 22 December 2000 having come into force[60], thus replacing the Brussels Convention[61]. The difference is not a pure formal difference. The EC 44/2001 regulation establishes a recognition and enforcement mechanism which is far more efficient, by granting the potential control of the foreign judgment over to the secondary jurisdiction in the case of a dispute over the enforcement judgment[62]. For that type of judgments, such a difference led the Ministry of Justice to choose a literal interpretation and to make *exequatur* rules of the Brussels Convention applicable[63], before it gave up that interpretation in a second circular, where that particular point was no longer mentioned[64].

3**5. –** The Court of Justice of the European Union did away with those tentative attempts and confirmed that the EC Regulation 44/2001 of 22 December 2000 is the prevailing reference text when it comes to the enforcement of such judgments[65].

The Community regulation should fully embrace this dynamic and supple interpretation, detailing the clauses of the general rules of applicability and simplify the provisions regarding the implementation of legal decisions resulting from insolvency proceedings.

C. - Drawing up a European insolvency law

36. – Those directions would help to improve the recognition and enforcement of rulings regarding insolvency proceedings and guarantee the pragmatic use of the European Regulation. Would it be possible to go even further?

The regulation on insolvency proceedings represented a preliminary draft of substantive law. A general principle of equality, a minimal, written and individual exchange of information for creditors and liquidators, the right for all creditors to lodge a claim, the right to use one's mother tongue to lodge a claim in another member state, and the protection

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[58] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 1, 2, b).
[59] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Article 25.
[60] On 1st March of 2002 (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 7).
[61] So references must be interpreted as referring to the new regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 68).
[62] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Articles 38, 43 et 45.
[63] Circ. Min. Just. 17 March 2003, JUS CO 32 201 34 C.
[64] Circ. Min. Just. 15 December 2006, JUS CO 6990 C: JCP E 2007, 1498, p. 30.
[65] Court of Justice of the European Union, 10 September of 2009, *German Graphics*, C-292/08: D. 2009, p. 2782.

of the rights *in rem* of the third parties when assets are located outside the member state of the opening of proceedings[66], as well as the rules of private international law mentioned above.

37. – A greater harmonisation of national rights would also be possible by establishing a minimal common formality. If it is to be realistic, such a harmonisation ought to focus on procedural points which could be unified either within the regulation itself or via a directive which could be adjusted when transposing in national laws.

38. – The obvious parallelisms that can be observed between European national laws make way for possibilities to draw up common criteria of opening, by establishing for instance distinctive rules for prevention proceedings and insolvency proceedings and for the opening as initiated by the debtor for the restructuring of a company or by creditors faced with difficulties or cessation of payments. This direction would limit - which is significant enough - the disadvantages of *forum shopping*, thanks to a better risk assessment regarding investors' insolvency.

39. – It is also possible to establish common ground rules regarding time limits and terms of the lodging of claims, the body meant to receive them, being either a jurisdiction or an officer of the court, the contents of the information to lodge, the creditors having or not the duty to lodge the claims, the creditors' negligence and their liability, the right to lodge claims via e-mail and digital signature…

40. – Another angle to be considered, which would be rooted in a major leaning of all European insolvency proceedings, would be to establish a ranking of claims bestowed with a general privilege, without prejudice to national laws that may have other provisions. A general privilege would then prevail here, as is already the case in many national laws of member states, regarding claims of administration, wages, business continuation and legal fees. Beyond that, a harmonisation relating to tax and social security claims would require an even greater effort of approximation of laws which would be mainly dependent on factors quite other than the sole functioning of insolvency proceedings (tax law, social security, public interest and public policy). But the principle of equality and non-discrimination that prevails between creditors now compels member states to try and reach such a harmonisation, at least with regards to similar claims.

41. – The scope of the stay of proceedings brought by individual creditors, a principle common to every national law, can also be given harmonised dispositions, which would clear up the perimeter of that rule for foreign creditors, that is the enforcement proceedings as well as the individual proceedings concerned, pending actions (currently left to the law of member state where such actions are pending) and creditors not submitted to discipline.

42. – Another possible approximation could be made via actions for voidness, a fundamental aspect of insolvency proceedings in all member states. With a view for legal certainty and clarification, harmonisation and adaptation of common rules were considered in an international level by the United Nations Commission on International Trade Law. It seemed essential for the third parties, especially creditors who managed to get payment before the opening of the proceeding to be made aware of the risk of such actions. Furthermore, the increasing amount of prevention proceedings has often prompted legislators to secure those operations and security interests in amicable and preventive agreements, as has been the case

[66] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Articles 20, 32 and 39. See J.-L. Vallens, Vers un droit matériel en matière de faillite?: LPA 12 December 2003, n° spéc. , p. 47.

in France, Spain and Italy. This concern for security has been enforced through rules protecting third parties from possible actions for voidability. A harmonisation and the adoption of uniform rules would bear on the maximum duration of the suspect period, a summary of the actions presumed detrimental to the creditors' collective interests, the persons entitled to act and the effects of such actions, considering that various national laws now provide voidness, now unenforceability for irregular acts and payments.

43. - Finally, other areas of approximation could be looked into, such as the setting up of common rules regarding current contracts and/or the possibility to grant debtors a discharge for a fresh start, the process of liquidation has been closed, as recommended by the European Commission.

The reflections presented above are naturally placed in the general framework of secondary community legislation, as being the result of instruments of judicial coordination and cooperation on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters and the taking of evidence but are also set in the context of the murky aftermath of the 2008/2009 financial crisis, when insolvency laws appear as useful instruments for company reorganisations on a European level. For the European legislator, obviously, there is still plenty of work ahead...[67]

[67] Translation into English made by Emmanuelle INACIO and Myriam MAILLY, Co-technical officers of INSOL Europe.