The Future of International Restructurings after the Implementation of WCO II and the Amendment of EIR: Is the Best yet to Come?

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Johan T. Jol

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Preface

The fifth annual conference of the Netherlands Association of Comparative and International Insolvency Law was held on November 6, 2015 in Amsterdam. The event was kindly hosted and sponsored by Allen & Overy and chaired by Prof. Reinout Vriesendorp.

The conference started with a presentation by Prof. Michael Veder, chair of NACIIL, on some of the changes that the recast of the European Insolvency Regulation will bring to the European insolvency and restructuring arena.

The core of the conference consisted of a discussion on the report of Johan Jol: "The future of international restructurings after the implementation of WCO II and the amendment of EIR; Is the best yet to come?". In his report, Jol examines nineteen restructurings that have taken place in the period of 2002-2015. Jol essentially raises the question as to whether these cases would have played out differently if the currently pending law reforms, in particular the recast of the European Insolvency Regulation and the proposals for the introduction of a type of scheme of arrangement in the Netherlands, would have been in place at the time. The report published in this book has been finalized, taking into account the lively and interesting discussions during the conference. A report on the conference proceedings is included in this book.

We would like to thank Allen & Overy, Prof. Reinout Vriesendorp and Prof. Michael Veder for their contributions to a successful conference and would in particular like to express our gratitude to Johan Jol for committing his experience and expertise in international insolvency and restructuring to our conference. We are convinced that his report will contribute to a better understanding of the international restructuring practice and will further the academic debate.

The board of NACIIL

Report 2015 NACIIL

The Future of International Restructurings after the Implementation of WCO II and the Amendment of EIR: Is the Best yet to Come?

Johan T. Jol *

Introduction

This report addresses the changes in international restructuring practice since 2000.[1] The author has been active in the international restructuring practice in the Netherlands for more than twenty years, first as liquidator and solicitor and thereafter as legal counsel for financial institutions.[2] He has been involved in multiple international restructurings. In this report, he combines his extensive practical experience with legal research regarding specific deals, which he considers to be ground-breaking cases in international restructurings in the Netherlands and Europe.

The report begins (in Part 1) with short descriptions of nineteen international restructuring cases. Over the past fifteen years, it has been evident that international groups that are also based in the Netherlands apply or borrow restructuring legislation from all over the world to ensure that the restructuring result required by the stakeholders is delivered. For each of the cases mentioned in this report, the specific legislation is referenced and the reasons for using that specific legislation is explained.

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* Johan Jol is Senior Legal Counsel with the Legal Financial Restructuring and Recovery Team of ABN AMRO Bank N.V. He is currently also working for the Department of Business Studies of Leiden Law School. Johan is also an independent teacher and researcher under the name Legal Houdini Academy (see also <www.legalhoudini.nl>). This report contains the personal views of Johan. Furthermore, Johan has been involved in some of the cases mentioned in this report, but this report only provides information regarding these cases to the extent this information has become a part of the public domain. The author has benefitted from discussions he had on this topic in Berlin on October 1, 2015 with attendants to a CPO course on recent developments in international bankruptcy law and thanks all those attendants for their contribution. The members of the board of NACIIL had the idea of putting the author in mind to draft this report and deserve a thank you note. It was a challenging task. A special thanks goes to Chairmen Michael Veder with whom the author had discussions about the content of the report, be it that the author and the Chairmen have not been able to reach consensus (but contrary to non-consensual restructuring discussions, the discussions between the Chairmen and the author were fun and interesting to have). Michael Broeders, Rob van den Sigtenhorst, Lynn P. Harrison III and Farrington Yates also provided useful input. Kelly Visser-Van der Vooren was so kind to take on the task of close reading an earlier draft. Lynn P. Harrison III was so kind to do an additional close reading. As always, all errors are those of the author.

1 This report takes into account restructurings that came public before October 1, 2015.

2 See for curriculum vitae: <www.legalhoudini.nl/4/cv>.

The second part of this report deals with (legislative) changes in the international restructuring landscape for the period 2002-2015. In this part, the following topics are mentioned: recent trends including the Uncitral Model Law Code (the "Model Law") and the amendments of the European insolvency regulation of 2002, which came into force on June 26, 2017 ("EIR 2017"). Part 2 also contains a new interpretation of the so-called secured creditor exception (currently article 5 of the EIR, article 8 EIR 2017). Part 2 ends with a short explanation of that part of draft Dutch law Wet Continuïteit Ondernemingen II ("WCO II"), which is relevant for the international restructuring practice.[3] Finally, Part 3 applies the (legislative) changes that are dealt with in Part 2 to the cases of Part 1. In other words, Part 3 answers the question as to how the restructurings mentioned in Part 1 could have been effectuated if and when the (legislative) changes were already in place. The paper ends with a conclusion.

Part 1: Samples

In this part of the report, the following international restructuring cases will be dealt with:

1. NL suspension of payment with composition, combined with US Chapter 11
   - *Versatel* (2002)
   - *UPC* (2003)
2. NL out of court composition/financial restructuring
   - *Hagemeijer* (2003)
   - *Kendrion* (2004)
3. Enforcement NL of security by security trustee
   - *SAS* (2009)
4. EU Forum shopping to restructure debt
   - *Daiseytek* (2003), *Deutsche Nickel* (2004), *Collins & Aikman* (2005), *Eurotunnel* (2006), *Schefenacker* (2007), *Wind Hellas* (2009), *European Directories* (2010)
5. The scheme of arrangement route
   - *Rodenstock* (2011), *Estro* (2013), *Magyar* (2013), *Apcoa Parking* (2014) and *Van Gansewinkel* (2015)
6. The US Chapter 11 route
   - *Almatis* (2010) and *Marco Polo* (2011)

The cases cover the period between 2002 and 2015.[4] This report explains for each case which legislative restructuring method is used.

3 See for extensive coverage of WCO II also available in English the website of De Brauw, available at: <www.debrauw.com/draft-bill/#>.

4 To be precise: October 1, 2015.

Sample 1: NL Suspension of Payment with Composition, Combined with US Chapter 11

The Versatel case and UPC case stem from the Internet boom and bust cycle at the beginning of this century. In the early 2000s, it became evident that some Internet companies were overloaded with debt. The companies had obtained funding from the USA to invest in their Internet business activities in the form of US-listed bonds. These bonds were unsecured. The governing law of the bonds was that of the State of New York, and there was a jurisdiction clause submitting jurisdiction to the courts of New York. Bonds governed by New York law have an interesting feature. Pursuant to the so-called Trust Indenture Act, it is prohibited to modify the principal sum payment obligation or interest payments on a bond loan without the permission of the individual bond holder. This act has been heavily criticized for being too rigid but is still in force.[5] The result of this Trust Indenture Act is that an out-of-court restructuring of bonds is highly unlikely. A single bondholder, even if this bondholder has one single bond, can effectively block the restructuring and act as a holdout creditor. Both Versatel and UPC had US law-governed bonds outstanding. When the restructuring of these bond obligations was considered, it became evident that a US bankruptcy proceeding was required in order to be able to restructure these bonds successfully. The Trust Indenture Act does not restrict companies to restructure their financial obligations in US bankruptcy proceeding such as Chapter 11. However, Versatel and UPC also knew that US Chapter 11 proceedings would not result in an effective restructuring in the Netherlands. This is caused by the position Dutch law took (and still takes) with regards to decisions of foreign bankruptcy courts. Simply put, if the bonds were effectively restructured in Chapter 11 proceedings in the US, this judgement would not be recognized in the Netherlands.[6] The lawyers of Versatel and UPC knew this of course and found a way around this problem by combining a Chapter 11 proceeding in the US with suspension of payments proceedings in the Netherlands. Having only suspension of payments proceedings in the Netherlands and trying to have this recognized in the USA would most likely have not done the trick, simply because the USA did (at that time) not yet have a firm legal mechanism in place to recognize bankruptcy judgements from abroad.

5 See my article Forced cooperation on a debt for equity swap; (im)possible? under point 19, available at: <www.legalhoudini.nl/images/upload/ENG-DES%20artikel%20versie%20concept%2017_septemberdefuk.pdf>.

6 See (in Dutch) on the issue of acceptance of foreign non-EU bankruptcy decisions the Yukos Case: Supreme Court September 13, 2013, ELCI:NL:HR:2013:BZ5668, Mr. J.R. Berkenbosch in TvI 2014/6: "De bijdrage van de Hoge Raad aan het Nederland-Rusland jaar: de automatische erkenning van een niet-EU faillissement." The effect of the debt release in the US Chapter 11 proceeding would not be accepted in the Netherlands.

***Versatel Case* (2002)**

Versatel Telecom International Holding N.V. (Versatel) was an international holding company, with its only assets being shares in subsidiaries. The actual business activities of the group took place at the subsidiary level in the Netherlands, Belgium, Germany, France and the United Kingdom. In short, Versatel was a network operator of a broadband glass fibre network. Versatel had incurred losses from its start. In 2001, it had a negative equity position and was therefore technically insolvent. A financial restructuring was necessary. Its unconsolidated annual accounts 2001 showed an equity position short of €27 million, €1.7 billion long-term liabilities (bondholders, inter alia New York law) and €54 million short-term liabilities. Its shares were listed both on (what then was called) Amsterdam Stock Exchange and on Nasdaq. In October 2001, Versatel made a consensual offer to bondholders to restructure the bonds. The bondholders would receive 20 cent to the Euro in cash, the remainder in share in Versatel. The bondholders would effectively together obtain a 60% interest as shareholders in Versatel. On January 19, 2002, GE Capital agreed in principle to provide emergency funding to Versatel an amount of US$150 million. A credit facility would be put in place consisting of two tranches – US$50 million upon financial restructuring and a further US$100 million if certain conditions were met. The remuneration of GE Capital was very attractive: GE Capital obtained warrants representing 3.5% of capital after financial reorganization, a margin of 3%-5%, a commitment fee in between 0.75% and 2%, a transaction fee of 2.5% and finally a structuring fee of €750,000.

In March 2002, Versatel shares were put on the so-called "penalty bench" of the Amsterdam stock exchange owing to insufficient equity. Its listing was suspended. Apparently, this first offer of Versatel was not attractive enough to the bondholders. In March 2002, a new proposal was submitted. The bondholders were to receive 80% of the shares in Versatel and 23 cent to the Euro in cash. The bondholders committee representing 33% of the bonds agreed to support offer. Existing shareholders would also obtain a warrant representing 4% of the shares after financial reorganization.

In April 2002, the S&P rating of the bonds fell from B- to CC. Versatel was in the meantime able to enter into a voting agreement between Versatel and 65% of bondholders to vote in the suspension of payments in favour of the plan of composition. The "Voting Record Date" (the date when it is assessed as to who is able to vote) was set at July 30, 2002.

On June 19, 2002, Versatel commenced concurring Chapter 11 in the USA and suspension of payments in the Netherlands. In both proceedings, a deal was offered to each creditor. There were differences in the exact offer made to the holders of different bonds, according to relevant tranches of the bonds. The administrative costs (in the US) and the estate costs (in the Netherlands), the priority creditors (in the US), the preferred creditors (in the Netherlands) and the ordinary (unsecured) creditors were to be paid in full. Because of the commencement of the insolvency proceedings, the S&P rating of the bonds went from CC to D. On June 28, 2002, the listing of the shares of Versatel was struck from Nasdaq. On August 6, 2002, all ratings of Versatel were withdrawn.

On that same August 6, 2002, it became evident that the EBIDTA (earnings before interest, tax, depreciation and amortization) amounted to €2 million in the second quarter of 2002. Versatel announced that 65% of the bondholders (bondholder committee) were in favour of the restructuring. On September 2, 2002, the Dutch administrator (*bewind-voerder*) Deterink deposited the list of creditors of Versatel and informed the market that out of 80% of total outstanding creditors, 99% of those creditors agreed to vote on September 9, 2002 in favour of the plan; so the threshold of 66 2/3% of consenting creditors was met.

On September 6, 2002, the US Bankruptcy Judge confirmed Chapter 11 financial restructuring Versatel. On September 9, 2002, the voting on Dutch composition took place, and 99.9% of creditors of Versatel representing 85% of the total debt of Versatel voted in favour. On September 18, 2002, the Dutch bankruptcy court ratified the composition.

As of October 10, 2002, Versatel shares were no longer suspended on Euronext (the successor of the Amsterdam Stock Exchange).

***UPC Case* (2003)**

United Pan-European Communications B.V. (UPC) was, in 2002, a multinational business group and one of the leading broadband communications and entertainment companies in Europe. UPC provided (and still provides) television, Internet access, telephony and programming services. UPC's shares were traded on the Euronext Amsterdam Exchange (as UPC) and in the United States on the Over The Counter Bulletin Board (UPCOY.OB). UPC was funded with bank loans and bonds issues governed by NY Law. In February 2002, UPC stopped paying interest on the bonds, immediately triggering a cross default under its bank loans. In March 2002, the banks temporarily waived the default.

A deal was negotiated with the banks and bondholders. The bonds were converted together with other debt into equity of a newly incorporated company (Newco). Newco obtained claims against UPC, since the bondholders used these claims to pay for shares in Newco (and not to UPC, their debtor). In September 2002, an agreement was reached with 67% of the bondholders and the banks. In December 2002, the same protocol used in Versatel was implemented – combining a suspension of payment proceedings in Netherlands with a Chapter 11 proceeding in the US. In February 2003, the Chapter 11 reorganization plan was confirmed, but it was still subject to approval of the composition in the suspension of payment in the Netherlands. In March 2003, the Dutch Bankruptcy Court ratified the composition. A non-consenting creditor appealed first and thereafter went to the Supreme Court, but finally in August 2003, the Dutch Supreme Court decided in favour of UPC.

Sample 2: NL Out-of-Court Composition/Financial Restructuring

Sample 2 is the preferred route Plan A in all restructuring cases – the consensual route. Together with all relevant stakeholders, a deal is negotiated, and if and when final agreement is reached, the deal is effectuated. Both in the Hagemeijer case and the Kendrion case, a consensual deal was reached.

***Hagemeijer Case* (2003)**

Hagemeijer N.V. (Hagemeijer), with its statutory seat in Amsterdam, was the ultimate parent of an international group of companies with activities in the Europe, North America and Asia-Pacific regions. In the spring of 2003, Hagemeijer breached its covenants under its so-called Multicurrency Syndicated Loan Facility. In October 2003, it reached a standstill agreement with its syndicated lenders. One of the concessions Hagemeijer made was that it agreed to have a chief restructuring officer (CRO) to be appointed; Wiet Pot became the CRO. In January 2004, a fully consensual restructuring deal was reached.

The deal consisted of the following elements:

- A conversion of preferred shares into common shares;
- A rights offering of shares, partly underwritten by the syndicated lenders, partly setting off obligation to pay up shares against claim under the syndicated loan;
- A convertible bond, partly underwritten by the Lenders Syndicated Loan, setting off debt to fund convertible bond against claim under the Syndicated Loan.

As a result, Hagemeijer was deleveraged and saved.

***Kendrion Case* (2004)**

Kendrion N.V. (Kendrion), with its registered seat in Zeist, was the ultimate parent of an international group of companies (activities in Europe and Hong Kong), with its shares listed on Euronext. Kendrion had difficulties meeting its financial obligations with its financiers. The first step of the restructuring was in August 2003 when an intercreditor agreement was entered into between Kendrion and its respective lenders to ensure that it was clear as to what each of the lenders would get in a default situation.

In January 2004, a standstill agreement was reached between Kendrion and its lenders. The standstill was extended in March 2004. In October 2004, a bridge facility was put in place. All the lenders agreed that any new money that was put into Kendrion was to be awarded a super priority status, effectively subordinating the existing claims of the lenders.

In November 2004, a framework agreement was entered into on a fully consensual basis, thus with all lenders' consent. The deal consisted of the following elements:

- A conversion of preferred shares into common shares;
- A private placement of common shares with former holders of preferred shares;

– A rights offering, partly committed by common shareholders, partly underwritten by lenders (with the possibility to set off their claim as lenders against their debt to pay up the shares).

Thus, Kendrion was also deleveraged and saved.

Sample 3: Enforcement in the Netherlands of Security by Security Trustee: The Schoeller Arca *Case (2009)*

The Schoeller Arca Case (SAS) was a restructuring case in 2009 in which SAS had senior and junior lenders. The restructuring process that used to force the restructuring upon a dissenting junior lenders was on the basis of article 251, paragraph 1, Book 3 Dutch Civil Code (a different way of sale of pledged shares). The asset value of the company was enough to redeem the entire senior debt but only part of the junior debt. One of the junior lenders disagreed with the valuation and refused to agree to the restructuring. As a result of the judicial sale of Dutch shares, the dissenting junior lender was forced to settle for a small amount in cash. The finance documentation governed by English law included the (standard) clause that on the instruction of the majority of senior lenders, the security trustee[7] could enforce the security arrangements and also that – insofar as the sale under execution comprised the judicial sale of pledged shares – the security trustee could discharge the company of which the shares were sold under execution (as well as the subsidiaries of this company) from any debts remaining after enforcement of the security interests. The dissenting junior lender still had a residual claim on the company holding the shares sold under execution, but following private sale under execution the company no longer possessed any relevant asset.

Figures 1 and 2, taken from the article wrote by the two attorneys of the company, Teun Struycken and Holly Neavill, explain what happened in this restructuring.[8]

7 This represented security, which was given to the security trustee on behalf of the lenders, the customary manner to structure syndicated loans.

8 Holly Neavill and Teun Struycken in European Debt Restructuring Handbook (2013), p. 115 e.f.

Figure 1 Pre-transaction structure

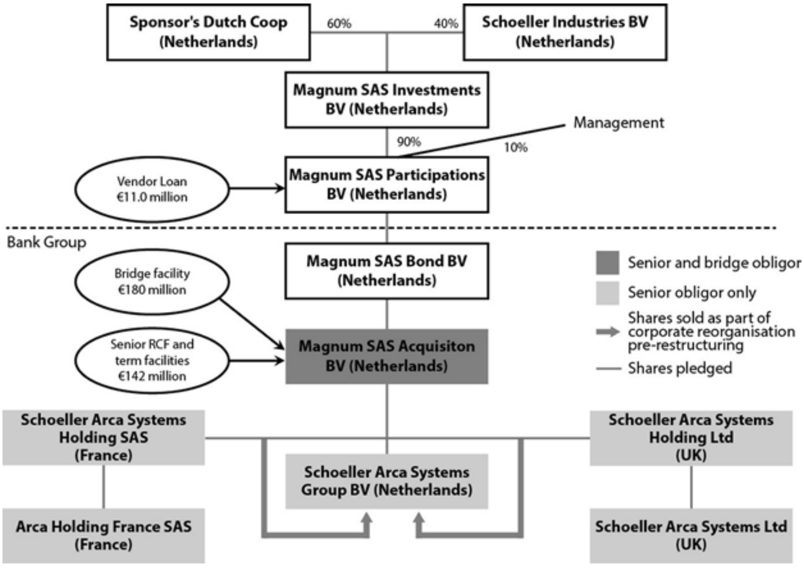
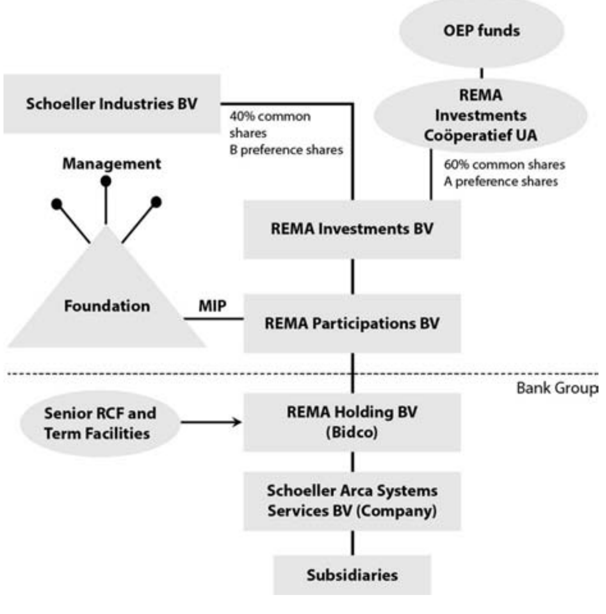


Figure 2 Final closing structure



The restructuring relied heavily on the effectiveness of a so-called release mechanism incorporated in the intercreditor agreement. This mechanism enables the security trustee when executing the forced sale of the shares to release the legal entity as to which shares are to be sold (including its subsidiaries), of all of its debts under the finance documents. Queen's Counsel had confirmed in the SAS case that the drafting of the intercreditor agreement was indeed, in his view, effective.

However, soon after the SAS restructuring, a similar clause in an intercreditor agreement was tested in a UK court in the European Directories case.[9] The relevant wording of the clause in that case was as follows:

> (b) if the asset which is disposed of consists of all of the shares (which are held by an Obligor or European Directories (DH5) BV…) in the capital of an Obligor or any holding company of that Obligor, any release of the Obligor or holding company from all liabilities it may have to any Lender, Subordinated Creditor or other Obligor, both actual and contingent in its capacity as a guarantor or borrower (including any liability to any other Obligor by way of guarantee, contribution, subrogation or indemnity and including any guarantee or liability arising under or in respect of the Senior Finance Documents or Mezzanine Finance Documents) and a release of any Transaction Security granted by that Obligor or holding company over any of its assets under any of the Security Documents; and
> if the asset disposed of consists of all of the shares held by an Obligor or the Parent in the capital of an Obligor or any holding company of that Obligor and if the Security Trustee wishes to dispose of any liabilities owed by that Obligor or Holding Company, any agreement to dispose of all or any part of those liabilities on behalf of the relevant Lenders, Subordinated Creditors, Obligors and Facility Agents (with the proceeds thereof being applied as if they were the proceeds of enforcement of the Transaction Security) Provided that the Security Trustee shall take reasonable care to obtain a fair market price...[.]

Mrs. Justice Proudman took a rather limited view on the effectiveness of this release clause[10]:

> 28. To my mind the defendants' interpretation of sub-clause 15.2 does not bear out what the clause actually stipulates. It seems to me plain that the reference to "Obligor or any holding company" is to the Obligor or holding company

9 See also further in this report on this case, page 16 e.g. where the complete picture of the case is described, including company charts.

10 The High Court of Justice Chancery Division September 23, 2010 [2010] EWHC 3472 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2010/2406.html>.

> whose shares are being disposed of, not to other Obligors (whether or not their holding companies are Obligors) whose shares are not being disposed of. It is to my mind artificial to dissociate the expression "an Obligor or any holding company of that Obligor" in the first part of clause 15.2(b) from the two references to release of "the Obligor or holding company" in the second part. As a matter of grammar the two expressions mean the same thing, namely, the Obligor or the holding company whose shares are sold. The Intercreditor Agreement already has a defined term "Subsidiary" which could have been used if release of the liabilities of subsidiaries had been intended.
> 29. Similar considerations apply to clause 15.2I. Again, the reference to "Obligor or holding company" is, grammatically, to the Obligor or holding company whose shares are being disposed of. Thus, where clause 15.2I provides that the Security Trustee is authorized to enter into any "agreement to dispose of all or part of those liabilities", the liabilities referred to mean only the liabilities owed by the Obligor or holding company whose shares are being disposed of, that is to say DH7 and only DH7.
> 30. I accept that the defendants' interpretation enables the Security Trustee to maximize the value on a disposal and thus to maximise the cash available to creditors or at any rate to those who now benefit under the priority waterfall provided for in the Intercreditor Agreement. However, the question is not what the clause ought to achieve in the events which have happened, but what it does provide on its true construction. It begs the question to say that the defendants' interpretation was potentially of benefit to all lenders. The issue is not what is or was beneficial, but what did the parties agree at the time.

In short, Judge Proudman did not allow for a release of the subsidiaries that would make the restructuring impossible. This interpretation might also have stopped a successful restructuring of SAS (if the clause in the SAS case would have been exactly the same). The Court of Appeal, however, set the matter straight and ensured that the customary release clause was interpreted as doing what it needed to do, release also the obligations of the subsidiaries[11]:

> 23. It is no misuse of language to use the words "disposal of all of the shares in the capital of an Obligor or any holding company of that Obligor" to refer to individual Obligors lower down the company chain and any holding company of such Obligors. It is agreed that the holding company can be both a direct and indirect holding company, and in such circumstances DH7 is indeed the

11 [2010] EWHC 3472 (Ch), available at: <www.bailii.org/ew/cases/EWCA/Civ/2010/1248.html>.

> Obligor's holding company and the company the shares in which it is proposed to dispose of.

An appeal to the Supreme Court was refused. The decision of the Court of Appeal was an important milestone in the European restructuring market. Or, as Kon Asimacopoulos, Parthe Kar, Ealaine Nolan and Freddie Powles write in their article on European Directories[12]:

> The Court of Appeal decision was crucial to the European restructuring market because of the prevalence of the drafting mechanisms under the dispute in a number of finance documents for leveraged acquisitions in this vintage[.]

When drafting an intercreditor agreement, legal counsels beware. Currently, such language is becoming less ambiguous.

Sample 4: EU Forum Shopping

Sample 4 deals with European cases in which the restructuring of the business was done by changing the Centre of Main Interest of a debtor (COMI), thus choosing the preferred court to deal with the restructuring. Since the adoption of European Council (EC) Regulation No. 1346/2000 of May 29, 2000 on insolvency proceedings[13] in the EU, local courts in the EU have been asked to apply the notion of COMI to individual cases. COMI under the EIR is to be decided per individual debtor, even if such an individual debtor forms a part of an international group of businesses. The EIR uses the presumption of the registered office to deal with the COMI issue. If in an international group of businesses this presumption would hold for each individual legal entity that forms a part of the group, this would mean that main proceedings would be declared in the jurisdiction of the registered offices of the individual legal entity. Judges have, however, been creative in trying to get around the presumption, resulting in several cases in which it was decided that the COMI was actually in a different location than the registered office of such legal entity – a flexible COMI approach.

12 European Debt Restructuring Handbook (2013), p. 175 e.f., esp., p. 181.
13 In this paper, the abbreviation EIR is also used to distinguish between the current EIR and the future EIR 2017, which only comes into force as of 2017.

Daisytek (2003)

One of the earlier cases is the Daisytek case.[14] Daisytek group was headed by Daisytek Inc., a US company.[15] Daisytek Inc. filed on May 7, 2003 for US Chapter 11 proceedings. The sub-holding company for the pan-European business group was Daisytek-ISA Ltd., based in Bradford, UK. Daisytek-ISA Ltd. was a pan-European business that (i) operated as a reseller and wholesale distributor of electronic office supplies to retailers, and (ii) sold to end users. Daisytek-ISA Ltd. further served as a sub-holding company for all the other European companies. One of these companies was ISA International plc, which in turn performed the head-office function for the European group. In total, fourteen companies – ten companies with registered offices in the UK, three companies with registered offices in Germany and one company with its registered office in France – petitioned to the Leeds court for an administration order to be made in order to achieve a more advantageous realization of its assets than would be achieved in a winding-up. The Leeds court ruled that the COMI of all fourteen companies was in Bradford and gave a main proceedings administration order in respect of the ten UK companies. Furthermore, the court made administration orders in respect of the French and German companies.[16] The Leeds court referred to the following eight elements:

1. The finance function of the group was operated from Bradford. The business was funded by a sub of Daisytek-ISA through a UK bank, by a factoring agreement through a UK bank, while their finance function is in accordance with English accounting principles, and reviewed and approved by ISA International plc;

14 In re Daisytek-ISA Ltd [2003] BCC 562, See Bob Wessels in International Insolvency Law, Volume X Insolvency Law (2012), p. 512 and further for more broad description of Daisytek case, see also Irit Mevorach in Insolvency within Multinational Enterprise Groups, p. 180 ff. Wessels considers the Daisytek case as the case that set the tone. See also Gabriel Moss in Coordination of Multinational Corporate Group Insolvencies: Solving the COMI Issue Group Insolvency – Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, p. 1010 ff.

15 The COMI of this US entity was apparently not in the EU, see or an example where the COMI of a US company was found to be in the EU: Re BRAC Rent-A-Car International Inc. [2003] EWHC (Ch) 128, [2003] 2 All E.R. 201; [2003] BCC also available through Wessels in International jurisdiction to open insolvency proceedings in Europe, in particular against (groups) of companies, p. 9 (Budget group restructuring) and Fletcher in Law on Insolvency, paras. 31-37; BRAC Rent-A-Car International Inc. was already subject to a Chapter 11 proceeding in US; the Model Law is applicable in the UK as of April 4, 2006 (source: Cross-Border Insolvency, A commentary on the UNCITRAL Model law [2006], p. 65) so if this Budget group restructuring would take place now, perhaps a different route would be taken to the Chapter 11 proceeding of the US been recognised in the UK. It shows how lively and therefore interesting the international insolvency arena is.

16 See for reaction of German and French Courts: Bob Wessels in International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups) of Companies, p. 22 e.f., available at <www.iiiglobal.org/sites/default/files/11-_InternJurisdictionCompanies.pdf>. Especially the French courts decisions are interesting: French Nanterre Commercial Court May 23, 2003: COMI French company is France, French Versailles Court of Appeal September 4, 2003: COMI determined by another EU Court is to be upheld, thus UK, and finally French Cour de Cassation June 27, 2006: upheld decision Versailles Court, which is according to Wessels, the correct approach. See also Mevorach, note 14, p. 181.

2. The German companies required ISA International plc's approval for any buying in excess of €5000;
3. All senior employees in Germany were recruited in consultation with ISA International plc;
4. All information technology and support was run from the Bradford office;
5. All pan-European customers were serviced by ISA International plc; 15% of the sales of the German companies were derived from contracts negotiated and entered into by ISA International plc;
6. 70% of the purchases are under contracts negotiated and dealt with from Bradford;
7. All corporate identity and branding are run from Bradford; and
8. The business of the German companies derived from the CEO's strategy plan, who visits Germany two days a month and spends 30% of his time (mainly in Bradford) on the management of the German companies.

The flexible COMI approach resulted in a single COMI for the group and enabled the restructuring of the Daisytek group. Daisytek has been followed by numerous other cases, such as *Collins & Aikman, TXU Europe, MG Rover* and *Eurotunnel.*[17]

***Eurotunnel* (2006)**

The Eurotunnel as such does not need any further introduction than that it is the tunnel between France and the UK, an immense project. Legally, the project was structured as follows: SA Eurotunnel and Eurotunnel plc were the two holding companies, but there were other companies in France, UK, Germany, Spain, Belgium (Société Européenne) and the Netherlands. On August 2, 2006, the Paris Commercial Court came to the conclusion that all companies were considered to have their COMI in France. Arguments were as follows: Strategic and operational management of the relevant companies was handled in Paris, the head office of the main French companies was in Paris, the financial management was in Paris and the court concluded the main part of the business was in Paris (sic!).[18] Finally, the Court concluded that the negotiations regarding restructuring mainly took place in Paris under responsibility of the French chairman. Wessels takes the view that COMI is here (in his view incorrectly) replaced by the court by CANE, the centre where all the negotiations have taken place.[19]

17 See Mevorach, note 14, p. 181, note 170 for references.

18 Would the court not have realised that the cash flow generating part of the group, the tunnel was in between France and the UK? See for a case study of Eurotunnel: Eurotunnel plc & Eurotunnel S.A. and Associated Companies August 2, 2006 and January 15, 2007, Case Study Series – 1 INSOL International, available at: <www.insol.org/TechnicalSeries/documents/INSOLInternationalTechnicalCaseStudy1.pdf>.

19 Wessels, note 14, para. 10600a, see also later in this report the Wind Hellas case.

Deutsche Nickel (2004)

Deutsche Nickel is an interesting case out of 2004 with a specific new aspect in it – the so-called migration.[20] In essence, there is no COMI-shifting here but a creative approach to gain benefit of a foreign insolvency proceeding. Deutsche Nickel AG, German company, vanished from Germany and re-emerged in the UK as DNICK Ltd. DNICK Ltd went into administration and did a Company Voluntary Arrangement. The relevant steps were as follows:

- Step 1: Deutsche Nickel AG converted itself into a limited commercial partnership – DNICK Ltd. (a newly incorporated Holding) and became one of the partners – the general partner.
- Step 2: Other partners quit the partnership, and DNICK Ltd. was automatically the full legal successor to the assets and liabilities.
- Step 3: The COMI of DNICK Ltd. was in UK, and a company voluntary administration proceedings was used to restructure the debts of the company.

Schefenacker (2007)

Schefenacker AG was an automotive manufacturer of – inter alia – side and rear-view mirrors, with thirty-three locations worldwide.[21] However, the biggest plant was in Portchester, England, and less than 10% of its core assets were in Germany. Its headquarters in Germany were in Schwaikheim, Alfred Schefenacker Strasse 1 (sic!). Its plan to restructure its debt out of court in Germany seemed impossible to achieve. Problems it encountered were: a German law requirement to file for bankruptcy in case of illiquidity or over-indebtedness. Furthermore, 95% of the bondholders needed accept the proposed debt to equity swap. Schefenacker used the Deutsche Nickel design by migrating to a plc and changing its COMI to the UK, thereby restructuring its bond obligations. The followings steps were taken:

- Step 1: Internal corporate restructuring of operating subsidiaries was done to ensure that Schefenacker Management UK Ltd., a 100% subsidiary of Schefenacker AG, became the sub-holding of all operating companies.
- Step 2: Schefenacker AG converted itself into Schefenacker & Co KG, a newly incorporated UK legal entity; Schefenacker plc became the general partner.
- Step 3: Schefenacker AG exited the partnership, leaving behind Schefenacker plc as its universal successor.
- Step 4: Schefenacker plc proposed a UK Company Voluntary Arrangement, which was accepted by the relevant creditors with the required 75% majority.

20 See Debt Restructuring (2011), Chapter 2, The EC Regulation on Insolvency Proceedings, part V, Forum Shopping as a Restructuring Tool by Alain Kornberg and Sarah Peterson, esp. p. 2.125 e.f.

21 See Kornberg and Peterson, note 20, p. 2.127 e.f., see also Wessels, note 14, para. 10616a.

***Wind Hellas* (2009)**

Wind Hellas is a Greek telecommunications business group. It supplies fixed-line and mobile telephone services, Internet access and broadband services. It started commercial operations in June 1993. In April 2007, Wind Hellas became the subject of a private equity transaction worth approximately €3.4 billion. At the beginning of 2009, the first signs of deteriorating performance were shown as a result of competitive, operational and market pressure. Costs reductions were initiated by Wind Hellas, and a first financial restructuring was successfully effectuated in 2009 using a UK administration process to do a so-called pre-pack.[22] The problem was, however, that Hellas Telecommunications (Luxembourg) II SCA (Hellas II) was a Luxembourg entity. A series of steps were taken to move the COMI from Luxembourg to the UK. These steps included appointing an English registered group company as corporate general partner of Hellas II and appointing individual residents in the UK as its directors and as members of the supervisory board of Hellas II. Its head office and principal operating address was moved to the UK, and its creditors were notified of this move. It opened a bank account in the UK, and all payments were made from that bank account (although Hellas II also had a bank account in Luxembourg). Finally, it registered under the UK Companies Act 2006 as a foreign company.[23] Hellas II successfully moved its COMI to the UK, at least in the eyes of the UK judge Justice Lewison[24]:

> 4. In the present case it is said that the company's COMI was changed from Luxembourg to England in the middle of August this year. I have to consider the position as at today's date. That is to say some three months on. The objective and ascertainable facts on which the company relies in support of its contention that it has shifted its COMI are that its head office and principal operating address is now in London, albeit that the premises it occupies are relatively modest since the company is no more than a financing and shareholding vehicle. The company's creditors were notified of its change of address around that time and an announcement was made by way of a press release that its activities were shifting to England. It has opened a bank account in London and all payments are made into and from that bank account although there still remains a bank account in Luxembourg to deal with minor miscellaneous payments. It has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too.

22 See on pre-pack further in this report in the Almatis Case.

23 Debt Restructuring (2011), part 1, Corporate Debt Restructuring, part 2 V. Forum Shopping as a Restructuring Tool, nr. 2.142 by Alan Kornberg and Sarah Paterson.

24 The High Court of Justice Chancery Division Mr. Justice Lewison November 29, 2009, [2009] EWHC 3199 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2009/3199.html>.

> 5. The purpose of the COMI is to enable creditors in particular to know where the company is and where it may deal with the company. Therefore, it seems to me that one of the most important features of the evidence, which is the feature I mention next, is that all negotiations between the company and its creditors have taken place in London.
> 6. On that evidence I am satisfied that the company has moved its COMI from Luxembourg to England with the consequence that I have jurisdiction to make the order sought. There is no doubt on the evidence that the company is insolvent; and the evidence is compelling that administration will produce a better result for creditors than would be produced on a winding up. The application is no longer opposed although concerns have been raised by some creditors of the company not to the effect that the outturn proposed would be no better than would be achieved in a winding-up, but that the outturn proposed could have been even better than the sale currently in prospect. The sale currently in prospect is a sale of the company's asset, namely its shareholding in another company called WIND Hellas which is a telecoms company operating in Greece. The proposed buyer is a company called Weather which is part of the same group as the company. It is what is colloquially known as a pre-pack, in other words a prearranged sale which the administrators intend to effect as soon as or shortly after an administration order is made.

This restructuring was, however, based on the assumption that the Greek macroeconomic conditions would remain stable. Then the 2010 Greek economic crisis hit the group. Standard & Poor rated Wind Hellas CCC+ at the beginning of 2010 but was worried about the capital structure of the group, its limited financial flexibility, its exposure to the depressed Greek economy, its weak operating performance and last, but certainly not the least, the tougher regulation of telecommunications operations in Greece. Another financial restructuring was required.[25]

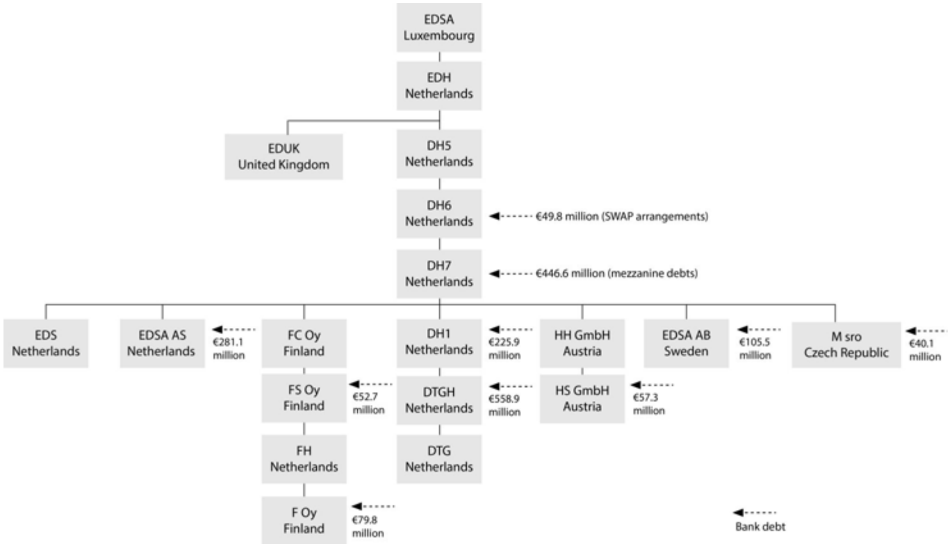
European Directories (2010)

European Directories offered advertising products through a variety of online and offline media, ranging from printed directories to Internet directory services, affiliate marketing, search engine marketing and search engine optimization and directory assistance in nine European jurisdictions. The original focus of the group was the printing of yellow pages directories. The Dutch "Gouden Gids" was also one of its products. The Internet changed

25 See for a detailed description of that restructuring combining a UK Scheme and UK pre-packaged UK administration proceedings, European Debt Restructuring Handbook (2013), p. 163 e.f. by Ben Davies and Mark Glengarry.

the viability of its business model, and it was obliged to change its strategy. Its new strategy became providing leads for small- and medium-sized enterprises. It goes without saying that this forced change of strategy also had its effect on the financial health of the group. A financial restructuring was required. Pre-restructuring the group structure was as shown in Figure 3[26]:

Figure 3



The financing structure is also partly[27] reflected in the company chart of the group and consisted of senior, mezzanine and payment-in-kind (PIK) facilities and certain hedging agreements. At the time of the restructuring, approximately €2.3 billon was outstanding, split into the following amounts; €1.4 billion of senior facilities, €441 million of mezzanine facility and €349 million of PIK facilities.

In the second quarter of 2009, the management of European Directories understood that the group could be in breach of its financial covenants by the end of 2009, owing to the deterioration of its operating performance. The difficulties were exacerbated by operational difficulties especially in the Netherlands and Denmark. Costs reductions were put in place, and a financial and commercial review was performed by an external advisor. Its report showed that the group was unlikely to be able to satisfy its debt service obligations

26 Charts are from European Debt Restructuring Handbook (2013), p. 175 e.f.
27 Only bank debt and hedging arrangement, not the unsecured and structurally subordinated payment in kind loan.

in full. In March 2010, a restructuring committee was put in place at the level of European Directories DH6 B.V. (DH6) to consider a potential restructuring. A CRO was appointed.

In the beginning, the secured creditors acted as one stakeholders' group in the restructuring. However, soon (most likely based on perceptions of the valuation of the group), the first and second ranking secured creditors were at war with each other. Earlier in this report, the discussion in the UK courts on the release clause in this case was already described.[28] In order to be able to complete the restructuring, a COMI-shift of DH6 was required, in order to be able to enter into a UK administration in which a pre-packaged sale would be used, to sell the shares of DH7 together with some other asset of DH6 (an intercompany claim). Once again, the UK judge was satisfied that the COMI was indeed changed:

> 37. Next, the date by which reference to the location of the COMI must be determined will be the date when the court is required to decide whether to open insolvency proceedings.
> 38. It is possible for a company to change its COMI from its original or presumed location. The decision of Lewison J in the case of R v Hallas Telecommunications Luxembourg SCA [2010] ECC 295, was cited to me as a particularly helpful illustration in the context of this case, of a company changing its COMI from one jurisdiction to another. In that case it was said that the COMI was changed from Luxembourg to England, and indeed Lewison J found that such was the case and an administration order was made. At paragraph 4.26 of his judgment Lewison J said the following:
>
> > Quote taken out, see quote earlier in this report on Wind Hellas
>
> Lewison J said that on the evidence he was satisfied the company had moved its COMI from Luxembourg to England.
> 39. In the present case the evidence before me may be summarised as follows. The company here acts as an intermediate holding company for the other companies within its group. It raises finance then made available to the operating subsidiaries within the group. It does not trade with third parties other than engaging legal and other advisors in connection with restructuring. Its assets mainly consist of intangible assets. It has no employees although of course the overall group has a large number of employees. The directors of the company are Mr Briggs, resident in London, Mr Cook, resident in the United States, and Mr Perisat, also resident in London.

28 See page 9 e.f. of this report.

40. All decisions, I am satisfied, relating to the company's strategic and financial arrangements, and in particular those concerning its financial dealings and the proposed group restructuring, are made by directors from the Chiswick office. The company and its directors do not operate from any office in The Netherlands in relation to the company's affairs. It created a restructuring committee with the role of considering the potential restructuring and that meets in London. The vast majority of its creditors are based in England. The principal financing agreements are governed by English law. The senior facilities agreement contains an exclusive jurisdiction clause in favour of England and the mezzanine facility and intercreditor agreements provide that the courts of England are the most appropriate and convenient forum. All of the first lien debt, second lien debt and mezzanine debt are, as I understand it, traded on the London secondary debt market.

41. Next, and this is of significance in the light of the observations of Lewison J in the Hallas case, since the onset of financial difficulties in the second half of 2009 the centre of discussions between the company's directors, its professional advisors and principal creditors in relation to the proposed restructuring and reorganisation has been in London. Numerous meetings have taken place between the company and its creditors in London to consider the proposed restructuring. The majority of the advisors to the company and its creditors are based in London and thus, in order to pursue a restructuring it has been determined that the only viable option is for the company to go into administration in England.

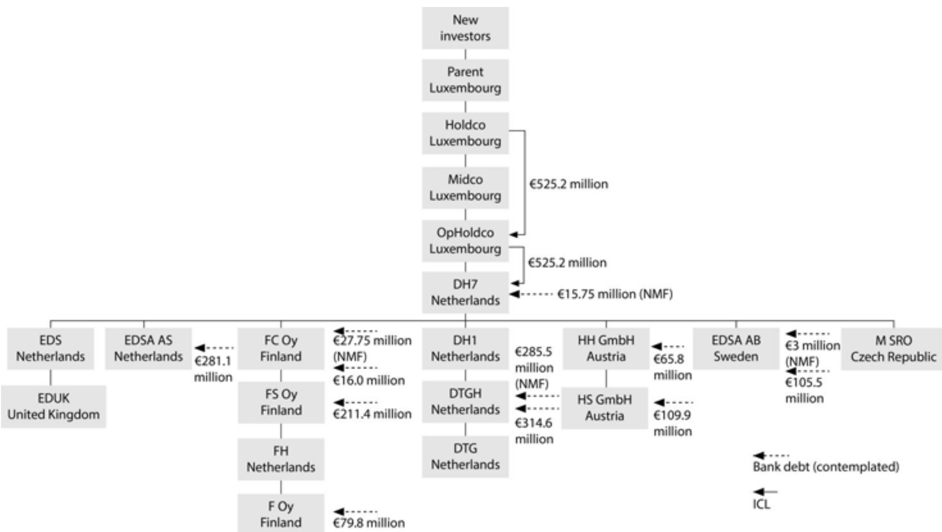
42. On 14 and 21 May the board resolved to take the necessary steps to confirm the location of the company's COMI in England, and on 20 May 2010 the company wrote to the senior co-ordinating committee to inform them of the steps the company would be undertaking to confirm the location of the COMI in England. Following that resolution a number of practical steps were taken with a view to confirming the COMI in England.

43. In summary, the company's business address registered at the Dutch Trade Registry has been designated as the Chiswick office. This address has been designated as the Head Office of the company, and the company does not have a business address in The Netherlands. It has a registered branch in England with the Registrar of Companies at Companies House. On 24 May of this year it wrote to its creditors and counterparties to notify them that the Chiswick address was the new address for correspondence. Its website lists the Chiswick office as the company's address and states, as is factually accurate now, that the company's operational headquarters is in London. The company has a bank account in London. The sole signatory to that is the chief financial officer who

is based at the Chiswick office. Creditors communicate with the company and its advisors in London.
44. On that evidence, which seems to me is entirely one way, I am perfectly satisfied that the company has discharged the onus which rests upon it to satisfy me that the rebuttable presumption that the COMI is the place of its registered office has indeed been rebutted. I am perfectly satisfied on the evidence before me that the COMI in the case of this company is England, and that there is thus jurisdiction to make the order which is sought to be made.

With this decision of the UK judge, the restructuring was possible. The company chart after the restructuring is as shown in Figure 4:

Figure 4



Conclusion for EU Forum Shopping to Restructure Debt

From these samples, it is evident that groups are using the possibility to forum shop within Europe in order to find the jurisdiction that meets the required criteria of the restructuring. There is ample literature available on the pros and cons of forum shopping in both Europe and the USA.[29] Forum shopping is heavily debated. In the USA, there is a split of forum

29 See for example: Lynn M. LoPucki, Courting Failure (2005); Lynn M. LoPucki, Where Do You Get off? A Reply to Courting Failure's Critics, (2006), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=888325>; Todd J. Zywicki, Is Forum Shopping Corrupting America's Bankruptcy Courts? (2006), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=781487>; Kenneth Ayotte and

shopping enthusiasts (the so-called Delaware enthusiasts) versus forum shop sceptics (the so-called Delaware sceptics). Lo Pucki is a forum shop sceptic and takes the view that the management of companies and bankruptcy professionals choose Delaware for their own interest and that as a result thereof, there are too many re-filings. Skeel takes the view that Delaware has simply superior judges and practices. In European context, although the EIR seems in recital 4[30] to argue that all forum shopping should be avoided, one can distinguish between good and bad forum shopping[31] or as A.G. Colomor points out in his opinion in the *Seagon/Deko Mart* Case:

> As the regulation intimates, forum shopping, is not a completely unlawful practice. The Community legislation counters the *opportunistic* and *fraudulent* use of the right to choose a forum, which is very different to the demonisation for the sake of it of a practice which on occasions it is appropriate to encourage.[32]

This is also the view laid down in the recent External Evaluation of Regulation No. 1346/200/EC on Insolvency Proceedings by European Insolvency Law (the "Heidelberg-Luxembourg-Vienna Report")[33] on forum shopping. Forum shopping should not be regarded as abusive and illegitimate per se.[34] Due to the fact that national insolvency laws in Europe are not harmonized, stakeholders may select the most favourable law to restructure their debts, but there is also abusive forum shopping. Especially, the flight of certain natural persons without permission of their creditors to another country to obtain

David A. Skeel Jr., Why Do Distressed Companies Choose Delaware? An Empirical Analysis of Venue Choice in Bankruptcy, European Corporate Governance Institute (ECGI) (2004), available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=463001> for USA and for Europe: Report 2011 of NVRII by reporter Prof Loes Lennarts who takes the view that the rebuttable presumption re registered office as COMI in the EIR should be changed in an irrebuttable presumption. I don't agree with that view, it is too simplistic and does not take into account the wishes of all the relevant stakeholders in an insolvency proceedings.

30 Recital 4: "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)".

31 See f.e. the Opinion of A-G Colomer in Case C-1/04 Staubitz-Schreiber [2006] ECR I-701 paras. 71-77, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=59558&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=23831>.

32 See the Opinion of A-G Colomor in the Case C-339/07 *Seagon v. Deko Marty Belgium* N.V. [2009] ECR I-1767, fn 49, available at: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd7a95a75e7bf142dcb1a38e86f2022ac7.e34KaxiLc3qMb40Rch0SaxuRaNj0?text=&docid=66608&pageIndex=0&doclang= en&mode=lst&dir=&occ=first&part=1&cid=22024>.

33 Available at: <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>. In the Netherlands there is currently a specific forum shopping issue due to the fact that a minority of bankruptcy courts refuses to cooperate with so-called pre-pack bankruptcies. This leads to a race to the majority bankruptcy courts which cooperate. See FD July 9, 2014 "Noodlijdend Estro omzeilt dwarse rechtbank via truc".

34 Heidelberg-Luxembourg-Vienna Report, p. 75.

a speedier discharge of their debts should be stopped.[35] If the debtor and a relevant majority of its creditors agree on the restructuring of the debts of the debtor, including a change of location of court that approves such restructuring, such forum shopping should, in my opinion, be allowed.[36] Of course, the interest of local creditors, i.e., creditors who have lent money to the debtor depending upon the local law of the jurisdiction of the debtor should be taken into account, but the EIR has sufficient safeguards built in for that protection.[37]

Another question is what to do with groups with registered offices (and therefore COMIS) spread all over Europe. Courts have concluded that the individual COMI of each of the companies within an international business enterprise group is located in the same jurisdiction even if their registered offices were spread all over Europe, and sometimes even outside Europe. In order to protect the interests of local creditors, so-called secondary proceedings might be declared in jurisdictions where the relevant companies have an establishment.[38] These secondary proceedings are subject to the law of the Member State in which the establishment is situated. In order to avoid these secondary proceedings,[39] UK practitioners have, in several cases, successfully argued to the UK courts that with respect to the assets of the establishment, they would, in their UK-governed main proceedings, be allowed to apply the law that would have been applicable if a secondary proceedings had been declared, and thus ensured that the interests of the local creditors were protected.[40] I also concur with this practice because it is a balanced view on how to be able to restructure the group but still safeguard the position of local creditors.[41]

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35 See for example Bankruptcy tourists cross Irish Sea: FT December 13, 2011: "It takes 12 years to be discharged from bankruptcy in Ireland compared to just one year in the UK. It is a no-brainer for people to relocate to the UK for a few months to free themselves of debts".

36 Or as Jennifer Payne says in her book *Schemes of Arrangement* (2014), p. 305: "However, forum shopping might not always be a bad thing. In some instances the debtor might be driven by a desire to utilize a form of proceeding in a particular jurisdiction with a view of maximizing returns to creditors or the company might wish to utilize a particular procedure that enables the most and efficient smooth resolution of its problems, in a manner that is beneficial to the creditors."

37 See for example articles 5-7 EIR.

38 Article 2 of the Insolvency Regulation provides, for the purposes of the Insolvency Regulation, several definitions, one of which is the one under (h), saying that an 'establishment' shall mean '… any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'.

39 The effect of the secondary proceedings might have a disrupted effect since the local insolvency practitioner could take a completely different view on the restructuring. See on the opening of secondary proceedings: Opening on Secondary Insolvency Proceedings in the EU by Bernard P.A. Santen, Fabian A. van de Ven and Gert-Jan Boon in Eurofenix (Autumn 2015), p. 20 e.f.

40 See also Moss, note 14, p. 1017 ff. and Wessels, note 14, para. 10603b.

41 See for more on COMI and international business enterprises groups: Johan Jol in Does an international business group have one COMI or not? That is the question, in the Liber Amicorum Mart Franken, available at: <www.vil.nl/nl/liberamicorum>.

Sample 5: The Scheme of Arrangement Route[42]

As of 2011, a new practice occurred in Europe – the usage of the UK Scheme of Arrangement proceedings to restructure the debt of a non-UK company.[43] Prior to the restructuring, these non-UK companies had neither their registered seat nor their COMI in the UK. Nevertheless, the companies made use of the English scheme to restructure their debts. Strictly speaking, these UK scheme proceedings are not insolvency law proceedings but company law proceedings and are incorporated in Part 26 of the Companies Act 2006.[44] Under the relevant insolvency law proceedings, a secured creditor cannot be bound by a composition plan and no cramdown possibility exists.[45]

Non-UK companies can only make use of a UK scheme if they meet the criteria of the Companies Act 2006.[46] In short, a scheme is available for "any company liable to be wound up under the Insolvency Act 1986".[47] Under the Insolvency Act, both solvent and insolvent companies can be wound up irrespective of whether these are registered or unregistered.[48] Unregistered companies include foreign companies.[49] English courts take the view that if a foreign company has sufficient connection with the UK, the UK court has jurisdiction to wind up the company, and therefore a scheme might be sanctioned.[50] However, all relevant decisions of UK judges are only so-called "first instance judgements". In other words, no court of appeal has decided on the issue. Furthermore, the reasoning by the judges is (to put it in Jennifer Payne's words[51]) "inconsistent" and (to use Lucas Kortmann and

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42 For Dutch language readers: see on this issue also: Forumshopping, pre-adviezen 2014, uitgebracht voor de vereniging van burgerlijk recht, Prof. Mr. Drs. F.E.F. Beekhoven van den Boezem, p. 24 e.f.

43 Strictly speaking the practice was not new but reinvented since there were already precedents in which the UK Scheme was used long before that date. See the decision Re DAP Holdings NV (a Dutch corporation) [2005] EWHC 2092 (Ch) and the discussion on that case, available at: <http://uk.practicallaw.com/uk/5-201-4781#>, see Chris Howard and Bob Hedger in Restructuring Law and Practice, 2nd edition, 2014, pp. 492 and 493 for overview of relevant case until 2014.

44 Available at: <www.legislation.gov.uk/ukpga/2006/46/part/26>, see also note 36.

45 See Giving Effect to Debt Compromise Arrangements – Binding the Minority or out of the Money Classes of Creditors by Gabriel Moss, Daniel Bayfield and Adam A-Attar in The Law and Practice of Restructuring in the UK and US (2011), pp. 164-176: Two relevant insolvency proceedings are: company voluntary arrangement or CVA and administration. Such a CVA needs to be approved by 75% of the creditors voting in person or by proxy by reference to the value of their claims. It furthermore required the approval of 50% in value of the members/shareholders present at the meeting. However, rights of secured creditors cannot be affected, compare Vanessa Finch in Corporate Insolvency Law (2009), pp. 489 and 490. Secured creditors cannot be crammed down in an administration and compelled to accept a reorganization plan against their wishes, id., p. 384.

46 Text available at: <www.legislation.gov.uk/ukpga/2006/46/contents>.

47 Payne, note 36, p. 288, see for Insolvency ACT 1986, available at: <www.legislation.gov.uk/ukpga/1986/45/contents>.

48 Payne, note 36, p. 288.

49 Id.

50 Id., pp. 288 and 290.

51 Id., p. 292.

Michael Veder's words[52]) "chameleonesque". Until a final decision in a higher UK court is reached, UK schemes for foreign companies are still to be treated with caution, and in any event, the (theoretical and practical) risk should take into account that the scheme route might be challenged successfully either in a higher UK court or in a court of a foreign jurisdiction.[53] Furthermore, the final verdict is still open on the question whether or not a UK scheme would fall under the Rome I or Brussel I Regulation, although Kortmann and Veder seem to have compelling arguments to vote for Brussel I.[54]

Rodenstock (2011), *Estro* (2013), *Magyar* (2013), *Apcoa Parking* (2014) and *Van Gansewinkel* (2015) are all cases in which the UK Scheme is used in the restructuring.

***Rodenstock* (2011)**

Rodenstock was, at the time of its restructuring, Europe's fourth largest manufacturer and distributor of spectacle lenses and frames. The group was headquartered in Munich, had forty sales offices across the globe and major production facilities in Europe and Thailand. Ultimately owned by a private equity sponsor, the German parent was Rodenstock GmbH, a German corporate entity with limited liability. Rodenstock GmbH had neither its COMI nor an establishment in the UK. The group had an outstanding debt of more than €305 million under a senior facilities agreement. The group breached its financial covenants in the second quarter of 2009. Although the group continued to pay its principal and interest under its debts, it became evident that it would not be able to continue these payments in April 2011, triggering German insolvency proceedings. After a lengthy discussion, the majority of the stakeholders agreed on a restructuring. In order to ensure that the holdout creditors were also bound by the restructuring, a UK Scheme was envisaged. Judge Justice Brigges sanctioned the scheme. He concluded that there was sufficient connection between the company and the UK. Relevant elements were, in his view, the following: Lenders had agreed on UK Law-governed loan documentation including a UK jurisdiction clause; the majority of the senior creditors were based in the UK and according to the expert advice of two German law experts, the decision of UK judge would be acknowledged[55]:

52 Lucas Kortmann and Michael Veder, The Uneasy Case for Schemes of Arrangement under English Law in Relation to Non-UK Companies in Financial Distress: Pushing the Envelope?, available at: <https://www.ntu.ac.uk/nls/document_uploads/174827.pdf>.

53 See Chapter 7 of the book *Schemes of Arrangement* (2014) by Jennifer Payne for more details, see also Kortmann and Veder, note 52, nr. 58 e.f.

54 Id.

55 May 6, [2011] EWHC 1104 (Ch), Case No: 2135 of 2011, available at: <www.bailii.org/ew/cases/EWHC/Ch/2011/1104.html>, see for full description of the case, Florian Bruder, Wolfgang Nardi, Leo Plank and Freddie Powle, European Debt Restructuring Handbook (2013), p. 187 e.f. Strangely enough Mr Briggs takes the view that the Rodenstock case was a solvent scheme. I agree with Jennifer Payne that this classification can be doubted since Rodenstock was financially distressed and the only possibility to avoid German insolvency proceedings was to ensure that the scheme was sanctioned, see Payne, note 36, p. 298.

68. I have, on a fairly narrow balance, come to the conclusion that the connection with this jurisdiction constituted by the choice of English law and, for the benefit of the Senior Lenders, exclusive English jurisdiction is on its own a sufficient connection for the purposes of permitting the exercise by this court of its scheme jurisdiction in relation to the Company. This is not a case where, merely by happenstance, a majority or even all of the Scheme Creditors have separately chosen English law and/or jurisdiction to govern their individual lending relationships with the Company. Rather, it is a case where they have collectively done so by a single agreement, governing what is in substance a single facility or set of facilities to which they have all contributed. The single agreement therefore regulates not merely a series of individual creditor/debtor relationships between each lender and the Company, but the relationship between each of the Senior Lenders inter se, and between them as a body and the Company.
69. I suggested by way of contrast during the hearing the hypothetical case of a Japanese shipping company, a majority of the creditors of which happened to be a series of shipowners based in various countries in the Far East, each of whom, separately from the others, chose to use charterparties governed, in accordance with typical maritime usage, by English law. I consider that a structure of that kind, in which each shipowner had an entirely separate relationship with the Company, governed by a separate contract, would be a less persuasive candidate for supplying the necessary connection with this jurisdiction for the purpose of permitting its exercise in sanctioning a scheme of arrangement for the Japanese company. Mr Snowden did not dissent from that analysis, but submitted that the unitary nature of the Existing Senior Facilities Agreement, binding all the Senior Lenders, and therefore all the Scheme Creditors, into a single English legal structure was sufficient to make the difference. I agree.
70. Mr Snowden also submitted that it fortified the necessary connection that the restructuring of the Company, and the Scheme itself, had been devised and negotiated in England. It occurred separately to me that the fact that all the Senior Lenders had voted at the court convened meeting, and that even the opposing creditors had, until a late stage, signified an intention to participate in the sanction hearing, might itself afford some fortification to the connection with the jurisdiction, by parity of reasoning with ordinary litigation in which a defendant had voluntarily submitted to the jurisdiction.
71. On reflection I am not persuaded that either of these factors adds anything of real substance to the connection afforded by the English legal structure which I have described. I have in mind in particular the fact that, throughout, the

opposing creditors' participation in the process has been subject to a clearly expressed denial both of the English court's jurisdiction to sanction the Scheme and of the existence of a connection sufficient to justify its exercise.
72. Nonetheless for the reasons which I have given, a sufficient connection is in my judgment established for that purpose.

Effectiveness
73. The essential question under this heading is whether the Scheme will be effective in practice in binding the opposing creditors into a variation of their rights as Senior Lenders to the Company, bearing in mind that they would be prima facie entitled to enforce those rights by litigating in Germany, since the jurisdiction clause in the Existing Senior Facilities Agreement is exclusive only for the benefit of the Lenders and may therefore be waived by them.
74. The principal difficulty with a conclusion that the Scheme would in practice be effective for this purpose lies in the decision of the Oberlandesgericht Celle in case 8U46/09 not to recognise the sanctioning by the English court of a scheme relating to Equitable Life, as varying the German law rights of certain policyholders against the company. Strictly, that case is distinguishable from the present case precisely because the relevant creditors' rights were governed by German rather than English law, but that was not the basis of the regional court of appeal's reasoning. Rather, its conclusion was that the English court's decision to sanction the Scheme could not be characterised as a judgment within the meaning of Article 32 of the Judgments Regulation, a conclusion which, if confirmed on the pending appeal to the Bundesgerichtshof with or without a reference to the ECJ, would be no less fatal to the automatic recognition of a sanction order made in this case, than it was in the Equitable Life case.
75. The opinions of the two German law experts, Mr Kirchof and Professor Peter Mankowski produced in evidence by the Company suggest that there is a real prospect that the appeal to the Bundesgerichtshof will succeed, but it seems to me that the two most likely outcomes in the short to medium term (which is the relevant period for practical purposes) must be either that the appeal will fail or that the issue will be referred to the ECJ, the Bundesgerichtshof having no alternative unless they regard the matter as acte claire. In short therefore, the effectiveness of the Scheme in binding the dissentient minority is unlikely to be achieved by automatic recognition of a sanction order in Germany under the Judgments Regulation.
76. Nonetheless, both experts are of the opinion that, in practice, a decision by this court to sanction the Scheme will be legally effective in Germany because the German courts will, pursuant to the Rome Convention, apply English law

> to the question whether the Senior Lenders' rights against the Company have been varied by the Scheme. If so, it seems to me reasonably clear that in any litigation between the dissentient Senior Lenders and the Company in Germany, their rights will be found to have been varied after a trial on the merits, rather than by the shortcut of automatic recognition of the Scheme under chapter III of the Judgments Regulation.
> 77. That outcome, to which the German experts subscribe in their opinions, would be a precise vindication in practice of Lawrence Collins J's reasoning that, even if only ancillary to a scheme made in the courts of the place of incorporation of a company, a scheme made by the courts which habitually apply the law governing the relevant creditor/debtor relationship would be a valuable and efficacious means of ensuring its effectiveness.

***Estro* (2013)**

The case of Rodenstock was soon followed by other cases. Peter Declercq writes in his note to the 2012 NEF B.V. case involving a scheme of a Dutch company[56]:

> In recent years also the use of English Schemes of Arrangements ("Schemes") has significantly grown in popularity as the restructuring tool of choice for implementing negotiated cross-border deals in respect of financially distressed companies – both English companies and foreign companies. Recent examples of the successful use of so-called "solvent[57] Schemes" to restructure foreign companies include: the Spanish company La Seda de Barcelona S.A. (in May 2010), the Spanish company Metrovacesa S.A. (in April 2011), the German company Rodenstock GmbH (also in April 2011), the German company PrimaCom Holding GmbH (in January 2012) and Seat Pagine Gialle S.p.A. (in August 2012). In view of this, the judgments published under «JOR» 2013/58 (the "August Judgment") and «JOR» 2013/59 (the "September Judgment"), which have created the first precedent for the successful use of a Scheme in respect of a Dutch company (NEF Telecom Company BV (the "Dutch HoldCo")) and a Bulgarian company (Bulgarian Telecommunications AD ("Bulgarian OpCo")), hardly come as a surprise. It was only a matter of time for this to happen in respect of a Dutch company as well and – as I understand it – another Dutch company (the Dutch nursery group Estro Groep BV) is already in the process of also using a Scheme to implement a consensual restructuring deal it was recently able to agree with its stakeholders.

56 JOR 2013/58 and 59.
57 See note 55 on the issue whether or not this is indeed a solvent scheme.

Declercq's understanding was indeed correct. The Estro Group did its first[58] financial restructuring in the beginning of 2013. Lawfirm Freshfields Buckhaus Deringer used the case as marketing material[59]:

> International law firm Freshfields Bruckhaus Deringer has advised leading Dutch daycare business Estro Groep BV on the successful restructuring of its €280 million leveraged loan facilities and related finance debt. Freshfields also advised Estro on the group's transition to new ownership.
> The restructuring was completed on a consensual basis, but backed by two English law Schemes of Arrangement which were convened and approved by the relevant creditor classes. The Schemes did not proceed to sanction on the basis that the restructuring was completed consensually prior to the sanction hearing.
> …. This restructuring for Estro Groep is highly significant, not least in that it marks another occasion where English Schemes of Arrangement were prepared to assist non-English companies execute their restructurings. There is a growing use of English Schemes of Arrangement to restructure English law governed debt even where the borrower and its creditors are located outside of England. We expect them to become increasingly mainstream in the coming months and years. …

***Magyar* (2013)**

Magyar Telecom B.V. (Magyar Telecom) was incorporated and registered in the Netherlands. The principal business of the group was the operation of telecommunication services in Hungary. The main operating company was a Hungarian company called Invitel Távközlési Zrt (Invitel). All but a very small proportion of the share capital of Invitel was owned by Magyar Telecom. Magyar Telecom also acted as principal financing vehicle for the group. The ultimate parent of the group was Hungarian Telecom LP, a private investment firm incorporated in Guernsey.

Magyar Telecom had, inter alia, outstanding debts in the form of €345 million 9.5% Notes due 2016 (the Notes), which were issued pursuant to an indenture dated December 16, 2009. The Notes were governed by the law of the State of New York and were subject to the non-exclusive jurisdiction of the Courts of that state in favour of noteholders. The obligations of Magyar Telecom under the Notes were guaranteed by Invitel and other companies in the group. The Notes were secured by a pledge over shares in the company

58 The second restructuring in 2014 was done through a Dutch pre-pack and has led to hefty debate in the Netherlands including several court cases.

59 Source: <www.freshfields.com/en/deals/Freshfields_advises_Dutch_daycare_firm_Estro_Groep_BV_on_its_successful_restructuring/>.

and over the shares held by the company in Invitel and by other liens on substantially all the assets of the group. Interests in the Notes were traded through Euroclear and Clearstream. A scheme was proposed with the persons described in the scheme as the Note Creditors, the persons with a beneficial interest as principal in the Notes, excluding the company itself as owner of Notes with a principal value of €21,041 million. The Note Creditors were, strictly speaking, not creditors of the company unless and until Notes were registered in their names. They were, however, under the indenture circumstances in which Notes may be registered in their names, and they were accordingly contingent creditors of the company and thus considered "creditors" for the purposes of Section 899 of the Companies Act 2006.

The proposed scheme was a part of a financial restructuring of the group. Magyar Telecom was unable to service its obligations under the Notes and had defaulted in the payment of half-yearly interest of more than €15.6 million due in June 2013. The directors of the company concluded that if the restructuring is not implemented, and in the absence of some other restructuring, it is likely that the company and other companies in the group will be forced to enter formal insolvency proceedings.

To ensure that the UK Court would be able to take jurisdiction over the matter, Magyar Telecom moved its COMI to the UK. Justice Richard concluded[60]:

> 18. Steps were taken from mid-August 2013, some time before the application to convene the meeting of creditors was issued, but in anticipation of it, to move the centre of main interests (COMI) of the company from the Netherlands to England. Detailed evidence has been provided to the Court that as at the date of the application and for some time before then, the COMI was located in England for the purposes of Council Regulation (EC) No 1346/2000 (the Insolvency Regulation), as interpreted by decisions of the European Court of Justice in Re Eurofood IFSC Ltd (Case C-341/04) [2006] Ch 503 and Interedil Srl v Fallimento Interedil Srl (Case C-396/09) [2012] Bus LR 1582. On the application before him, Arnold J was satisfied that the COMI of the company was indeed in England and it is clear that it remains so. As the only practical alternative to the restructuring proposed in the scheme or some other restructuring would be a formal insolvency process for the company, it follows that the insolvency would proceed under English law and in the English Courts[.]

The scheme was sanctioned. Soon thereafter, the scheme was exported to the USA. On December 11, the New York Bankruptcy Court recognized the English scheme in respect

60 High Court of Justice Chancery Division Companies Court [2013] EWHC 3800 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2013/3800.html>.

of Magyar under Chapter 15 of the US Bankruptcy Code as a foreign main proceeding providing for related relief, and giving full force and effect to the scheme and related documents in the USA.[61] The case in the USA was, however, uncontested by third parties.[62]

Apcoa Parking **(2014)**

Apcoa Parking Holdings GmbH (APHG) was the holding company of the Apcoa Group, a leading pan-European car park operator with (as at the end of July 2014) about 5,000 employees. APHG and its subsidiaries had entered into a facilities agreement originally in 2007. Originally, the facilities agreement was governed by German law with a jurisdiction clause for the German Court. The Apcoa Group had outstanding liabilities under the Existing SFA, with a total of about €764 million.

Since September 2013, it was obvious that a restructuring of the liabilities under the facilities agreement was necessary and would have to be pursued to resolve the over-leveraged position of Apcoa Group. On March 3, 2014, APHG made a request to the lenders for a three month extension of the maturity date under the facilities agreement and to amend the governing law and jurisdiction clauses from German law and jurisdiction to English law and jurisdiction. The latter request was made with a view to giving the English court jurisdiction over the schemes of arrangement to be proposed in the event that all lender consent to the extension request was not achieved. The requisite support was not obtained for the extension of the maturity date (which required unanimous lender support), but it was obtained for the amendments to the governing law and jurisdiction clauses (which required the support of only two-thirds by value of the lenders).

Apcoa Group then decided to go for the scheme route. Nine inter-conditional schemes were proposed by APHG and its subsidiaries: Apcoa Parking Deutschland GmbH, Apcoa Parking Austria GmbH, Apcoa Parking Belgium N.V., Apcoa Parking Holding Danmark ApS, Apcoa Parking Holdings (UK) Limited, Apcoa Parking (UK) Limited, EuroPark Holdings AS and EuroPark Scandanavia AS. Justice Hildyard sanctioned the schemes.[63] Justice Hildyard's decision is especially interesting with regards to the issues of change of choice of law and jurisdiction:

> 25. To summarise my views on the jurisdictional issues, I have concluded that the combination of the fact that: (a) the facilities agreement is now (albeit

61 Sonya van de Graaf and Peter J. M. Declercq, Popularity of UK Scheme of Arrangements to Restructure Foreign Companies Continues — Boundaries of Application Further Extended available at: <documents.lexology.com/ff66332c-108a-4d54-aecf-9692caf231df.pdf>.

62 Source: Client Alert Paul Hastings, note 11, available at: <www.paulhastings.com/docs/default-source/PDFs/stay-current-apcoa-uk-schemes-of-arrangement.pdf>.

63 High Court of Justice Chancery Division Companies Court [2014] EWHC 1867 (ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2014/1867.html> and confirmed by [2014] EWHC 3849 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2014/3849.html>.

pursuant to a change of law clause) governed by English law, (b) subject to one small issue, the creditors have selected the English court as having exclusive jurisdiction, and (c) the court has been provided with independent experts' opinions confirming that the courts in the jurisdiction where the creditors would have otherwise been likely to seek enforcement would indeed be likely to recognise the effectiveness of the orders if made, is sufficient to warrant the exercise of jurisdiction and the expectation that such exercise will be effective, given (of course) that I am otherwise satisfied that the schemes are fair and the relevant requirements of English law have been satisfied.
26. Accordingly, though the point they raise is a novel one, I think ultimately the schemes proposed fall into line with the sequence of cases to which I have referred. Although I acknowledge, as Mr Justice Vos emphasised in I think it was NEF Telecom B.V. [2012] EWHC 164, that where there is no contest the court can only do its best on the basis of the material which is offered by one side, and all (I think) of the cases were effectively decided ex parte, I see no reason to depart from that line.
27. In conclusion, I am satisfied on each of the matters which I have considered myself bound to assess, and I therefore sanction each of the schemes. I will consider the terms of the orders with Counsel.

In other words, the change of law and the jurisdiction clause enabled Apcoa to do the restructuring through UK Scheme proceedings.[64]

***Van Gansewinkel* (2015)**

Van Gansewinkel is a group that conducts waste management business across the Netherlands, Belgium and Luxembourg. Van Gansewinkel Groep B.V. (VGG) is a management holding company. It is the contractual party to several key contracts, and it per-

64 It is questionable whether in the future this mechanism can be used with European loans which follow the so-called leveraged finance standard model of the Loan Market Association since in that model an amendment to governing loan should require all lenders consent, see James Watson in Foreign the Connection: Foreign Companies & English Scheme of Arrangement in Eurofenix (Autumn 2015), p. 24. See for another sample of changing law and jurisdiction DTEK Finance B.V. in which the governing law of high yield bonds was changed from US law to UK law and furthermore a COMI shift from the Netherlands to the UK was done, see client memorandum of Latham & Watkins dated May 5, 2015, available at: <https://www.lw.com/thoughtLeadership/lw-the-dtek-scheme>. See also Publication of Allen & Overy dated July 6, 2015, available at: <www.allenovery.com/publications/en-gb/Pages/Schemes-of-arrangement-and-why-loan-note-investors-should-be-wary-of-governing-law-amendment-mechanisms.aspx> and the decision itself, available at: <www.bailii.org/ew/cases/EWHC/Ch/2015/1164.html>. Even if the text of the agreement allows for this conversion of law and jurisdiction, one could argue that parties to this agreement have never contemplated this possibility and that trying to convert is contrary to principles of reasonableness and fairness, see for UK law explanation: Howard and Hedger, note 43, p. 509.

forms the head-office function for the group. Van Gansewinkel Nederland B.V. (VGN) is the principal operating subsidiary of VGG and has approximately 1,500 employees and numerous operating contracts. Robesta Vastgoed B.V. (RV) operates as a real-estate holding company. Riebeeck Olie Amsterdam 1 B.V. (ROA), Van Gansewinkel Belgie NV (VGB) and Van Gansewinkel Industrie B.V. (VGI) are all investment holding companies.

When the Van Gansewinkel group needed a financial restructuring in 2015, it used six inter-conditional schemes proposed by VGG, VGN, RV, ROA, VBG and VGI. None of these companies had either a COMI or an establishment in the UK. Justice Snowden sanctioned the Schemes. He concluded[65]:

> 51. In Rodenstock at paragraphs 61-62, Briggs J suggested that on the assumption that the Judgments Regulation applied to schemes of arrangement, they might be capable of being "shoehorned" into this provision on the basis that the scheme creditors who are entitled to appear and oppose the relief sought, and who will be bound by the result, could be regarded as defendants for this purpose. In Rodenstock, more than 50% of the scheme creditors were domiciled in England and this provided some reassurance for Briggs J. That was not the situation of the Scheme Creditors in the instant case. The evidence contained no information as to the domicile of any of the Scheme Creditors, but after a short adjournment whilst inquiries were made, I was told by Mr. Allison (on instructions) that out of a total of 106 Scheme Creditors, 15 creditors with claims totaling about €135 million were domiciled in England, and that these creditors were spread across the various creditor classes. Although this number did not meet the 50% mentioned in Rodenstock, I cannot see that this makes any difference. On the assumption that the recast Judgments Regulation applies, Article 8(1) would be potentially engaged provided that at least one creditor is domiciled in England and it is expedient to hear the "claims" against all other scheme creditors together with the "claim" against him. In the instant case, the numbers and size of the Scheme Creditors domiciled in England were far from immaterial, and in my judgment they were sufficiently large that the test of expediency was satisfied. I therefore considered that I was entitled to regard all Scheme Creditors as coming within the jurisdiction of the English court under Article 8(1) for the purposes of the exercise of the scheme jurisdiction in relation to them.
> 52. That conclusion made it unnecessary for me to consider the third alternative basis for jurisdiction suggested in Rodenstock at paragraph 61, namely the

65 High Court of Justice Chancery Division [2015] EWHC 2151 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2015/2151.html>.

possibility that the English court could simply apply its scheme jurisdiction rules by analogy with the provisions of Article 6 of the recast Judgments Regulation. That argument has not been much developed in subsequent cases, and I would prefer to express no view upon it.
53. Since the intention to ask Henderson J to determine the composition of the classes of Scheme Creditors had been fully disclosed in the Practice Statement letter, and there was no challenge to the class composition at the sanction hearing I was entitled to take the view that the jurisdictional requirements in that regard were satisfied, and in any event it seemed to me that Henderson J's order was plainly correct.
54. Accordingly, I concluded that I had jurisdiction to sanction the Schemes in the instant case[.]

Van Gansewinkel is at first sight just another sample case following Rodenstock. However, Justice Snowden made some interesting remarks about when a scheme should be used and in which cases it should not be used. Those remarks will be dealt with hereafter in this report in the Conclusion of Scheme of Arrangement Route to restructure the debt.

Conclusion for Scheme of Arrangement Route to Restructure the Debt
The UK scheme of arrangement route has recently been very successful. It is especially helpful in those situations in which there is no other restructuring legislation available in the relevant country to put the restructuring deal in place. In other words, the scheme of arrangement route is not the main route but the fall-back plan, if nothing else is available.
Or, as Jennifer Payne puts it[66]:

> where a financially distressed company, such as Rodenstock, has no domestic option that allows it to restructure and to carry dissenting creditor with it, that would enable it to avoid insolvency, to deny access to a scheme might result in insolvency for the company. Such an outcome is likely worse to be worse for creditors than a successful debt restructuring under an English scheme. In such circumstances, to allow the company to utilise the scheme seems eminently sensible, particularly where the creditors have chosen English law to govern their lending arrangements. To demand that the company forgo this option and instead go through (domestic) insolvency will be of no benefit to the creditors or other stakeholders of the company. Thus, schemes may offer a valuable pre-insolvency solution that can transcend international borders.

66 Payne, note 36, p. 305.

My personal view is that indeed the UK legal system and its practitioners have come to rescue when everything else failed in the restructuring. Some may find this approach imperialistic, other even accuse the UK of being "the insolvency brothel of Europe".[67] I disagree and concur with the view of Kortmann and Veder in their article on the scheme[68]:

> 79. It seems that one of the reasons, if not the sole reason, why non UK-companies have sought assistance from the English law and English courts by means of a scheme of arrangement is that the relevant home jurisdiction did not provide for adequate similar restructuring tools. In the legal (restructuring) practice, the rather cooperative approach that the English courts have taken in accepting jurisdiction has therefore been welcomed and that approach has made several successful restructurings possible for companies that otherwise would have had to apply for the opening of insolvency proceedings.
> 80. As we have seen, several European countries have now introduced similar hybrid restructuring tools or are in the process of doing so. The European Commission in its Recommendation has also recommended that all Member States introduce a hybrid restructuring tool outside of formal insolvency proceedings. Thus, in the future there may be less need for non-UK companies to seek the assistance of the English courts and consequently, the English courts may not need to stretch their jurisdiction as far as they have done thus far.

One could read the same reasoning in the decision of Justice Snowden in Van Gansewinkel. I especially refer to his following arguments in the decision[69]:

> Cross-border schemes of arrangement
> 4. In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England. In such cases, the English court has been satisfied that neither the EC Insolvency Regulation (EC 1346/2000) nor the EC Judgments Regulation (EC 44/2001) (now recast and replaced by Regulation EU 1215/2012 with effect from 10 January 2015) has prevented the court from having jurisdiction; and a sufficient connection with England to justify the exercise of the scheme jurisdiction of the English court has been found to exist as a result of the fact that the debt obligations which are to be restructured under the scheme are governed by English

67 See note Declercq in JOR 2013/59.
68 On this issue I agree with Veder: Kortmann and Veder, note 52, nr. 79 e.f.
69 High Court of Justice Chancery Division [2015] EWHC 2151 (Ch), available at: <www.bailii.org/ew/cases/EWHC/Ch/2015/2151.html>.

law. The legal issues arising in such cases were first considered in depth by Briggs J in Re Rodenstock GmbH [2011] EWHC 1104 (Ch), [2011] Bus. L.R. 1245, [2012] BCC 459 ("Rodenstock") and were most recently tested before Hildyard J in Re Apcoa GmbH [2014] EWHC 3849 (Ch), [2015] Bus. L.R. 374, [2015] BCC 142 ("Apcoa") (a case in which permission to appeal to the Court of Appeal was granted, but the appeal was subsequently compromised).

5. The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.

6. In circumstances such as these, there is a considerable commercial imperative, and indeed pressure, upon the court to approve a scheme of arrangement. It should be emphasised, however, that even where the scheme in question has the support of an overwhelming majority of the creditors who are to be subject to it, the court does not act as a rubber stamp. Whether or not the scheme is opposed, the court requires those presenting the scheme to bring to its attention all matters relevant to jurisdiction and the exercise of its discretion. The court will then consider carefully the terms and effect of what is proposed, whether it has jurisdiction, and whether it is appropriate to exercise such jurisdiction. That is particularly the case when the court is considering a scheme for an overseas company which does not have its COMI or an establishment in England, where jurisdictional issues necessarily arise, and where recognition of the scheme in other countries will be important.

….

Possible alternatives to the Scheme

21. The submissions to me indicated that the Group had considered various alternatives to the Schemes but concluded that the Schemes represented the only realistic means by which to achieve the restructuring of the financial indebtedness of the Group so as to enable the Group to continue to trade. The expert evidence on Dutch law from Prof. Dr. Paul Michael Veder was to the effect that although a consultation is currently underway in the Netherlands

in response to a recommendation of the European Commission that Member States of the EU should introduce a procedure similar to the scheme of arrangement into their national law, Dutch law does not yet provide a rescue procedure equivalent to a scheme of arrangement that could be used to bind a dissenting minority of creditors of a company outside a formal insolvency proceeding.

22. The evidence was that if the Schemes were not approved, then the Group would be likely to collapse into a series of formal insolvency proceedings in the Netherlands and Belgium. It was submitted that such a scenario would lead to a materially worse return to Scheme Creditors than the Schemes and would be likely to lead to the loss of the jobs of the Group's employees. There was, however, no detailed material provided either to the creditors or to me in support of these contentions as to the alternative to the Schemes. The only substantive information was that contained in the following paragraphs of the Explanatory Statement:

> "8.2 If the Schemes are not approved by the requisite majority of Scheme Creditors so as to become effective on the presently proposed timetable, the Restructuring is not likely to be consummated. The Boards believe that, in light of the considerable effort and time taken to agree the proposed Restructuring with key stakeholders, the prospects of agreeing an alternative transaction which would leave the Group with a viable capital structure before it would become necessary to place the Scheme Companies (and possibly other companies in the Group) into insolvency procedures are remote.
>
> 8.3 Accordingly, in the absence of the Restructuring completing as planned, the Boards (and the directors of other companies in the Group) would expect to determine shortly after it became apparent that the Restructuring was not capable of being implemented (for example, if the requisite majority of each class of creditors of each Scheme did not vote in favour of each Scheme or if the Court failed to sanction any of the Schemes) that they have no reasonable option other than to take steps to put the companies into an insolvent liquidation to protect those companies' assets for the benefit of their respective creditors.
>
> 8.4 In forming their opinion in relation to the recoveries that the Scheme Creditors may receive in the event of the insolvency of the Group, the directors of each Scheme Company have considered the relevant information available to them and have obtained advice from both financial and legal advisers, as well as assistance from KPMG Advisory N.V. in the

> form of an illustrative liquidation analysis of the possible outcomes for Scheme Creditors in the event that each Scheme Company and/or its Subsidiaries are placed into liquidation.
> 8.5 On the basis of considered and reasonable assumptions, the directors have concluded that the likely range of returns for Scheme Creditors in the event that each Scheme Company and/or its Subsidiaries are placed into liquidation would be between 38 per cent. (low case) and 46 per cent. (high case) in respect of their Scheme Claims.
> 8.6 In the absence of the Schemes being approved by the requisite majority of Scheme Creditors and becoming effective and the Restructuring being consummated, it is also acknowledged that a requisite majority of Scheme Creditors may then elect to take Enforcement Action in accordance with the terms of the Existing Senior Facilities Agreement."

23. On the basis of the Explanatory Statement, the accuracy of which was confirmed in the evidence in support of the application, I was prepared to accept that the Scheme Companies were indeed in urgent need of the restructuring proposed and that the alternative under formal insolvency proceedings was likely be far less advantageous for all concerned. I also accepted that the institutional Scheme Creditors in this case were likely to have been able to form their own view of the accuracy of the predictions in the Explanatory Statement.
24. I would, however, indicate for the future that companies that seek the consent of their creditors and the sanction of the court to a scheme of arrangement that is put forward as a more advantageous outcome for creditors than formal insolvency proceedings may be well advised to ensure that greater detail is provided, both in the Explanatory Statement and in the evidence before the court, as to the possible alternatives to the scheme and the basis for the predicted outcomes. The provision of such information is likely to be essential if there is a challenge to the scheme.

My reading is that if indeed another restructuring tool in Europe outside the UK is available, the UK judges (or at least Justice Snowden) will take (takes) a step back. And this is indeed how UK judges should, in my view, act.

Sample 6: The US Chapter 11 Route[70]

The final two samples of restructuring cases are two cases in which Chapter 11 of Bankruptcy Code of the US was used to ensure that a restructuring deal has the required effect: Almatis (2010) and Marco Polo (2011). The advantages of a Chapter 11 proceedings are that upon confirmation of a plan, secured and unsecured creditors are bound by a Chapter 11 proceeding and can be crammed down.[71] It is relatively easy to ensure that a judge in the USA is able to accept jurisdiction over a Chapter 11 case. The relevant paragraphs are 11 US Code par 109 and 28 US Code 1408 and read as follows[72]:

> 11 U.S. Code § 109
> (a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.
>
> §1408. Venue of cases under title 11
> Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district-
> (1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district; or
> (2) in which there is pending a case under title 11 concerning such person's affiliate, general partner, or partnership[.]

As a result of this legislation, the mere fact that a debtor has some assets in the US suffices to obtain jurisdiction, and US bankruptcy courts have a history of using nominal US property to assert jurisdiction over foreign entities.[73]

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70 See Howard and Hedger, note 43, p. 769 e.f. on Chapter 11 in general.

71 See: Douglas G. Baird in Elements of Bankruptcy (2014), p. 239 e.f. See for the position of a secured creditor also p. 260 e.f.

72 Available at: <https://www.law.cornell.edu/uscode/text/11/109> and <http://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1408&num=0&edition=prelim> respectively.

73 See Andrew DeNatale and Jonathan D. Canfield, Minimum Jurisdictional Threshold for U.S. Bankruptcy Courts in Cross-border Insolvency Cases, INSOL World Second Quarter (2013), note 4, see also Howard and Hedger, note 43, p. 785 e.f. and esp. pp. 788 and 789 on the Almatis Case. In Berau Capital Resources Pte Ltd. (Case No. 15-11804, October 28, 2015), Judge Glenn pushed this minimum jurisdictional threshold even further. Although also in that case other property existed (namely, an attorney retainer held by its

***Almatis* (2010)**

Almatis Group was a global leader in the development and production of specialty alumina materials, employing 900 people worldwide.[74] The Almatis Group was domiciled in the Netherlands with a Dutch acquisition vehicle (DIC Almatis Bidco B.V.), which was used when Almatis was spun off in 2007 from its previous owner, Alcoa Inc., several other Dutch holdings companies and a large production facility in the Rotterdam harbour. Dubai International Capital LLC (DIC) was the ultimate shareholder of the Almatis Group. Almatis group included Dutch, German, US and other foreign subsidiaries. The slowdown of the global economy in general and of the steel industry in particular, combined with an increase in the costs of commodities, resulted in a substantial drop of the earnings of Almatis. In June 2009, the group needed and obtained the first waivers from its lenders. These waivers were prolonged several times. Several restructuring options were reviewed, including an option that involved multi-jurisdictional insolvency filings in the Netherlands, United States and Germany. Finally in early 2010, the relevant stakeholders agreed on a restructuring proposal that significantly deleveraged the group, provided a feasible plan that could be effected through a Chapter 11 filing in the USA and left senior lenders with the majority of the equity.

However, the ultimate shareholders, DIC, tried to stop the restructuring by filing a petition with the Enterprise Chamber of the Amsterdam Court of Appeal. The Enterprise Chamber rejected the petition of DIC on April 12, 2010.[75]

Almatis wanted to get in and out of the Chapter 11 proceeding as soon as possible and therefore decided to try to use a so-called pre-pack bankruptcy proceeding. A pre-pack proceeding in the USA is characterized by the fact that the debtor proposes a plan of reorganization and solicits votes on it before entering into a Chapter 11.[76] As a result thereof, the composition plan is already agreed between the company and its majority of creditors before entering into the Chapter 11 proceedings, allowing the company to exit

New York counsel) which was sufficient to satisfy the requirements of §109(a), Judge Glenn nevertheless went on to note that "it is apparent that another substantial (and frequently recurring) basis for chapter 15 eligibility exists here" in the form of the dollar denominated notes subject to a New York law governed Indenture appointing a New York based trustee and subject to a New York forum selection clause. Under New York state law, contracts create property rights which are intangible property of the debtor and, per Judge Glenn, satisfy the "property" requirement of §109(a).

74 See for an extensive description of the Almatis Case: European Debt Restructuring Handbook (2013), p. 153 e.f. by Kon Asimacopoulos, Justin Bickle and Adam Paul, see also the Disclosure Statement in the Almatis Case, available at: <http://bankrupt.com/misc/ALMATIS_DisclosureStatement.pdf>. For a short Dutch description of both Almatis case and the Marco Polo case, the master thesis: "Surseance van betaling of Chapter 11; waarom vennootschappen kiezen voor een buitenlandse reorganisatieprocedure" of H.M.J.T. Ceelen, available at: <http://arno.uvt.nl/show.cgi?fid=128582>, see also: Howard and Bob, note 43, p. 785.

75 The decision of the Enterprise Chamber is published in the Dutch language in JOR 2010/183.

76 See for a description of both UK and US pre-pack: Out-of-Court vs Court Supervised Restructurings, Alan Kornberg and Sarah Paterson in Debt Restructuring (2011), Chapter 3.

the Chapter 11 proceedings within as little as sixty days of the time of the filing.[77] As such, the US pre-pack is not to be compared with the UK and Dutch pre-packs. Those EU pre-packs look more like what in the US is called a 363-sale,[78] i.e., a sale of the assets of the company is prepared before the insolvency proceedings, which is effectuated in the insolvency proceedings.[79] A Chapter 11 proceedings has extraterritorial effect as a matter of US law. Breach outside the USA of an order of a US bankruptcy judge decision is considered to be contempt of court and in some instances, as such a criminal offense.[80] So even if the breach of the order would take place outside the USA, the US bankruptcy judge would consider the act to be breach of his order. Any creditor with commercial interests in the USA would most likely accept the court order, even though there is no official recognition of US court order in its country. In the Almatis Chapter 11 Proceedings, this effect was noted in the Disclosure Statement as follows[81]:

> A significant percentage of the Financial Lenders have connections in the United States. This connection provides some measure of assurance that these parties will not take actions in violation of the Bankruptcy Code and, if they do, that the Bankruptcy Court has an adequate remedy. (p. 59)

The relevant legal entities that filed for Chapter 11 were companies in the Netherlands, Germany and the USA. Neither the Netherlands nor Germany had implemented the Model Law[82]; so a formal recognition of the decision of the Bankruptcy Court on that basis was impossible. In order to try to ensure that the deal would not fall apart, several interesting requests were made to the bankruptcy judge in relation to cross-border issues. One of the first-day motions was a "Debtors' Motion for Interim and Final Orders (A) Authorizing, but not Directing, Debtors to Pay Prepetition Obligations Owed to Foreign Creditors; and

77 Kon Asimacopoulos, Justin Bickle and Adam Paul in European Debt Restructuring Handbook (2013), p. 159 and Emergency Sales in the US and the UK by Scott Simpson and Jay M. Goffman in The Law and Practice of Restructuring in the UK and US (2011), p. 7 e.f.

78 Text 11 US Bankruptcy Code section 363, available at: <https://www.law.cornell.edu/uscode/text/11/363>.

79 For description of US pre-pack and UK pre-pack, see also Vanessa Finch, Corporate and Insolvency Law (2009), p. 454 e.f., See on 363 sale Douglas Baird in Elements of Bankruptcy, 6th edition, 2014, p. 235 e.f. and Kornberg and Paterson, note 76, p. 122 e.f.

80 Definition of contempt of court: "A contempt of court is an act of disobedience or disrespect towards the judicial branch of the government, or an interference with its orderly process. It is an offense against a court of justice or a person whom the judicial functions of the sovereignty have been delegated', United States Attorney's, United States Attorney's Manual, Title 9 Criminal Division, no. 9-39.000 Contempt of Court, available at: <www.justice.gov/usam/usam-9-39000-contempt-court>.

81 The Disclosure Statement in the Almatis Case, p. 57, available at: <http://bankrupt.com/misc/ALMATIS_DisclosureStatement.pdf>.

82 See further Part 2 of this Report.

(B) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers". This motion was explained as follows[83]:

> In light of the international scope of the Debtors' businesses, the Debtors incur obligations to numerous foreign creditors, including, but not limited to, vendors, landlords, suppliers, trade creditors, contractors, shippers, common carriers, private concessionaires, public facility operators, warehousemen, distributors, brokers, mechanics, materialmen, utility providers, service providers, customs agents, duty collectors, governmental agencies, quasigovernmental agencies, and taxing authorities (collectively, the "Foreign Creditors") in connection with their core business operations. The Foreign Creditors supply goods and services without which the Debtors' businesses could not operate, and therefore the continued cooperation of these Foreign Creditors is an essential element in bringing the Debtors' specialty alumina products to market. The success of the Debtors' operations depends upon the continued supply by Foreign Creditors' of the high quality goods and services necessary for the Debtors to produce and transport their specialty alumina products to customers located throughout the world. The Debtors will request authority to pay the Foreign Creditors all prepetition amounts due to them in an aggregate amount not to exceed $25 million. While the Foreign Creditors are subject to the automatic stay as a matter of U.S. bankruptcy law, as a practical matter the Debtors' ability to enforce the stay provisions may be limited. Indeed, based on the substantial experience of the Debtors' management in the industry and their knowledge of the Foreign Creditors, there is a significant risk that the Foreign Creditors may consider themselves to be beyond the jurisdiction of the Bankruptcy Court, disregard the automatic stay, and engage in conduct that disrupts the Debtors' domestic and international operations, including, but not limited to, commencing competing insolvency proceedings in foreign countries. In Germany and The Netherlands, the commencement of insolvency proceedings would require the Debtors to liquidate, thereby thwarting any attempt to reorganize under Chapter 11.

A second motion in relation to cross-border issues – "Debtors' Motion for Interim and Final Orders Confirming the Protections of Sections 362 and 365 of the Bankruptcy Code and Restraining Any Action in Contravention Thereof" – was explained as follows[84]:

83 See note 81, p. 56.
84 Id., p. 57.

> As a result of the Debtors' worldwide operations, the Debtors have thousands of foreign creditors, customers and counterparties to contracts that may be unfamiliar with the global-reach of the protections afforded by the Bankruptcy Code. Due to this lack of familiarity, certain Foreign Creditors may attempt to seize assets located outside of the United States to the detriment of the Debtors, their Estates, and creditors, or may take other actions in contravention of the automatic stay imposed by section 362 of the Bankruptcy Code. In addition, Foreign Creditor counterparties to unexpired leases and executory contracts may attempt to terminate those leases or contracts due to the commencement of the Chapter 11 Cases in contravention of section 365 of the Bankruptcy Code. To assist the Debtors in explaining the bankruptcy protections to the Foreign Creditors, the Debtors will seek an order that confirms, restates, and restrains any action taken in violation of two key protections afforded to the Debtors by the Bankruptcy Code: (a) the automatic stay provisions of section 362; and (b) the prohibition of section 365 against terminating agreements and leases due to ipso facto provisions. The Debtors believe that a specific order from the Court that the Debtors can present to the Foreign Creditors will assist the Debtors to explain these protections to the Foreign Creditors and dissuade many, if not all, of such Foreign Creditors from taking actions that would violate the Bankruptcy Code.

A third motion in relation to cross-border issues was entitled: "Debtors' Motion for Interim and Final Orders Pursuant to Sections 105(a) and 362(a) of the Bankruptcy Code (A) Limiting Certain Transfers of Claims Against the Debtors, and (B) Approving Related Notice Procedures". This motion stated as follows[85]:

> A significant percentage of the Financial Lenders[86] have connections in the United States. This connection provides some measure of assurance that these parties will not take actions in violation of the Bankruptcy Code and, if they do, that the Bankruptcy Court has an adequate remedy. This benefit is lost, however, to the extent that a Financial Lender is able freely to transfer its Claims to an entity that lacks minimum contacts with the United States and is not likely to be subject to the jurisdiction of this Court or the provisions of the Bankruptcy Code (a "Foreign Transferee"). A Foreign Transferee might consider itself to be beyond the jurisdiction of the Bankruptcy Court, disregard the

85 Id.

86 Financial Lenders are defined on p. 4 of the Disclosure Statement of Almatis as: "the Senior Lenders, the Second Lien Lenders, the Mezzanine Lenders and the Junior Mezzanine Lenders".

> automatic stay, and institute proceedings to enforce a Claim in a foreign jurisdiction that has not agreed to give effect to the bankruptcy laws of the United States. Such a scenario could result in drastic remedies that could threaten the Debtors' ability to preserve their assets and business operations, such as the triggering of an involuntary liquidation of some or all of the Debtors' foreign operations. The Senior Lenders that are parties to the Plan Support Agreement have agreed not to transfer their Claims unless the transferee agrees to be bound by the Plan Support Agreement and consents to the jurisdiction of the Bankruptcy Court. On the Petition Date, the Debtors intend to file a motion (the "Trading Motion") that would provide the Debtors with some protection against transfers by Financial Lenders that are not parties to the Plan Support Agreement. The Trading Motion will seek an order that (1) prevents the transfer of Claims against the Debtors to a Foreign Transferee unless such Foreign Transferee agrees to the jurisdiction of the Bankruptcy Court and to be bound by the automatic stay, and (2) provides the Debtors' advance notice, and an opportunity to object, to any proposed transfers of Claims against the Debtors to a Foreign Transferee.

Finally, by another motion filed on the petition date, the debtors requested authority to pay the Foreign Creditors all pre-petition amounts due to them in an aggregate amount not to exceed US$23 million. A final order authorizing the Debtors to do so was entered by the Bankruptcy Court on May 17, 2010. After a plan has been voted for in the Chapter 11 proceedings, a confirmation hearing is set. In the Almatis case, just before the confirmation hearing for the original plan, with which the company had filed and to which the relevant creditors had subscribed in the pre-pack, DIC, the existing shareholder, proposed a new plan. Under that new plan, DIC would (briefly summarized) not lose its equity to the creditors, but inject a significant amount of new money and remain majority shareholder. The group's debt burden would still be relieved very significantly, whereby the existing creditors would get new debt, part of the equity or various other instruments depending on their position in the capital structure. Almatis then, as is possible in a Chapter 11, abandoned the original plan and filed the DIC proposed plan with the court and the creditors instead. That amended joint plan of reorganization was eventually supported by the requisite majorities of the creditors. The Southern District of New York Bankruptcy Court confirmed the DIC plan in September 2010, successfully deleveraging the company and fixing its capital structure.

Almatis case demonstrates that non-US companies can use US bankruptcy proceedings to restructure their debt. The Marco Polo case is another sample of this technique.

***Marco Polo* (2011)**[87]

Marco Polo Seatrade B.V. with three affiliated companies – Seaarland Management B.V., Magellano Marine B.V. and Cargoship Maritime B.V. – filed on July 29, 2011 for Chapter 11 in USA. Marco Polo was an international maritime shipping company, with almost US$210 million of secured debt outstanding. Its two principal lenders Crédit Agricole and Royal Bank of Schotland (RBS) filed motions to dismiss the case contesting the propriety of US jurisdiction on the basis, among other things, that the Marco Polo debtors (MPD) did not meet the requirements of §109(a) of the Bankruptcy Code. The principal lenders noted that

1. MPD were foreign entities lacking places of business in the USA;
2. MPD's vessels all operated under foreign flags;
3. MPD had no domestic employees;
4. MPD had no satellite offices or employees in the USA;
5. MPD's businesses operated primarily in foreign waters;
6. the loan documents were governed by foreign law and provided for foreign courts to have exclusive jurisdiction over disputes thereunder;
7. MPD's secured creditors were foreign entities; and
8. the members of the unsecured creditors' committee were foreign entities.

The principal lenders argued that MPD links to the USA consisted mainly of an interest in a co-mingled, pooled working capital reserve account maintained by MPD's New York-based pool manager and an unused fee retainer in the amount of US$250,000 held by its counsel in New York. The principal lenders asserted that these property holdings were too insubstantial to provide proper jurisdiction.

The Southern District of New York (SDNY) bankruptcy court disagreed and concluded that MPD's property interests in both the pooled account and in the unearned portion of the retainer were sufficient to satisfy "the relatively low bar that is necessary under Section 109 for there to be property sufficient to establish eligibility". Interestingly, not all four MPD legal entities possessed US property interests at the time of the Chapter 11 filing. Only one of them paid for, and thereby owned an interest in the retainer, and yet another

87 At the time of this writing, Bracewell & Giuliani LLP, counsel to the Marco Polo had opened a website for the public's convenience with relevant info, free of any charge, available at: <https://www.kccllc.net/marcopolo>. Most interesting document is Motion of The Royal Bank of Scotland plc Pursuant to 11 U.S.C. §§105(a), 362(d), 305(a), and 1112(b) for Entry of an Order (I)(A) Suspending All Chapter 11 Cases or Granting Relief from the Automatic Stay, and (B) Dismissing the Chapter 11 Cases, or Alternatively, (II) Dismissing the Chapter 11 Cases or Granting Relief from the Automatic Stay, available at: <https://www.kccllc.net/marcopolo/document/1113634111103000000000005/related>. This part of the report is heavily based on the description in the article Minimum Jurisdictional Threshold for U.S. Bankruptcy Courts in Cross-border Insolvency Cases, Andrew DeNatale and Jonathan D. Canfield published in INSOL World Second Quarter 2013.

individual MPD debtor was the sole owner of an interest in the pooled account. Ultimately, the SDNY bankruptcy court concluded that the retainer was on behalf of all the MPD debtors and thus created a US-based property interest for each MPD debtor. This, in addition to the money contained in the pooled account, was sufficient for the SDNY bankruptcy court to find that jurisdiction was proper. Finding otherwise would have prevented the SDNY bankruptcy court from exercising jurisdiction over all of the MPD debtors.

The principal lenders also argued that the SDNY bankruptcy court should suspend or dismiss the Chapter 11 proceeding under §305(a) of the Bankruptcy Code because "the interests of creditors and the debtor would be better served by such dismissal or suspension".[88] In their view, there was "no prospect of a recovery for unsecured creditors or equity holders". The SDNY bankruptcy court denied the principal lenders' request for abstention, stating that "at least for the time being, the interests of the creditors are better served by maintaining the case as a fully active Chapter 11 case, not dismissing it". The fact that no foreign insolvency proceeding was pending and the existence of some US-based unsecured creditors supported the Southern District of New York court's decision.

Conclusion for Chapter 11 Route to Restructure the Debt

Personally,[89] the basis for this route seems to me rather thin. A debtor is able, by simply putting some asset in the USA to shift the restructuring court to the USA, even if the (secured) creditors, who are in a restructuring the economic owners of the business, do not agree.[90] In order to execute a successful restructuring in Chapter 11, creditors get their day in court and are allowed to vote on the reorganization plan.[91] However, US bankruptcy judges are able to cram down decisions on dissenting classes of creditors, even on the

88 Section 305 a reads as follows:
"(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
(2) (A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and
(2) (B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension."
Available at: <https://www.law.cornell.edu/uscode/text/11/305>.

89 I am fully aware of the fact that this personal taste is influenced by my position as a counsel of secured creditors.

90 I take the view the majority of the stakeholders which are in the money should have a say on which restructuring forum is used since they are in the money and the restructuring therefore is all about their money. See (only in Dutch) on this aspect: "Wettelijk Faciliteren van (financiële) herstructureringen: het dwangakkoord", onder meer verschenen in Herstructurering en insolventie: naar een Scheme of Arrangement? Uitgave 2013 in de Zifo reeks nr. 9, available at: <www.rechten.vu.nl/nl/Images/ZIFO_deel_9_Herstructurering_tcm247-407976.pdf>.

91 See for description of how Chapter 11 reorganization plan works: Baird, note 71, chapters 10-12, see also Kornberg and Paterson, note 76, p. 103 e.f. and Restructuring Through US Chapter 11 and UK Prepack Administration by Ben Larkin, Berwin, Leighton, Paisner and Joseph Smolinksy in The Law and Practice of Restructuring in the UK and US (2011).

whole of the class of the secured creditors. Or, as Howard and Hedger put it: "Importantly, unlike many other jurisdictions, cram down also is applicable to classes of secured creditors".[92]

These secured creditors are entitled to what is called "adequate protection"[93] for their secured claim in the Chapter 11 proceeding, but in practice such adequate protection fails due to valuation issues of the collateral.[94] If the debtor argues successfully in front of a bankruptcy court that the collateral has a certain value and that therefore the secured creditor is already adequately protected, the secured creditor is stuck with that value, even if it is wrong. In any event, even if and when the secured creditor in the Chapter 11 proceeding obtains its adequate protection, it is still forced to accept the use of its collateral by the debtor at terms that might be unacceptable to the secured creditor but which are forced upon it by the bankruptcy court.[95]

Furthermore, unless management is replaced, which in a US Chapter 11 proceedings is difficult to do[96] given its so-called debtor-in-possession character, the secured creditor might be stuck with the same management that put the business in trouble, and another Chapter 11 could arise at the horizon soon.[97]

If on the other hand the vast majority of the creditors (including the secured creditors) supports the move to the USA, I concede this route as a fallback option, particularly where

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92 See note 43, p. 784.

93 See Section 361, available at: <https://www.law.cornell.edu/uscode/text/11/361>; see for a recent discussion on adequate protection: American Bankruptcy Institute Commission to Study the Reform of Chapter 11, p. 67 e.f.

94 Interestingly enough, the American Bankruptcy Institute Commission to Study the Reform of Chapter 11 suggests that the foreclosure value of the collateral needs to be protected, describing the foreclosure value as the net value that a secured creditor would realize upon a hypothetical, commercially reasonable foreclosure sale of the secured creditor's collateral under applicable non bankruptcy law. In evaluating foreclosure value, a court should be able to consider a secured creditor's ability to structure one or more sales, or otherwise exercise its rights, under applicable non bankruptcy law, in a manner that maximizes the value of the collateral. See page 67.

95 See for a recent case and discussion the Momentous Decision as commented by the Weil Bankruptcy Blog. In short the secured creditor were forced to accept a post chapter 11 interest rate, which was lower the secured creditor had in mind. Momentous Decision in Momentive Performance Materials: Cramdown of Secured Creditors – Part I (available at: <http://business-finance-restructuring.weil.com/chapter-11-plans/momentous-decision-in-momentive-performance-materials-cramdown-of-secured-creditors-part-i/>) deals with cram down of secured creditors in general. Momentous Decision in Momentive Performance Materials: Cramdown of Secured Creditors – Part II (available at: <http://business-finance-restructuring.weil.com/chapter-11-plans/momentous-decision-in-momentive-performance-materials-cramdown-of-secured-creditors-part-ii/>) deals more specifically with the applicable interest rate.

96 In practice, management is often replaced, see Stuart C. Gilson, Managing Default: Some Evidence on How Firms Choose between Workouts and Chapter 11 in Corporate Bankruptcy, Economic and Legal Perspectives (1996), p. 319.

97 The so-called Chapter 22 Debtors, see Edward I. Altman and Edith Hotchkiss in Corporate Financial Distress and Bankruptcy, 3rd edition, p. 24 (electronic edition); see also critical on the US Chapter 11 process, LoPucki, note 29.

other possibilities are simply unavailable to ensure that a restructuring takes place against the wishes of the minority holdout creditors.[98]

Part 2: (Legislative) Changes in the International Restructuring Landscape

Trends

In the period 2002-2015, a lot of research and attention has been focused on the so-called out-of-court debt restructurings.[99] Out-of-court debt restructuring[100] involves changing the composition and/or structure of assets and liabilities of debtors in financial diflculties, without resorting to a full judicial intervention with the objective of promoting eflciency, restoring growth and minimizing the costs associated with the debtor's financial diflculties. The restructuring activities may include measures that restructure the debtor's business (operational restructuring) and measures that restructure the debtor's balance sheet (financial restructuring). Out-of-court debt restructuring performs an important role in countries all over the world. In numerous situations of financial diflculties, the respective interests of the debtor, the creditors and other stakeholders are more effectively and efficiently protected if an informal solution is implemented. There are pros and cons to out-of-debt restructuring compared to formal insolvency proceedings. Workouts are flexible. Negotiations take place in a free format and they can be confidential, which might result in less stigma for the business activities. Thus, such business activities are able to continue, the management of the business stays in place, there is no court involvement required and the costs of restructuring are less. However, on the other hand: the analysis of the debtor could be more difficult since no court-appointed officer is put in place, there is no governmental punishment for fraud, there are no avoidance actions available and the remedies available in a formal insolvency proceeding such as stay are lacking. Furthermore, the multiparty negotiation should end in an all-lender consent.[101]

98 My conclusion seems to be in line with that of Chris Howard and Bob Hedger in Restructuring Law and Practice, 2nd edition, 2014, p. 789 re: Almatis: "Almatis illustrates that Chapter 11 works best when there is a general consensus among the major creditor classes. The most successful examples of cross-border use of Chapter 11 involve balance sheet deleveraging with significant creditor support."

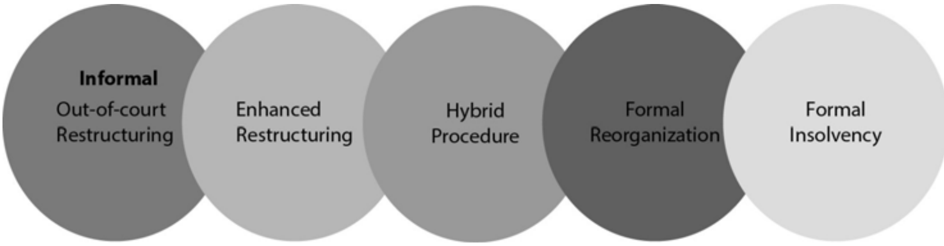
99 World Bank Study 2012 Out-of-Court Debt Restructuring, available at: <https://openknowledge.worldbank.org/handle/10986/2230>.

100 Out-of-court restructuring is quite often also described as a work out.

101 Unless appropriate collective actions are in place, see my article Forced cooperation on a debt for equity swap; (im)possible?, available at: <www.legalhoudini.nl/images/upload/ENG-DES%20artikel%20versie%20concept%2017_septemberdefuk.pdf>.

The World Bank study published in 2012[102] showed that in reality, the treatment of indebtedness problems can be represented by a continuum (Figure 5), with informal workouts at one extreme and formal insolvency proceedings at the other:

Figure 5 The continuum of procedures for the treatment of financial difficulties



In this continuum, enhanced restructurings are also purely contractual workouts that are enhanced by the existence of norms or other types of contractual or statutory arrangements. The expression "hybrid procedures" refers to all procedures in which the involvement of the judiciary or other authorities is an integral part of the procedure, but it is less intensive than in formal insolvency proceedings.

Looking at the Dutch restructuring world, the continuum of procedures currently could be described as discussed in the following sections.

Informal Out-of-Court Restructuring, Purely Consensual

Almost any restructuring starts indeed with an effort to do an informal out-of-court restructuring on a consensual basis. This is always the preferred route, since it is the most efficient and less costly possibility. Plan A, as it is called in the restructuring jargon, is this pure consensual route.

Enhanced Restructuring, Consensual Supported by Code of Practices

An example of this practice is the so-called London Approach, which was popular in the UK as of 1990.[103] There was no formal code or set of rules. The approach relied on consensus, persuasion and banking collegiality. However, the fact that the Bank of England as regulator endorsed this practice and sometimes stepped into talk persuasively to a non-

102 See note 99.
103 Inception date of London Approach is earlier as of 1970, see Esteban C. Buljevich in Cross-Border Debt Restructurings (2005), p. 7.

willing bank made this approach quite often successful.[104] The elements of the London Approach (sometimes also called the London Rules[105]) are the following[106]: Lenders should have a reasonable and constructive attitude towards companies experiencing financial difficulty. Banks should remain supportive when they receive bad news. Banks should make decisions based on accurate information that it shared with the other creditors. Banks should work together towards a consensus view. In a workout, the different levels of seniority of debt should be recognized and used to share the pain of the restructuring. Lenders should properly coordinate their restructuring efforts. Finally, additional liquidity should be afforded priority both prior to and following insolvency.

Although the London Approach was not officially endorsed, the informal out-of-court restructuring practice, as it is currently in international cases, is heavily influenced by the norms laid down in the INSOL Global Principles for Multi-Creditor Workouts 2000, which was heavily influenced by the London Approach.[107] The eight principles (the "Principles") set out by INSOL Global Principles for Multi-Creditor Workouts 2000 are in practice regarded as statements of best practice for all multi-creditor workouts.

The eight principles read as follows:

1. Where a debtor is found to be in financial difficulties, all relevant creditors should be prepared to co-operate with each other to give sufficient (though limited) time (a "Standstill Period") to the debtor for information about the debtor to be obtained and evaluated and for proposals for resolving the debtor's financial difficulties to be formulated and assessed, unless such a course is inappropriate in a particular case.
2. During the Standstill Period, all relevant creditors should agree to refrain from taking any steps to enforce their claims against or (otherwise than by disposal of their debt to a third party) to reduce their exposure to the debtor

104 See on the London Approach: Jan Adriaanse in Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands (2005), p. 39 e.f.; Howard and Hedger, note 43, p. 5 e.f.; Vanessa Finch, note 45, p. 307 e.f.; Esteban C. Buljevich, note 103, p. 7. e.f.; Pen Kent in Corporate Workouts-a UK Perspective, International Insolvency Review (1997), 6(3), pp. 165-182; John Armour and Simon Deakin (2000) "Norms in private insolvency procedures: the 'London approach' to the resolution of financial distress." CBR Working Paper Series, No.173, Cambridge: University of Cambridge. See for an interesting sample on how in 2009 in the Yell restructuring the Bank of England seemed to have intervened, Howard and Hedger, note 43, p. 7. and "Yell's restructuring heralds the return of the 'London approach', Old Lady secretly mediates on major financial restructurings to ensure approval by creditors, Independent November 29, 2009, available at: <www.independent.co.uk/news/business/news/yells-restructuring-heralds-the-return-of-the-london-approach-1830370.html>.

105 Howard and Hedger, note 43, p. 7.

106 Id., p. 8 e.f.

107 Available at: <www.insol.org/pdf/Lenders.pdf>, see also: See on also Finch, note 45, p. 315 and Howard and Hedger, note 43, p. 11 e.f.

but are entitled to expect that during the Standstill Period their position relative to other creditors and each other will not be prejudiced.

3. During the Standstill Period, the debtor should not take any action which might adversely affect the prospective return to relevant creditors (either collectively or individually) as compared with the position at the start of the Standstill Period.
4. The interests of relevant creditors are best served by coordinating their response to a debtor in financial difficulty. Such coordination will be facilitated by the selection of one or more representative coordination committees and by the appointment of professional advisers to advise and assist such committees and, where appropriate, the relevant creditors participating in the process as a whole.
5. During the Standstill Period, the debtor should provide, and allow relevant creditors and/or their professional advisers reasonable and timely access to all relevant information relating to its assets, liabilities, business and prospects, in order to enable proper evaluation to be made of its financial position and any proposals to be made to relevant creditors.
6. Proposals for resolving the financial difficulties of the debtor and, so far as practicable, arrangements between relevant creditors relating to any standstill should reflect applicable law and the relative positions of relevant creditors at the start of the Standstill Period.
7. Information obtained for the purposes of the process concerning the assets, liabilities and business of the debtor and any proposals for resolving its difficulties should be made available to all relevant creditors and should, unless already publicly available, be treated as confidential.
8. If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors.

As is noted earlier, at the beginning of an international financial restructuring, parties enter into a so-called standstill agreement.[108] Standstill agreements usually contain elements of these principles, so that those principles become binding to the parties on a contractual basis, although the exact usage depends upon the relevant local insolvency laws and customs.

108 Howard and Hedger, note 43, p. 53 e.f. on standstill agreement.

Hybrid Proceedings (Pre-pack)

The “hybrid proceedings” could be in the form of a pre-pack in the Netherlands. Although in the Netherlands the so-called WCO I[109] is not yet in force, the majority of the District Courts in the Netherlands cooperate with a pre-pack proceeding where, even before a bankruptcy is declared, a future receiver is informally appointed and oversees the preparing by the debtor of an assets sale, which is then after the bankruptcy is declared, executed by the trustee after his official appointment as a trustee upon the declaration of bankruptcy. WCO I (if and when it becomes into force) will simply put this practice in statutory law by giving the possibility to apply with the district court for the appointment of a trustee and a supervising judge before the bankruptcy order to facilitate a pre-packaged assets sale in the bankruptcy by the liquidator. WCO I has been in consultation with the public and advice of the Counsel of State was given before the legislation was sent to parliament in the first half of 2015. The debate is still on at the date of finalization of this report. The informal practice is, however, already been used and in a lot of cases quite successfully.

Other possibilities are the so-called enforcement in the Netherlands of security using the Schoeller Arca case route as described earlier in this report.[110] Another alternative is the Scheme of arrangement route, using a UK scheme of arrangement proceeding for a Dutch company, such as the Estro case, the Magyar case and the Van Gansewinkel case. Currently, the so-called WCO II, Draft bill on the Continuity of Companies Act II (WCO II) is being prepared by the Dutch legislator.[111] If and when this comes into force, the Netherlands has its own extrajudicial debt restructuring composition tool available.

Formal Reorganization

The official Dutch insolvency law tool that was meant to reorganize a business was the suspension of payments proceeding. In rare cases, i.e., if only the minority of unsecured creditors block the restructuring, this tool can be effectively used, such as in the UPC and Versatel case described in Part 1 of this report.[112] However, the majority of Dutch suspension of payments proceedings end up in a bankruptcy proceedings. Reasons for that are that preferred and secured creditors are not bound by (a composition in) a suspension of payment, and furthermore under Dutch law any transfer of a business in a suspension of

109 de Wet continuïteit ondernemingen I, currently pending in parliament under number 34218, see (only Dutch speakers), available at: <https://zoek.officielebekendmakingen.nl/dossier/34218>.

110 See this report page 7 e.f.

111 See for extensive coverage of WCO II also in English the website of De Brauw, available at: <www.debrauw.com/draft-bill/#>.

112 See this report page 4 e.f.

payment proceedings simply means that the acquirer of the assets is forced to take over all the employees.

Insolvency

Bankruptcy proceedings rarely end up in a restructuring proceeding in the Netherlands, although in theory a composition is possible. However, as in a suspension of payment proceedings, the preferred and secured creditors cannot be bound by a composition. In most cases, if stakeholders take the view that (a part of) the business is worth saving, an asset sale is prepared and executed in the bankruptcy proceeding, preferably after the sale has already been prepared in the so-called silent phase of a pre-pack. The old debts are left behind.

In rare cases, Chapter 11 is used for Dutch companies as restructuring too (see the Alamatis and the Marco Polo sample).[113] Also, in rare cases, the UK pre-pack is used (see the European Directories sample).[114]

Uncitral Model Law Code[115]

Although the Model Law, which was developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL), was already endorsed by the General Assembly in December 1997, it nevertheless deserves a place in the overview of this report. The reason is simple – its implementation took a long time to pick up and is still ongoing. The Model Law does not purport to address substantive domestic insolvency law and needs to be implemented in local law to become statutory law. It provides procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one State. Most of the countries that implemented the Model Law did so only after 2002.[116] In Dutch literature, Van Galen has called the Model Law "State of the Art".[117]

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113 See this report page 38 e.f.

114 See this report page 13 e.f.

115 See Cross-Border Insolvency, note 15, general editor Look Chan Ho (2006), newest edition is third edition (2012), See the Guide on enactment explanatory piece of work, available at: <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

116 The Mode Law is adopted and his hard law in Australia (2008), British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland (2003), Canada (2009), Colombia (2006), Chile (2013) Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011), the United States of America (2005) and Vanuata (2013).

117 Van Galen, Ondernemingsrecht 2008, afl. 13., nr. 137.

The Model Law is designed to apply where:

- assistance is sought in a state (the enacting state) by a foreign court or a foreign representative in connection with a foreign insolvency proceeding;
- assistance is sought in the foreign state in connection with a specified insolvency proceeding under the laws of that state;
- a foreign proceeding and an insolvency proceeding under specified laws of the enacting state are taking place concurrently, in respect of the same debtor; and
- creditors or other interested persons have an interest in requesting the commencement of, or participating in, an insolvency proceeding under specified laws of the enacting state.

The Model Law anticipates that a representative (the foreign representative) will have been appointed to administer the insolvent debtor's assets in one or more States or to act as a representative of the foreign proceedings at the time an application under the Model Law is made.

There are four principles on which the Model Law is built. These are as follows:

1. The "access" principle: This principle establishes the circumstances in which a "foreign representative" has rights of access to the court (the receiving court) in the enacting State from which recognition and relief is sought.
2. The "recognition" principle: Under this principle, the receiving court may make an order recognizing the foreign proceeding, either as a foreign "main" or "non-main" proceeding.
3. The "relief" principle: This principle refers to three distinct situations. In cases where an application for recognition is pending, interim relief may be granted to protect assets within the jurisdiction of the receiving court. If a proceeding is recognized as a "main" proceeding, automatic relief follows. Additional discretionary relief is available in respect of "main" proceedings, and relief of the same character may be given in respect of a proceeding that is recognized as "non-main". The scope of relief depends on bankruptcy law of the state acknowledging.
4. The "cooperation" and "coordination" principle: This principle places obligations on both courts and insolvency representatives in different States to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvency estate is administered fairly and efficiently, with a view to maximizing benefits to creditors.

The Model Law consists of five chapters. Chapter 1 contains the general provisions such as scope, definitions, public policy exception, additional assistance under other laws, interpretation and exclusion. Chapter 2 is called "access of foreign representatives and creditors to courts in a state" and deals with issues such as right of access, limited jurisdiction, application, participation and notification.

Chapter 3 is named "recognition of a foreign proceeding and relief" and deals with the application, a presumption concerning recognition,[118] decision to recognize, provisional relief, relief to be granted upon application for recognitions and relief to be granted upon request for relief and protection of creditors.

Recognition of the foreign proceeding is possible either as main or as non-main. If no recognition is done, in some cases due to principles of comity, recognition as so-called tertiary proceeding is possible.[119]

As said, the Model Law needs to be implemented in the local foreign law. The implementation of the automatic relief provisions of a main proceeding in the USA and UK with regards to the position of secured creditors is described here as illustration of implementation in local law.

The position of the secured creditor in the Model Law is dealt with in article 22. Article 22 reads as follows:

> Article 22. Protection of creditors and other interested persons
> 1. In granting or denying relief under article 19 or 21, or in modifying or terminating relief under paragraph 3 of this article, the court must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.
> 2. The court may subject relief granted under article 19 or 21 to conditions it considers appropriate.
> 3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or at its own motion, modify or terminate such relief.

The automatic relief of a main proceedings is implemented in the USA in section 1520.[120]

> (a) Upon recognition of a foreign proceeding that is a foreign main proceeding—

118 See article 16.3 includes a reference to the COMI principle, see further One Comi or Not, that's the question, Johan Jol in Vriendenbundel ter ere van het veertig jarig advocatenbestaan van Mart Franken, available at: <www.vil.nl/app/webroot/img/userfiles/files/18.%20Johan%20Jol%281%29.pdf>.

119 See on Comity: Cross-Border Insolvency in the US, a chapter in The Law and Practice of Restructuring in the UK and US (2011), p. 453; Samuel L. Bufford in Tertiary and Other Excluded Foreign Proceedings under Bankruptcy Code Chapter 15 in The American Bankruptcy Law Journal (Winter 2009) 83, p. 165.

120 In restructuring jargon to be referred to simply as Chapter 15, available at: <https://www.law.cornell.edu/uscode/text/11/1520>, see R. Craig Martin and Cullen Drescher Speckhart in Chapter 15 for Foreign Debtors (2016), available at: <www.abi.org/bookstore/chapter-15-for-foreign-debtors>.

> (1) sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States;

In short, the recognition of a foreign main proceeding will result in an automatic stay as if a US bankruptcy proceeding would have been declared, including the entitlement of secured creditors to so-called "adequate protection".[121]

In case of a main proceeding in the UK, the automatic relief provisions is dealt with section 20 and 21 Schedule 1 Cross-Border Insolvency regulation 2006 apply.[122]

> Article 20. Effects of recognition of a foreign main proceeding
> 1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this article—
> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
> (b) execution against the debtor's assets is stayed; and
> (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
> 2. The stay and suspension referred to in paragraph 1 of this article shall be—
> (a) the same in scope as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 (a) or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985 (b), or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986; and
> (b) subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case, and the provisions of paragraph 1 of this article shall be interpreted accordingly.
> 3. Without prejudice to paragraph 2 of this article, the stay and suspension referred to in paragraph 1 of this article, in particular, does not affect any right—
> (a) to take any steps to enforce security over the debtor's property;
> (b) to take any steps to repossess goods in the debtor's possession under a hire-purchase agreement; (c) exercisable under or by virtue of or in connection with the provisions referred to in article 1(4);or (d) of a creditor to set off its claim against a claim of the debtor, being a right which would have been exercisable if the debtor, in the case of an individual, had been adjudged bankrupt under

121 See Douglas Baird in Elements of Bankruptcy 6th edition, 2014, p. 203 e.f., See for text Sections 361 and 362 11 U.S. Code available at: <https://www.law.cornell.edu/uscode/text/11/chapter-3/subchapter-IV>.

122 Available at: <www.legislation.gov.uk/uksi/2006/1030/pdfs/uksi_20061030_en.pdf>.

> the Insolvency Act 1986 or had his estate sequestrated under the Bankruptcy (Scotland) Act 1985, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986.
>
> Article 21. Relief that may be granted upon recognition of a foreign proceeding
> 1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
> (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;
> (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
> (c) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(c) of article 20;
> (d) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; (e) entrusting the administration or realization of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;
> (f) extending relief granted under paragraph 1 of article 19; and
> (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986(c).
> 2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected[.]

In short, upon recognition, a UK law stay applies as if the debtor were subject to a UK insolvency proceedings.[123,124]

123 Cross-Border Insolvency, note 15, p. 82.

124 It is suggested in literature that the application of article 21(2) should not override the protection afforded to secured creditors under paragraphs 70 and 71 of Schedule B1 to the Insolvency Act 1986, see Cross-

Chapter 4 contains rules in relation to the cooperation with foreign courts and foreign representatives to enable cooperation and direct communication between courts and foreign representatives. The idea is to enable cooperation between courts as much as possible using direct communication. It also contains an enunciative list of cooperation possibilities. Chapter 5 deals with concurrent proceedings for the same debtor. Of those proceedings, all non-main proceedings are strictly local proceeding to local assets. Coordination should take place between main and local proceedings.

The Netherlands have not implemented the Model Law. On November 1, 2007, a draft of the new Insolvency Act was proposed to the legislator by the Insolvency Commission (*Commissie Insolventierecht*). This new draft included in Title 10 a proposal to incorporate in Dutch law rules implementing the Model Law. However, the draft bill never came into force. Currently, the Dutch legislator is working on the fine-tuning ("recalibration") of Dutch insolvency law. It remains to be seen whether or not as a part of this recalibration the Model Law will be implemented. In the Dutch literature, it has been defended that indeed it is time to ensure that the Netherlands join the counties that have already done so.[125] I agree, and I take the view that the Model Law should, as soon as practically possible, be implemented in the Netherlands in order to ensure that Dutch bankruptcy law is – in this respect – to use the words of van Galen: "State of the Art".[126]

EIR/IVO Amendment as of June 26, 2017

History of Amendment

Article 46 of EIR of 1992 states that no later than June 1, 2012, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of the EIR. Article 46 further states that the report shall be accompanied, if need be, by a proposal for adaptation of the EIR.

The report was delayed by six months and highlighted the following key problems with the EIR[127]: The first key problem was that the EIR contained obstacles to the rescue of business and to the free movement of entrepreneurs and debt-discharged persons. The second problem stated was that there were difficulties in determining the right jurisdiction to open proceedings. A third problem was that cross-border procedures were inefficient.

Border Insolvency, note 15, p. 87, see text of relevant articles available at: <www.legislation.gov.uk/ukpga/1986/45/schedule/B1>.

125 See Van Galen, note 117 enBerends, de Insolventie in het internationaal privaatrecht, 2e druk, p. 102 e.v. See also Wessels, note 14, p. 281. Wessels notes on p. 284 that to his knowledge no countries are clearly hesitant or have rejected the Model law.

126 Van Galen, note 117.

127 Report and executive summary available at: <http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf> and <http://ec.europa.eu/justice/civil/files/insolvency-ia-summary_en.pdf>.

The fact that there was no legal framework to cover insolvency of groups of companies was the fourth problem mentioned. The report went on to say that there were three policy options have been identified to tackle the foregoing problems and achieve the aforementioned objectives. These are: (1) keeping the status quo, (2) an option A, i.e., updating the existing Regulation, while maintaining the current balance between creditors and debtors and between universality and territoriality, the so-called Updating the framework for cross-border insolvency option and (3) Option B, to change the basic premises of the Regulation and requiring some approximation or convergence of national insolvency laws and proceedings and to strive towards the approximation of national insolvency laws and proceedings. Personally, I would assume that in a common economic market, the latter should have been the preferred option.[128] The European Commission report contained an interesting overview of the different options (Table 1).

Table 1

<table>
<tr><th>Problem</th><th>Status Quo (Baseline scenario)</th><th>Option A 'Updating the framework for cross-border insolvency proceedings'</th><th>Option B 'Towards approximation of national insolvency laws and proceedings'</th></tr>
<tr><td rowspan="2">Limited scope of the Insolvency Regulation</td><td>The scope and definition of the EIR do not cover pre-insolvency, hybrid and most personal insolvency proceedings.</td><td colspan="2">Extend the scope of the EIR to include hybrid proceedings, pre-insolvency proceedings and personal insolvency proceedings, and do away with the requirement that secondary proceedings have to be winding-up proceedings.</td></tr>
<tr><td>No rules for groups of companies.</td><td>Coordination of main proceedings through general cooperation mechanisms, with the option, when appropriate, to nominate a lead insolvency practitioner.</td><td>Single court competent for all main proceedings; single insolvency administrator appointed for all members of the group (procedural consolidation).</td></tr>
<tr><td rowspan="2">Difficulties in implementing the Insolvency Regulation</td><td>No obligation to publish and not all MS have an electronic insolvency register.</td><td colspan="2">Require Member States to publish all relevant decisions of insolvency proceedings in a national electronic register, and define common categories to be able to link national registers in the e-justice portal.</td></tr>
<tr><td>No standard forms for lodging claims. The procedures are entirely left to national law.</td><td colspan="2">Introduce procedures and a standardised form at EU level for lodging claims, and encourage Member States to set-up electronic means for lodging claims.</td></tr>
</table>

128 According to an interview with Klaas Knot, President of Dutch Central Bank, as published in the FD of October 8, 2015, capital markets union of the European Union will ensure that pressure will be built up to harmonise and modernise bankruptcy laws in the European Union. I agree that although harmonization will never be perfect until also the tax and civil law in the countries (including position of secured and preferred creditors) is harmonized, we still have a long way to go.

Problem	Status Quo (Baseline scenario)	Option A 'Updating the framework for cross-border insolvency proceedings'	Option B 'Towards approximation of national insolvency laws and proceedings'
	Jurisdiction remains at the COMI, which is defined by case law.	Improve the procedural framework and train judges on the EIR.	Harmonise elements of national insolvency laws.
	Coordination is limited to coordination between practitioners.	Maintain secondary proceedings, but improve coordination with the main proceedings prior to and during secondary proceedings.	Abolish secondary proceedings.

The report concluded, however, in my view, as a result for failure of getting political consensus on option B, that "Option A seems a more proportionate option at this stage. Accordingly, the preferred option for the revision of the Insolvency Regulation is Option A". The report also contained a proposal for an amendment of the EIR.[129]

The report includes the following summary of the proposed amendments[130]:

> The elements of the proposed reform of the Insolvency Regulation can be summarised as follows:
>
> – Scope: The proposal extends the scope of the Regulation by revising the definition of insolvency proceedings to include hybrid and pre-insolvency proceedings as well as debt discharge proceedings and other insolvency proceedings for natural persons which currently do not fit the definition;
> – Jurisdiction: The proposal clarifies the jurisdiction rules and improves the procedural framework for determining jurisdiction;
> – Secondary proceedings: the proposal provides for a more efficient administration of insolvency proceedings by enabling the court to refuse the opening of secondary proceedings if this is not necessary to protect the interests of local creditors, by abolishing the requirement that secondary proceedings must be winding-up proceedings and by improving the cooperation between main and secondary proceedings, in particular by extending the cooperation requirements to the courts involved;
> – Publicity of proceedings and lodging of claims: The proposal requires Member States to publish the relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register and provides for

129 Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No. 1346/2000 on insolvency proceedings. Available at: <http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf>.

130 Id., p. 5.

the interconnection of national insolvency registers. It also introduces standard forms for the lodging of claims;
- Groups of companies: The proposal provides for a coordination of the insolvency proceedings concerning different members of the same group of companies by obliging the liquidators and courts involved in the different main proceedings to cooperate and communicate with each other; in addition, it gives the liquidators involved in such proceedings the procedural tools to request a stay of the respective other proceedings and to propose a rescue plan for the members of the group subject to insolvency proceedings.

The European Commission continued to work on the amendments of the EIR and an interesting recommendation of the European Commission called "Commission recommendation on a new approach to business failure and insolvency came out on March 12, 2014" (the "Recommendation").[131] The European Commission takes in the Recommendation the view that the rescue culture for businesses should be enhanced. Whereas clauses 1 and 10 to and including 12 of the report are specifically enlightening:

> The objective of this Recommendation is to ensure that viable enterprises in financial difficulties, wherever they are located in the Union, have access to national insolvency frameworks which enable them to restructure at an early stage with a view to preventing their insolvency, and therefore maximise the total value to creditors, employees, owners and the economy as a whole. The Recommendation also aims at giving honest bankrupt entrepreneurs a second chance across the Union. (Whereas 1)
> Several Member States are currently undertaking reviews of their national insolvency laws with a view to improving the corporate rescue framework and the second chance for entrepreneurs. Therefore it is opportune to encourage coherence in these and any future such national initiatives in order to strengthen the functioning of the internal market. (Whereas 10)
> It is necessary to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies which hamper the early restructuring of viable companies in financial difficulties and the possibility of a second chance for honest entrepreneurs, and thereby to lower the cost of restructuring for both debtors and creditors. Greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border

131 Text available at: <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf>.

> investment. Greater coherence would also facilitate the restructuring of groups of companies irrespective of where the members of the group are located in the Union. (Whereas 11)
> A restructuring framework should enable debtors to address their financial difficulties at an early stage, when their insolvency could be prevented and the continuation of their business assured. (Whereas 12).

Member states are invited to implement the principles set out in the Recommendation. The European Commission takes the view that in Europe the corporate rescue framework should be enhanced. For international restructurings, the topic of this report, this should mean that these international restructurings should also be facilitated if and to the extent these international restructurings lead to the salvation of viable businesses.

Although the Recommendation suggests that viable business should be saved sooner rather than later and that the law should facilitate this, the Recommendation in my view missed a few things. First of all, it seems that the focus has been on the fresh start principle, which is in principle only relevant for natural persons, and legal entities could simply be liquidated if and when there is too much debt in the entity and no viable business case is to be made. If there is still a viable business case, a restructuring of the capital structure is the essence of the restructuring, not a fresh start. Perhaps this is meant by the European Commission, since it appears that the fresh start is only meant to be for an entrepreneur as a natural person, but a clear definition of the word "entrepreneur" is missing.[132] Secondly, the Recommendation does not give any guidance on the question when a business is still viable and when it is not. Moreover, clear guidance on which entrepreneurs are to be considered honest or not is lacking.

Finally, what is in my view really a missed opportunity is the fact that the European Commission seems to have forgotten to deal with the question of the shareholders' position of a company is in these situations.[133] Most likely, the inability to reach political consensus is the reason behind this.

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132 Confusing in this regard is whereas 7 of the Recommendation which states: "To this end, the Commission announced that it would analyze how the efficiency of national insolvency laws could be further improved with a view to creating a level playing field for companies, entrepreneurs and private persons within the internal market." This reference seems to include the possibility that there are also entrepreneurs who are not private persons. In Recommendation 32 c, however, it appears that entrepreneurs are only private persons, given the reference to family: "(c) safeguard the livelihood of the entrepreneur and his family by allowing the entrepreneur to keep certain assets."

133 See for a description on the role of shareholders in restructuring in the Netherlands, including suggestions how to deal with it: Forced cooperation on a debt for equity swap; (im)possible, unofficial translation of the Dutch article "Gedwongen medewerking aan debt for equity swap: een (on)mogelijkheid", published in Insolad Jaarboek 2010, De Insolvente Vennootschap. English translation is available at: <www.legalhoudini.nl/images/upload/ENG-DES%20artikel%20versie%20concept%2017_septemberdefuk.pdf>, Dutch

The European Commission states in the Recommendation that "The Member States are invited to implement the principles set out in this Recommendation by 12 months from the publication of the Recommendation".

The Dutch State quickly jumped on the Recommendation when preparing the draft WCO II in the consultation phase. From the draft explanatory memorandum of WCO II, it appears that indeed the Dutch government wants to ensure that WCO II complies with the Recommendation.[134] The Dutch legislator assessed whether the draft WCO II did indeed meet the Recommendation and went – rightfully in my view – a step further and also ensured that the position of the unwilling shareholder is taken into account in its WCO II draft proposal. WCO II is still work in progress and needs to pass Dutch parliament.

On September 30, 2015, a report called the Evaluation of the implementation of the commission recommendation of December 3, 2014 on a new approach to business failure and insolvency (the "Evaluation") was published.[135] The conclusion of the Evaluation is:

> As a general rule, it can be noticed in Member States with weak preventive restructuring frameworks the number of restructurings is low or very low.
> As for the recent reforms, although it is still too early to make a comprehensive assessment of their impact, the initial results in the Member States are already visible. For example, in Member States which have introduced a preventive restructuring procedure for the first time, the number of restructurings has increased significantly while the amount of debt-overhang has decreased.
>
> ….
>
> In conclusion, it can be seen that among the Member States who replied, several Member States consider that they already largely comply with the Recommendation, and that a significant number of those which do not comply have not launched any reforms to date. While it is clear that the Recommendation has provided useful focus for those Member States undertaking reforms in the area of insolvency, it has not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty and in giving a second chance to entrepreneurs because of its only partial implementation in a significant

original available at: <www.legalhoudini.nl/images/upload/DES%20artikel%20versie%20concept%2017%20septemberdef.pdf>.

134 See draft explanatory memorandum WCO II 2.5., unofficial English translation available thanks to De Brauw at their website: <www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/WCO-II-Draft-Bill-14-August-2014-Explanatory-Memorandum-Unofficial-English-Translation_FO.pdf>.

135 Available at: <http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf>.

> number of Member States, including those having launched reforms. These differences in the implementation of the Commission Recommendation mean continuing legal uncertainty and additional costs for investors in assessing their risks and continuing barriers to the efficient restructuring of viable companies in the EU, including cross-border enterprise groups.

The European Commission is not yet satisfied with the progress. It will be interesting to see if anything comes out of Brussels soon to further enhance the rescue culture of Europe. A first step, be it as will be explained hereafter in this paper, in my view too small a step, has been taken by an amendment of the EIR. The Evaluation, however, succeeds this recast of the EIR so apparently in the eyes of the European Commission, the work is not yet done and further amendments of the legislation to enhance the rescue culture might follow.

EIR/IVO Amendment as of June 26, 2017 Itself

On May 20, 2015, the European Parliament and the Council adopted a recast of the EIR, which will enter into force on June 26, 2017 ("EIR 2017").[136] The four main areas on which the recast is focused are: extension of the scope, prevention of forum shopping, change of rules in relation to group companies and an online insolvency register.

By extending the scope, the recast aims to promote rescue of economically viable businesses.[137] The updated rules on cross-border insolvency proceedings aim to shift the focus away from liquidation and help businesses overcome financial difficulties by extending the scope of the regulation to proceedings that promote rescue of economically viable businesses. The regulation includes provisions governing jurisdiction for opening insolvency proceedings, recognition and enforcement of judgements and the law applicable to insolvency proceedings.

The prevention of forum shopping is done by way of a clarification of the definition of COMI, the principal element to determine in which Member State the main proceeding will be opened. COMI is, as a rule, the place of debtor's registered office or, in the case of

136 Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R0848&from=NL>.

137 Once again, focus on the rescue of viable business, see whereas 10 of EIR 2017: "(10) The scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context, the term 'control' should include situations where the court only intervenes on appeal by a creditor or other interested parties."

an individual exercising an independent business or professional activity, principal place of business. To prevent parties exploiting differences between national legislations, the text adds that the rule should only apply if the registered office has not been moved to another Member State within three months prior to the request for the opening of insolvency proceedings, unless the debtor can provide sufficient evidence to support his assertions. For the consumer insolvency, this period was extended to six months.

The new rules with respect to groups of companies subject to insolvency proceedings before different national courts include tools to enhance cooperation between Member States in order to ensure efficient proceedings and to save assets.

The online insolvency register should ensure that cross-border creditors are well informed and have the opportunity to protect their interests. The law would require Member States to publish relevant information on cross-border insolvency proceedings in an electronic register.

It goes beyond the scope of this report to comment extensively on the amendment; so only a first initial reaction is given here based upon my practical experience with the EIR in international restructurings.

The amendment regarding scope makes sense. These days, the focus is much more of a pre-insolvency process and deal, and inclusion of pre-insolvency processes is supported wholeheartedly. The UK Scheme of Arrangement will still fall outside the scope; the UK ensured in its lobby that it is by putting in whereas 16: "This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency." In other words, UK Schemes are still excluded from the scope of EIR 2017. The UK could, of course, decide to make a distinction between solvent and insolvent schemes, whereby the first would be a general corporate law proceedings and the latter, an insolvency proceeding, which could then be put on Annex A by the UK government. However, as Jennifer Payne puts it, putting schemes on Annex A is "very unlikely to happen, since the effect would de facto limit the use of [insolvent, JTJ] schemes to companies with a COMI in the UK, and therefore their inclusion will be resisted strongly by practitioners within the UK".[138]

The amendment regarding COMI might have some effect on the success of last minute COMI change. However, I doubt whether in relation to the move of the COMI of businesses with the aim of restructuring, this will make much difference in practice. In the Magyar case, the COMI was moved before the three months period, which is relevant under the EIR 2017. The six months period for natural persons could, in theory, indeed help creditors against natural persons fleeing to an easier[139] jurisdiction. What is helpful is that in the

138 Payne, note 36, p. 294.

139 Easier in the sense that a discharge of debt is obtained quicker, within a shorter time frame.

considerations of EIR 2017, some indications are available when forum shopping is unacceptable and under which circumstances forum shopping is acceptable and if so, what should be done in order to ensure that the COMI is moved:

> (5) It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).
> (28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.
> (29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.
> (30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State. In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.
> (31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's principal place of business or at the individual's habitual residence should not apply where, respectively, in the case of a

> company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.
> (32) In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction.
> (33) In the event that the court seised of the request to open insolvency proceedings finds that the centre of main interests is not located on its territory, it should not open main insolvency proceedings.
> (34) In addition, any creditor of the debtor should have an effective remedy against the decision to open insolvency proceedings. The consequences of any challenge to the decision to open insolvency proceedings should be governed by national law.

The restructuring practice is, in my view, helped by this clarity, although the appeal route mentioned in whereas 34 might give rise to unforeseen complications.

The new group rules are very elaborated, seem very complicated and all work only on a voluntary basis. One does not need legislation to say what happens if parties are able to agree, that is just the consensual route that is always tried before a plan B kicks in.[140] The new group rules might be effective if a coordinated approach of all European bankruptcies in a group is already prepared prior to the bankruptcies together with both the relevant courts and the liquidators to be appointed. This seems – to put it mildly – a challenging task, or perhaps – to put it realistically – an impossible route to take. But I might be just too sceptical, and perhaps the creative international restructuring practice is able to find its way through the myriad of articles on the group, coordinator and group coordinating proceedings with the possibility to opt out of or opt in to the EIR 2017.

140 See in more detail: Stephan Madaus in Insolvency Proceedings for Corporate Groups under the New Insolvency Regulation, in International Insolvency Law Review (2015), 3, p. 235 e.f. Madaus concludes: “The legislative process in Europe does not yet seem to allow for solutions that make a considerable difference in the practice of administration insolvent corporate groups.” See also Prof. Dr. Jessica Schmidt, Group Insolvencies under the EIR recast in Eurofenix (Autumn 2015), p. 17 e.f. Schmidt concludes: “However, it remains to be seen whether the system will work in practice (especially the reliance on a “comply-or-explain”-mechanisme and the “opt-out”-model raise some concerns).”

I fully endorse the online insolvency register to ensure that cross-border creditors are well informed and have the opportunity to protect their interests, although that is more of an issue on the recovery of assets and not on the restructuring of a business.

A New Interpretation of the Secured Creditor Exception under the EIR/IVO and the Synthetic Secondary Proceedings and a Solution

What is even more interesting is the fact that despite a hefty debate in literature (old) article 5, the section of the EIR that deals with the question of a secured creditor in member state is bound by an insolvency proceeding in another member state, has not been clarified, but only been renumbered to article 8. The text of (currently) article 5 (and the future identical article 8) reads as follows:

> Article 5
> 1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
> 2. The rights referred to in paragraph 1 shall, in particular, mean:
> (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
> (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
> (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
> (d) a right in rem to the beneficial use of assets.
> 3. The right, recorded in a public register and enforceable against third parties, based on which a right in rem within the meaning of paragraph 1 may be obtained shall be considered to be a right in rem.
> 4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

The debate in the literature with respect to this clause is focused on the question as to what is meant by the words “shall not affect”. The Heidelberg-Luxembourg-Vienna Report concludes that this clause should be understood as a so-called substantive restriction rule:

> 6.2.2.1 How to achieve policy goals
>
> …
>
> If Article 5 (1) EIR was a choice of law rule, the opening of the main proceedings in the Member State A ("member state in which the main proceedings is opened, LHA") would automatically have the effects on rights in rem for which the insolvency law of Member State B provides. Therefore, the original meaning of the provision in question is not to adapt the effects from the jurisdiction of the Member State A to the jurisdiction of the Member State B (choice of law rule), but instead to restrict the effects to the assets situated in the territory of Member State A. It is therefore a substantive rule restricting the effects of the opening of insolvency procedures on rights in rem assets located in the territory of Member State A in derogation of the general concept of Article 17 EIR …

In short, if an insolvency proceeding has been declared in Member State A, this insolvency proceeding does not have any effect on the secured assets in Member State B.

It is, however, important to take a step back in history. The Virgós/Schmit-report contains some indication of how article 5 should be interpreted.[141]

> 94. This provision excludes from the effects of the proceedings rights in rem of third parties and creditors in respect of assets belonging to the debtor which, at the time of the opening of proceedings, are situated within the territory of another Contracting State. If the assets are situated in a non-Contracting State, Article 5 does not govern the issue (see points 44 and 93).
>
> 95. In order to understand the functioning of Article 5, account should be taken of the fact that main insolvency proceedings based on Article 3(1) have a universal scope. All the assets of the debtor shall be subject to the main proceedings irrespective of the State where they are situated unless territorial proceedings are opened. The law of the State of the opening of the main proceedings shall determine which of those assets shall be regarded as forming a part of the estate in the main proceedings and which shall be excluded (see Article 4(2)(b)). A part of those assets may be subject to third parties' rights in rem. The Convention does not make it obligatory for these assets to be included in or excluded from the estate in the main proceedings. The Convention imposes only an obligation to respect third parties' rights in rem over assets located within the territory of a Contracting State different from the State of the opening of pro-

141 Report of May 1996, containing the Report on the Convention of Insolvency Proceedings, designated for the delegation of the Members States, delivered by Miguel Virgós and Etienne Schmit, available at: <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf>. The status of the report is described by Wessels, note 14, pp. 353 and 354: it has an important interpretative status.

ceedings. The creation, validity and scope of these rights in rem are governed by their own applicable law (in general, the "lex rei sitae" at the relevant time) and cannot be affected by the opening of insolvency proceedings. This means that although the law of the State of the opening stipulates that all assets are part of the estate, the holder of the right in rem retains all his rights in respect of the assets in question. For instance, the holder of the right in rem may exercise the right to separate the security from the estate and, where necessary, to realize the asset individually to satisfy the claim. On the other hand, the liquidator, even if he is in possession of the asset, cannot take any decision on that asset which might affect the right in rem created on it, without the consent of its holder (see also point 161).

96. Article 5 only applies to the rights in rem created before the opening of proceedings. If they are created after the opening, Article 4 shall apply without exception (without prejudice to Article 14).

97. The fundamental policy pursued is to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee. Rights in rem can only properly fulfil their function insofar as they are not more affected by the opening of insolvency proceedings in other Contracting States than they would be by the opening of national insolvency proceedings. This aim could be achieved through alternative solutions which were in fact discussed in the working party. However, to facilitate the administration of the estate the simplicity of the formula laid down in the current Article 5 was preferred by the majority: insolvency proceedings do not affect rights in rem on assets located in other Contracting States.

98. The rule does not "immunize" rights in rem against the debtor's insolvency. If the law of the State where the assets are located allows these rights in rem to be affected in some way, the liquidator (or any other person empowered to do so) may request secondary insolvency proceedings be opened in that State if the debtor has an establishment there. The secondary proceedings are conducted according to national law and allow the liquidator to affect these rights under the same conditions as in purely domestic proceedings.

99. Article 5 states that the proceedings shall not affect rights in rem in respect of assets located in other Contracting States and not that the proceedings shall not affect assets located in another State. As main proceedings are universal (ex. Article 3(1)) they encompass all the debtor's assets. This is important if

> the value of the security is greater than the value of the claim guaranteed by the right in rem. The creditor will be then obliged to surrender to the estate any surplus of the proceeds of sale.

Article 5 should be read on conjunction with recital 24 and 25 of the EIR:

> (24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.
> (25) There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

To put this in the words of the Heidelberg-Luxembourg-Vienna Report[142]:

> Therefore, the effects on rights in rem under the insolvency law of Member State B, such as a restriction of foreclosure, are not triggered by the opening of the main proceedings in Member State A, but rather only by the opening of the secondary proceedings in Member State B.

A question that has been heavily debated in legal literature is whether or not article 5 also restricts the possibility to restructure the debtor's liabilities in a main proceeding through

142 The Heidelberg-Luxembourg-Vienna Report, p. 178, available at: <http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf>.

a composition or reorganization plan. This debate was complicated by the fact that the EIR secondary proceedings could only be liquidation proceedings rather than restructuring proceedings.[143] This debate continues since no decisive case law on article 5 is available. One of the reasons for this lack of case law is the manner in which companies are financed and in which the security for this financing is put in place. In cross-border financing, a typical security arrangement is that one legal person (the "Security Trustee") obtains the security rights on behalf of all the lenders.[144] The Security Trustee is most of the time instructed by a majority decision of the lenders. However, in cases where a restructuring is envisaged, most of the lenders do not want any use of the security rights but want to wait until a final restructuring agreement is in place. Even if such a restructuring agreement is not in place, an individual lender is not able to force the Security Trustee to take action, lacking an instruction of the majority lenders.[145]

What is the legal debate among the scholars all about, and what is the status of the discussion? Pursuant to article 4.2 of the EIR,[146] the law of the State of the opening of the proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure, and in particular the conditions for and effects of closure of insolvency proceedings, such as composition.

Scholars in Germany and Austria haven taken the view that article 5(1) EIR does not protect secured creditors against a reduction or even the discharge of the secured claim during insolvency proceedings.[147] Some of these authors even take the view that article 5 does not hinder an adjustment of a secured claim through a reorganization plan and advise secured creditors to realize their securities as soon as possible.[148]

Other scholars take the view that rights in rem falling in the scope of article 5 EIR should not be affected by reorganization plans.[149] In his thesis of 2004, Michael Veder took the view that article 5 EIR entails a general exemption of security rights from the effects of the main proceeding. In his view, any measure taken in the main proceeding that affects the position of the security rights, including measures that indirectly affect security rights

143 Article 27 EIR. In article 35 EIR 2017 this restriction to liquidation proceedings is taken out.

144 See extensively on this topic: Collective Security Arrangements by Angelique Thiele (2003) and (in Dutch) Collectieve zekerheidsarrangementen; onzekere zekerheid by Angelique Thiele in Zekerhedenrecht in ontwikkeling KNB (2009).

145 An interesting question, which is to the best of my knowledge is yet unanswered, is the question whether the beneficiary of the security, i.e., the lender who is entitled to the proceeds of the security realised by the security trustee, could also benefit from article 5.

146 Article 7 of EIR 2017.

147 See for references note 110 of p. 195 of the Heidelberg-Luxembourg-Vienna Report.

148 See further p. 195 of the Heidelberg-Luxembourg-Vienna Report.

149 See further p. 196 of the Heidelberg-Luxembourg-Vienna Report, see already (in Dutch) R.J. van Galen in Enkele praktische opmerkingen over de werking van de Europese Insolventieverordening en de belangen die daarbij betrokken zijn TvI 2002/Special – Parallelle procedures, p. 140. Van Galen takes the view that the main proceeding could adjust the secured debt itself and that article 5 does not protect the secured creditor in such a case.

in assets situated in other Member States cannot affect security rights. A reduction of liabilities enforced on creditors bound by the plan can, in his opinion, not lead to an infringement on the right to enforce the secured claim to their full extent to the encumbered assets. Article 25 EIR does not change that. The only exception Veder saw (and still sees) is if a secured creditor has voluntarily acceded and accepted the plan.[150] UK practitioners have a similar view. Jennifer Marshall, solicitor at Allen & Overy UK wrote in her paper for the future of the European Insolvency Conference as follows[151]:

> Perhaps the most fundamental question regarding Article 5 is unanswered by the EIR and is not addressed in the Virgós-Schmit Report. The question is this: does the Article merely protect the right in rem in the strict sense (i.e. the security interest over the relevant assets) or does it also protect the underlying secured debt? In order words, does Article 5 prevent a composition plan or proceeding which would be effective under the state of the opening of proceedings (and which other Member States would be required to recognize under Article 25) from amending or discharging the debtor's secured indebtedness and therefore protect the secured lender's rights to enforce its security in respect of that indebtedness over assets located in another Member State? Although an English company voluntary arrangement (which is available as a main proceeding in the United Kingdom) cannot, by virtue of section 4(3) of the Insolvency Act 1986, affect the right of a secured creditor to enforce its security without its concurrence, it may well be that main proceedings opened in another Member State (for example French safeguard proceedings) could provide for the variation or charge of a secured debt governed by English law without the express consent of the secured creditor and this could have an effect on the enforcement of security in England. The composition plan or proceeding could, for example, purport to discharge the secured indebtedness or the indebtedness could be reduced to 50% (or even 99.9%) of its face value. In these circumstances, having a right in rem in relation to the remaining 0.1% of the debt would seem fairly pointless. I would argue that, for these reasons, Article 5 must protect the secured indebtedness as well as the security interest but clarification is needed on this point.

150 Michael Veder in Cross-Border Insolvency Proceedings and Security Rights (2004), p. 353 and Applicable law, in particular security rights proposal paper presented it at the congress The Future of the European Insolvency Regulation in Amsterdam in April 2011, available at: <www.eir-reform.eu/uploads/papers/PAPER%204-3.pdf>. Further (but only in Dutch) in Goederenrechtelijke zekerheidsrechten in de int. Handels- en financieringspraktijk, p. 314, Zekerhedenrecht in ontwikkeling KNB 2009 and Zekerheidsrechten en de Insolventieverordening: op zoek naar balans NTHR 2013-2, p. 91.

151 Jennifer Marshall in article 5 (rights in rem) paper for the future of the European insolvency regulation, available at: <www.eir-reform.eu/uploads/PDF/Jennifer_Marshall.pdf>.

The UK lawyers are aware of the fact that decisive case law is not available. In the EC Regulation on insolvency proceedings, a commentary and annotated guide, UK commentators give their view on how article 5 EIR could be interpreted[152]:

> One important question is unanswered by the Regulation and is not addressed in the Virgós-Schmit Report. Does the Article (5, JTJ) merely protect the right in rem in the strict sense (i.e. the security interest over the relevant asset) or does it also protect the underlying secured debt? In other words, does Article 5 prevent a composition plan or proceeding which would be effective under the state of the opening of proceedings from amending or discharging the debtor's secured indebtedness and therefore protect the bank's rights to enforce its security interest in respect of that indebtedness over assets located in another Member State? Although an English voluntary arrangement (which is available as a main proceeding in the United Kingdom) cannot, by virtue of section 4(3) of the Insolvency Act 1986, affect the right of a secured creditor to enforce its security interest without its concurrence, it may well be that main proceedings opened in another Member State could provide for the variation or discharge of a secured debt governed by English law without the express consent of the secured creditor and this could have an effect on the enforcement of security in England. Although such a result would seem to be far from the intentions of the draftsman, it cannot be excluded.

The UK practitioners accept the fact that the EIR is not clear on this issue[153]:

> If, as a matter of the insolvency law of the relevant Member State referred to above, the main proceedings had the effect of discharging the obligation of the debtor in all jurisdictions, the question arises whether Article 5 would allow the secured creditor to enforce its security in another Member State notwithstanding the discharge of the secured liability pursuant to the main proceeding. The Regulation is not clear in this regard. Whilst Article 5 states that the opening of proceedings shall not "affect" the rights in rem of creditors in respect of assets in another Member State, it could be argued that this does not prevent the discharge of secured liability. However, without the any underlying secured liability for the security to secure, the rights in rem would be worthless. This

152 Chapter 6.56, The effect of the Regulation on Cross-Border Security and Quasi-security. The EC Regulation on insolvency proceedings, a commentary and annotated guide, 2nd edition edited by Gabriel Moss, Ian Fletcher and Stuart Isaacs This chapter was written by Stuart Isaacs QC, Felicity Toube, Nick Segal and (again) Jennifer Marshall.

153 Chapter 6.129, Id.

> is a matter which it might be appropriate to refer to the European Court of Justice.

UK QC Mark Arnolds recently wrote the following in relation to article 5[154]:

> 'Shall not affect'
>
> 2.75 As other commentators have pointed out, article 5(1) has given rise to a question which is unanswered, at least in terms which admit of no doubt, by the Insolvency Regulation itself or in the Virgós-Schmit Report. That is whether a distinction is to be drawn the purposes of Article 5 between the rights in rem and the debt to which it relates, so as to permit the reduction or compromise of the debt (without the consent of the holder of the right in rem) as a result of the opening of insolvency proceedings, leaving the right in rem itself to apply only in relation to the reduced balance.
>
> 2.76 That is a question which neither the CJEU nor the English courts have so far considered. Until they have spoken, it is suggested that the better view is that no such distinction is to be drawn for the purposes of Article 5, where it applies, and that the debt in the respect of which the right in rem is held cannot be reduced or compromised without the consent of the holder of that right. The very reason for including Article 5 at all was because rights in rem are 'of considerable importance for the granting of credit. As already stated, this is reinforced by Virgós-Schmit report. In practical terms, the value attributable to wright in rem will ultimately only be as much as the amount of the debt to which it relates or, if lower, the realisable value of the asset. It follows that, if the amount of the underlying debt is reduced as a result of the opening of insolvency proceedings, so too the value of the right in rem will be reduced. But if the value of the right in rem were to be reduced in this matter, it is difficult to see how it could not be said to have been "affected", which is the very thing Article 5 prohibits. Such a result could hardly be said to "insulate [the holders of in rem rights] against the risk of insolvency of the debtor or the interference of third parties", nor would it facilitates the provision of credit.
>
> 2.77 That said, it is with restating that Article 5 only applies in any event in relation to the rights in rem over assets situated in another Member State at the time of the opening of proceedings (or at the time of accession if the Member State acceded after the proceedings were opened). It does not provide any protection in relation to rights in rem over assets situated within the State of the opening of the proceedings, because it simply does not apply in such

154 General Editor Richard Sheldon in Cross-Border Insolvency, 4th edition, 2015, p. 52.

> circumstances. If insolvency proceedings are opened in the Member State in which the relevant assets are situated, therefore, and the law of that Member State permits rights in rem to be affected in this or any other way, Article 5 will provide no protection.

During the process of the amendment of the EIR into the EIR 2017, the correct interpretation of article 5 has been discussed. Estonia raised precisely this question in its national report.[155]

The Heidelberg-Luxembourg-Vienna Report itself came with a suggestion to amend article 5[156]:

> 6.2.6. Recommendations
> The recommendations of this report are the following:
> 1. Article 4(2) (n) EIR is added, reading as follows: "the effects of the insolvency proceedings on right in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable 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 any Member State at the time of the opening of proceedings."
> 2. Article 5 (1) is amended as follows: "Article 4 (2) (n) shall not apply insofar as a creditor or a third party provided proof that: (a) The secured assets have been situated within the territory of another Member State than the State of the opening of the proceedings at the time of the opening of proceedings, and (b) The substantial effects of insolvency proceedings on rights in rem provided for under the law of that State of the opening proceedings do not comply with the insolvency law of the Member State within the territory of which the assets were situated at the time of the opening of proceedings."
> 3. Article 5 (2) EIR is amended as follows: "The courts of the Member State, within the territory of which the assets were situated at the time of the opening of proceedings, have special jurisdiction for claims based on paragraph 1.

The purpose of this recommendation was to ensure that – in the words of the Heidelberg-Luxembourg-Vienna Report – article 5 is transformed into a so-called opposition rule. The secured creditor may invoke the opposition rule if the adjustment in the main pro-

155 Annex Systematic Summary of National reports, p. 471 from Heidelberg-Luxembourg-Vienna Report.
156 Heidelberg-Luxembourg-Vienna Report, p. 197.

ceeding of the insolvency results in an adjustment or discharge of its claim, and this adjustment or discharge puts him in a worse-off position than if an insolvency proceeding would have been declared in the other Member State where the secured assets are located.[157]

INSOL Europe also came forward with a proposal[158]:

> The discrepancy of the treatment of security rights depending on whether insolvency proceedings have actually been opened in the Member State where the assets are located has been the cause of much debate. Generally it is felt that the distinction may be understandable for historical reasons, but that such a distinction is no longer justified. INSOL Europe therefore suggests amending Article 5(1) and inserting a provision which is similar to the provisions of Articles 8 and 10. The amended text reads "The effects of insolvency proceedings on the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets […] belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings shall be governed solely by the law of the Member State within which the assets are situated."

Berends also took the view that the EIR should indeed contain a rule as formulated by INSOL but sees no sufficient grounds to interpret the current EIR (and presumably given the fact that article 8 has not been amended to future article 8 EIR 2017) in this manner.[159]

Veder has also given his views recently[160]:

> 26. The approach taken in Article 5 (and 7) EIR should be seriously reconsidered. Article 5 EIR in fact allows secured creditors in a cross-border context to acquire a position that they have under no existing insolvency law. The "excessive" protection now granted by Article 5 (and 7) EIR should be replaced by a more balanced approach. The option of applying the insolvency law of the Member State where the asset is located should be given serious consideration. Another option that could be considered is to assess the secured creditor's position in the debtor's insolvency in accordance with the insolvency rules of the law applicable to the security right, which does not necessarily coincide with the lex rei sitae (e.g. in respect of intangibles). That never would require

157 Id.

158 Revision of the European Insolvency Regulation, proposal by INSOL Europe 2012, available for INSOL Europe members at: <www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe>.

159 A.J. Berends, Insolventierecht in het internationaal privaatrecht (2011), p. 338.

160 P.M. Veder, in The Future of the European Insolvency Regulation – Applicable Law, in Particular Security Rights in International Insolvency Law Review (2011), 3, p. 291.

the introduction of a European set of uniform conflict of laws rules in respect of the creation and recognition of security rights, an issue that I will not further address here.

…

30. In some jurisdictions secured creditors can be bound by a court-approved composition or reorganisation plan. Can such a plan affect the rights of creditors holding a security right over assets situated in other Member States? It has been argued that Article 5 EIR only exempts the security right itself from the effects of a main proceeding but not also the secured claim, so that a reduction of claims under a composition or reorganisation plan – which must be recognised in other Member States – also affects the claim that can be recovered from the security. I have difficulty with this reasoning. It is difficult to reconcile with the purpose of Article 5 EIR. In my view, Article 5 EIR is intended to operate in such a manner that any measure taken in the main proceeding that affects security rights, including measures that indirectly affect security rights through a forced reduction.

…

- The approach taken in Article 5 (and 7) EIR in respect of rights in rem should be reconsidered. The "excessive" protection now granted by these provisions should be replaced by a more balanced approach. The option of applying the law of the Member State where the asset is located should be given serious consideration.
- The Insolvency Regulation should clarify whether a composition or reorganisation plan has any effect on claims that are secured by security rights over assets situated in another Member State.

However, I doubt if a change of the text of article 5 is indeed necessary as suggested by Heidelberg-Luxembourg-Vienna Report, INSOL Europe, Veder and Berends.

In 2012, the European Court of Justice had to decide on a Hungarian case.[161] I take the position that pursuant to this decision of the European Court of Justice, article 5(1) current (and thus article 8(1) EIR 2017) could be read as a typical choice of law rule. This would

161 ECJ 5 July 2012 Case C-527/10, ERSTE Bank Hungary *Nyrt v. Magyar Állam*, BCL Trading GmbH, ERSTE Befektetési Zrt, available at: <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5fe28ec87b9114d17a4ebde8ec312226c.e34KaxiLc3eQc40LaxqMbN4ObNeRe0?text=&docid=124745&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=196141>.

mean that article 5(1) EIR allows the insolvency law of the Member State where the secured asset located is to be applied along with the effects such as restrictions of enforcement of rights in rem by creditors and third parties. Advocate General's Ján Mazák opinion taken strictly literal seems very clear[162]:

> 36. Article 5(1) of the Regulation, however, does not relate to the court's jurisdiction. That provision does not deal with the conflict between courts which is liable to arise as a result of the insolvency proceedings. The rule set out in Article 5(1) constitutes a *conflict-of-laws rule* (italics, JTJ) in the form of an exception to the general principle, laid down in Article 4(1) of the Regulation, that the law of the Member State in which the insolvency proceedings were opened is to apply.

The decision of the European Court of Justice itself also seems self-explanatory:[163]

> 38. Article 4(1) of the Regulation then lays down the rule that the determination of the court with jurisdiction entails determination of the law which is to apply. According to that provision, as regards both the main insolvency proceedings and secondary insolvency proceedings, the law of the Member State within the territory of which proceedings are opened (lex concursus) is applicable to the insolvency proceedings and their effects (see, to that effect, Eurofood IFSC, paragraph 33; MG Probud Gdynia, paragraph 25; and Case C-191/10 Rastrelli Davide e C. [2011] ECR I-13209, paragraph 16). As stated in Recital 23 in the preamble to the Regulation, that law governs all the conditions for the opening, conduct and closure of the insolvency proceedings.
> 39. However, in order to protect legitimate expectations and the legal certainty of transactions in Member States other than the State of the opening of the insolvency proceedings, the Regulation lays down, in Articles 5 to 15, a certain number of exceptions to that rule of the applicable law for certain rights and legal situations which are considered, according to recital 11 thereto, as particularly important.
> 40. Thus, as regards rights in rem, Article 5(1) of the Regulation states that the opening of insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated

162 ECJ 5 July 2012 Case C-527/10, ERSTE Bank Hungary *Nyrt v. Magyar Állam*, BCL Trading GmbH, ERSTE Befektetési Zrt, Opinion of Advocate General Mazák delivered on January 26, 2012, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=118481&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=42944>.

163 See note 161.

> within the territory of another Member State at the time of the opening of proceedings.
> 41. The scope of that provision is clarified by recitals 11 and 25 in the preamble to the Regulation, according to which there is a need for a special reference "diverging from the law of the opening State" in the case of rights in rem, since these are of considerable importance for the granting of credit. Thus, according to recital 25, the basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings.
> 42. Therefore, Article 5(1) of the Regulation must be understood as a provision which, derogating from the rule of the law of the State of the opening of the proceedings, *allows the law of the Member State on whose territory the asset concerned is situated to be applied to the right in rem of a creditor or a third party over certain assets belonging to the debtor* (italics, JTJ).

In other words: article 5(1) is already to be regarded as a conflict-of-law rule. I am aware of the fact that the case was atypical. The issue the ECJ had to decide on was whether or not article 5(1) is applicable if insolvency proceedings are opened in an old Member State (in this case Austria) before the accession of the new Member State (Hungary) and, on the day of accession, the debtor's assets charged with rights in rem were situated in that new Member State.[164]

> 43. As regards the case in the main proceedings, it is true that, at the time the insolvency proceedings were opened in Austria, on 5 December 2003, the debtor's assets on which the right in rem concerned was based were in Hungary, that is in a State which, at the time, was not yet a Member State of the Union.
> 44. However, the fact remains, as set out in paragraphs 35 and 37 of this judgment, that the provisions of the Regulation are applicable in Hungary from the date of accession of that State to the European Union, that is 1 May 2004, and therefore, from that date, the Hungarian courts were required to recognise the decision to open insolvency proceedings handed down by the Austrian courts.
> 45. In those circumstances, in order to maintain the cohesion of the system established by the Regulation and the effectiveness of insolvency proceedings, Article 5(1) thereof must be interpreted as meaning that that provision is applicable even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union in a case, such as that in the main proceedings, when, on 1 May 2004, the debtor's assets on which the right in

164 Id.

> rem concerned was based were situated in that State, which is for the referring court to ascertain.
> 46. Taking account of those findings, the answer to the question referred is that Article 5(1) of the Regulation must be interpreted as meaning that that provision is applicable, in circumstances such as those in the main proceedings, even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union where on 1 May 2004 the debtor's assets on which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.

However, contrary to the Heidelberg-Luxembourg-Vienna Report,[165] I consider it likely that indeed, the European Court of Justice takes in the future the view that article 5 should be considered as a conflict-of-law rule. By doing so, the European Court of Justice then ensures that article 5 is in line with how secured creditors are treated under the Model Law in (for example) the USA and the UK,[166] and that indeed, the interests of local secured creditors are sufficiently (or in the words of the Model Law, "adequately") protected.

The substantive restriction rule (as defined by Heidelberg-Luxembourg-Vienna Report) leads – as Veder puts it –:

> to unjustifiable bonus for secured creditors in cross-border insolvencies. It does not do justice to the balance that in national insolvency laws is sought between the interests of the secured creditor on the one hand, and the interests of the estate (and the unsecured creditors) on the other. Article 5 EIR effectively gives secured creditors a holdout position that can only be avoided by opening secondary proceedings, if possible (and including all the disadvantages of having parallel proceedings (such as increased costs, etc.))[167]

I agree in this sense with Veder but take the view that these are all the more reasons to see whether we could find convincing arguments to take the position that the conflict-of-law rule is already in place. It is interesting to see that Veder, when he was still younger, seems to have defended together with S.C.J.J. Kortmann a less strict interpretation of article 5. In their article in the Dutch WPNR in 2000, Kortmann and Veder took (very consciously) the view that it was not an undefinable position to explain article 5 in such a manner that

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165 Heidelberg-Luxembourg-Vienna Report, p. 180 concludes that "it seems very doubtful that any conclusion could be drawn out of this strange case as to the understanding of article 5".

166 See earlier in this report page 54.

167 Paper of Veder Applicable law, in particular security rights proposal paper presented it at the congress The Future of the European Insolvency Regulation in Amsterdam in April 2011, p. 84, available at: <www.eir-reform.eu/uploads/papers/PAPER%204-3.pdf>.

article 5 only restricts the effects of a foreign main proceeding with regards to secured assets in another Member State to the extent the foreign main proceedings would result in a more extensive infringement of the security rights than would have been the case if those secured assets had been subject to a local insolvency proceeding.[168] My position is just that we set the clock back to the position Kortmann and Veder took in 2000.

In EU countries where the Model Law has been adopted, such as the UK, the substantive restriction rule also has an extremely awkward effect, i.e., the effect that a non-EU main proceedings, once recognized under the adopted Model Law, does affect the secured assets in the UK and that the automatic recognition of a EU insolvency proceeding does not have any effect on secured assets whatsoever.

One of the explicitly stated purposes of the EIR 2017 and the Recommendation is to promote the rescue of economically viable but distressed businesses.[169] The interpretation of article 8 as a substantive restriction rule seems contrary thereto, since it excludes secured assets from a debtor in another Member State from the insolvency proceedings. One could argue against this argument that secondary proceedings with a rescue character are under the EIR 2017 an option and that even synthetic proceedings are facilitated. But, this is the only solution if and when the secured assets in the other Member State are a part of an establishment. If there is no establishment, the relevant secured assets are lost for the restructuring unless the secured creditor of those assets voluntary agrees to the restructuring.[170]

If my position is correct, this would not yet result in a perfect restructuring possibility of individual debtor with assets spread all over Europe.[171] Whether or not a restructuring for an individual debtor is feasible with regards to secured assets in a specific jurisdiction will depend on the (pre-)insolvency law of country where the assets are located. This shows that the idea of the European Commission in its Recommendation makes perfect sense, and we need better restructuring laws all over Europe.[172] WCO II dealt with later in this report could, in my view, be that new state-of-the-art European restructuring law.

168 Veder en Kortmann in 2000 in WPNR 6421, p. 770.

169 See Whereas 10 EIR 2017.

170 See also in this report, page 85 e.f.

171 EU business groups with several legal entities spread all over Europe are even more complicated, EIR 2017 does not seem to help there much.

172 See especially whereas 11 of the Recommendation on a new approach to business failure and insolvency of March 12, 2014 to encourage greater coherence between the national insolvency frameworks in order to reduce divergences and inefficiencies that hamper the early restructuring of viable companies in financial difficulties.

What if Article 8 EIR 2017 Is Still the Hard and Fast Rule?

Is it possible that both Veder and the Heidelberg-Luxembourg-Vienna Report are right and that my new interpretation is just wishful thinking?[173] Is there anything in EIR 2017 that might come to rescue? If article 8 EIR 2017 is still the hard and fast rule, we fall back on the Virgós-Schmidt Report[174]:

> 98. The rule does not "immunize" rights in rem against the debtor's insolvency. If the law of the State where the assets are located allows these rights in rem to be affected in some way, the liquidator (or any other person empowered to do so) may request secondary insolvency proceedings be opened in that State if the debtor has an establishment there. The secondary proceedings are conducted according to national law and allow the liquidator to affect these rights under the same conditions as in purely domestic proceedings.

A secondary proceeding is required in order to do something against the position of the secured creditor. But, when the EUI 2017 comes in force, a synthetic secondary proceeding could in theory[175] – and provided it is approved by the majority of local creditors – be sufficient[176]:

> (42) First, this Regulation confers on the insolvency practitioner in main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened. That undertaking has to meet a number of conditions set out in this Regulation, in particular that it be approved by a qualified majority of local creditors. Where such an undertaking has been given, the court seised of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. When assessing those interests, the court should take into account the fact that the undertaking has been approved by a qualified majority of local creditors.

173 Veder, as I understand, also takes the view that indeed the EIR should have a rule as I defend his position is only that the statutory law needs to be amended first. I put my hopes on creative judges since the EU political process will take ages.

174 Report of May 1996, containing the Report on the Convention of Insolvency Proceedings, designated for the delegation of the Members States, delivered by Miguel Virgós and Etienne Schmit, Available at: <http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf>.

175 In theory, since it is not clear whether the foreign administrator of a main proceeding is willing to promise something with respect to a local law, he or she might not fully grasp.

176 EIR 2017 Whereas 42 to and including 47 and article 36.

(43) For the purposes of giving an undertaking to local creditors, the assets and rights located in the Member State where the debtor has an establishment should form a sub-category of the insolvency estate, and, when distributing them or the proceeds resulting from their realisation, the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have had if secondary insolvency proceedings had been opened in that Member State.
(44) National law should be applicable, as appropriate, in relation to the approval of an undertaking. In particular, where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purpose of voting on the undertaking. Where there are different procedures for the adoption of restructuring plans under national law, Member States should designate the specific procedure which should be relevant in this context.
(45) Second, this Regulation should provide for the possibility that the court temporarily stays the opening of secondary insolvency proceedings, when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors. In such a case, all creditors that could be affected by the outcome of the negotiations on a restructuring plan should be informed of the negotiations and be allowed to participate in them."

"Article 36 Right to give an undertaking in order to avoid secondary insolvency proceedings
1. In order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State. The undertaking shall specify the factual assumptions on which it is based, in particular in respect of the value of the assets located in the Member State concerned and the options available to realise such assets.
2. Where an undertaking has been given in accordance with this Article, the law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, to the ranking of creditors' claims, and to the rights

of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary insolvency proceedings could have been opened. The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment at which the undertaking is given.
5. The undertaking shall be approved by the known local creditors. The rules on qualified majority and voting that apply to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened shall also apply to the approval of the undertaking. Creditors shall be able to participate in the vote by distance means of communication, where national law so permits. The insolvency practitioner shall inform the known local creditors of the undertaking, of the rules and procedures for its approval, and of the approval or rejection of the undertaking.
6. An undertaking given and approved in accordance with this Article shall be binding on the estate. If secondary insolvency proceedings are opened in accordance with Articles 37 and 38, the insolvency practitioner in the main insolvency proceedings shall transfer any assets which it removed from the territory of that Member State after the undertaking was given or, where those assets have already been realised, their proceeds, to the insolvency practitioner in the secondary insolvency proceeding.
8. Local creditors may apply to the courts of the Member State in which main insolvency proceedings have been opened, in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings.
9. Local creditors may also apply to the courts of the Member State in which secondary insolvency proceedings could have been opened in order to require the court to take provisional or protective measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.
10. The insolvency practitioner shall be liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out in this Article[177].
11. For the purpose of this Article, an authority which is established in the Member State where secondary insolvency proceedings could have been opened and which is obliged under Directive 2008/94/EC of the European Parliament and of the Council (16) to guarantee the payment of employees' outstanding

177 Especially this liability might scare the liquidator of the main proceeding so much that he is not willing to use the synthetic secondary route.

> claims resulting from contracts of employment or employment relationships shall be considered to be a local creditor, where the national law so provides.

However, this approach to secured assets in a Member State other than the Member State in which the main proceedings are opened, has a very limited scope. Secondary proceedings should be available for the location where the secured assets of the debtor are located; thus, there needs to be an establishment.[178] Furthermore, the synthetic proceedings need to be approved by qualified majority voting, which is applicable to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened.[179] This requirement of a qualified majority voting that is applicable to the adoption of restructuring plans under the law of the Member State where secondary insolvency proceedings could have been opened is understandable and would also apply if my reading of article 5 is correct. The major difference here is that secured assets in another Member State where is no establishment are excluded.

WCO II – What to Do?

Earlier in this report, the draft WCO II was already mentioned briefly. WCO II, if and when implemented in its current form, introduces a statutory procedure to bind creditors and/or shareholders, or any class of them, to a composition (also: "akkoord") amending the rights of creditors and/or shareholders with the approval of a Dutch court. It is beyond the scope of this report to give detailed comments to this draft law. There is ample material available, also in the English language.[180] This report only deals with the international aspects of WCO II. Article 384 of the current draft deals with International Issues and reads (in his unofficial translations[181]) as follows:

> The provisions in this part apply accordingly in the event that an extrajudicial composition is offered on the basis of article […] of the regulation referred to in article 5:3.

178 Compare definition establishment in article 2(10) EIR 2017: "(10) 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets".

179 See article 36(5) EIR 2017.

180 See note 111.

181 Source: <www.debrauw.com/draft-bill/#>.

The regulation referred to in article 5.3 is the EIR. According to the explanatory statement, the purpose of this article is as follows[182]:

> This article serves to bring the proposed scheme regarding the compulsory composition outside bankruptcy under the scope of the Insolvency Regulation. This makes the automatic recognition of the scheme on other EU Member State easier.

Of course, the composition laid down of WCO II needs to be added to Annex A of EIR in due time, but if that is the case, the composition is a proceedings that is recognized under EIR.

Vriesendorp has written an extensive report on WCO II.[183] He also touches on international issue and states that article 384 (although wrongly numbered as there is no article 383) is meant to ensure that indeed the composition falls under the EIR.[184] Vriesendorp raises the question as to under which circumstances the Dutch judge has jurisdiction. Article 374(1)(c) reads as follows[185]:

> 1. The petition by which the requests referred to in the previous article are made is submitted no later than eight days after the creditors and shareholders whose rights are amended pursuant to the composition have been given the opportunity to take cognisance of the report referred to in article 372:5 and it will state:
>
> > a. the name and place of domicile of the petitioner and, if the request is submitted by a creditor, the name and place of domicile of the debtor;
> > b. a clear description of the request and the grounds on which it is based;
> > c. such details as enable the court to establish if it is competent by virtue of EC Regulation 1346/2000 of the Council of the European Union (OJEU L 160) on insolvency proceedings.

From this article, one might conclude that the Dutch Court has only jurisdiction if and when the COMI of the debtor is in the Netherlands. As Vriesendorp indicates, however,

182 Unofficial translation prepared by De Brauw availabe at: <www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/WCO-II-Draft-Bill-14-August-2014-Explanatory-Memorandum-Unofficial-English-Translation_FO.pdf>.

183 Available only in Dutch at <www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Preadvies-WCO-II.pdf>.

184 See number 101 of Preadvies voor de vereniging van handelsrecht (2014); het buitengerechtelijk akkoord en het concept-voorstel WCO II.

185 See note 181.

pursuant to article 368 of the draft bill, any legal entity or an individual who, whether or not in collaboration with one or more other individuals or legal entities, practises an independent profession or runs a business, is, in order to restructure his debts, entitled to offer his creditors or a number of them, as well as his shareholders or a number of them, a composition that provides for amending their rights.[186] There is no reference to COMI of the debtor there. Having your COMI in the Netherlands might not be a requirement to the voting proceedings in those circumstances where parties have explicitly accepted jurisdiction from a Dutch Court by choosing Dutch law and accepting Dutch jurisdiction in their contract. This is something that needs to be explained in the final law.

Another question is how the draft bill WCO II deals with groups. Article 368(3) states as follows[187]:

> 3. Unless stipulated otherwise by the composition, the rights which creditors can exercise towards sureties, co-debtors and guarantors of the debtor remain unchanged.

The explanatory notes to article 368(3) are as follows[188]:

> This paragraph satisfies the desire expressed by practice to be able to deal with the restructuring of a group of enterprises in one go. It opens the possibility not only to involve the relevant "main enterprise" in the composition but also the group companies of that enterprise that are guarantors, provide surety or have provided collateral. The same applies to the parent company that has issued a statement under article 2:403 BW and has undertaken joint and several liability in respect of the debts of a subsidiary, as well as to the joint and several liability of subsidiaries in the event of a tax entity within the meaning of article 39 of the Collection of State Taxes Act. To bring about the restructuring of the entire group of enterprises, this provision is also arranged such that it includes creditors' set-off rights, for example against the group companies of the debtor. This paragraph for instance provides a finance company that has raised funds by means of issuing bonds under guarantee of its parent company the possibility of offering its creditors a composition under which the creditors have to waive their claim on the guarantor parent company. This means that a substantial

186 See number 102 of note 184. Technically speaking, WCO II will be an insolvency proceedings. During the annual meeting of 2015 of NACIIL, the question was raised whether or not a similar proceeding should be implemented as a Dutch company law proceeding, thus matching the UK Scheme possibility. The author is still considering to investigate this further.

187 See note 181.

188 See <www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/WCO-II-Draft-Bill-14-August-2014-Explanatory-Memorandum-Unofficial-English-Translation_FO.pdf>.

> impairment of the group's value can be prevented, which would otherwise be the case if the parent company were to go bankrupt. After all, in economic terms the parent company and its finance company subsidiary form one entity. If the composition for the creditors of the finance company is to be acceptable, the shareholders and (some of the) creditors of the parent company will have to agree to a voluntary debt restructuring. This, of course, requires the composition to be fair with respect to the creditors of the finance company, despite the fact that they are waiving their rights against the guarantor parent company (see R.M. Hermans and R.D. Vriesendorp, Het dwangakkoord in het insolventierecht: Vrijheid in gebondenheid? (Compulsory composition in insolvency law: Freedom in restraint?) TvI 2014/10).
> This paragraph also seeks to reduce the costs of a reorganisation (points 7, 15, 17 and 21 of the preamble), thereby satisfying the recommendation of the European Commission on a new approach to bankruptcy and insolvency, which calls on reducing as much as possible the costs of a reorganization.

Vriesendorp, Hermans and Van den Sigtenhorst concluded in their Special Report "The Netherlands Proposes Modern Restructuring Legislations in Global Distress Signal // Winter 2015"[189]:

> Restructuring of groups of companies
> The legislation would also facilitate the restructuring of a group of companies through one composition because a composition may amend the rights of creditors against guarantors and joint debtors, which is a necessity for the efficient restructurings of any debtor with a complicated corporate structure. It should be noted, however, that the legislation focuses mainly on debtors having their centre of main interest (COMI) in the Netherlands pursuant to the European Insolvency Regulation.

In my view, the Dutch court will only accept jurisdiction if the composition is proposed by a debtor with its COMI or an establishment in the Netherlands. Given the fact that most international groups have a debtor in the Netherlands, this threshold will most likely be met. However, the question that needs to be answered is whether or not all the guarantors and joint debtors need to have a COMI or establishment in the Netherlands. If that is the case, WCO II will be of limited use for international restructurings. If Dutch Courts take the view that if Dutch law and Dutch jurisdiction has been chosen by contract, the Dutch

189 Available at: <www.debrauw.com/wp-content/uploads/NEWS%20-%20PUBLICATIONS/Global.Distress.Signal.Winter2015.jan15.pdf>.

court has also jurisdiction to decide on a composition, WCO II could, in theory, have a much wider impact. Dutch courts do not have to be afraid of a run on Dutch Courts. Most international financial contracts are governed by UK law and given that a lot of parties providing financing are more familiar with UK law in any event. At least, in theory, the Netherlands restructuring community has with WCO II an alternative for the UK Scheme.

Part 3: Could and Would We Have Done It Differently if the Changes Were Already in Place as of 2002?

In this final part of the report, Part 3, the question is how the restructurings mentioned in Part 1 could have been effectuated if and when the (legislative) changes mentioned in Part 2 had already been in place. In other words, would any of the (legislative) changes make any difference in the restructuring practice and if so, which differences would I expect? I am aware of the fact that nobody (including myself) can with certainty predict the future.[190] However, I have had my fair share of experience in international restructurings, and I am using this experience to try to suggest what could happen.[191] The cases mentioned in Part 1 are one again dealt with in this report, in the same order.

Versatel *(2002) and* UPC *(2003) NL Suspension of Payment with Composition, Combined with US Chapter 11*

In both the Versatel case and the UPC case, the purpose of the restructuring was to bind the minority of non-consenting unsecured creditors to the restructuring. Both the restructuring of Versatel and UPC, as Dutch-incorporated legal entities, could in theory now be done with only a Dutch suspension of payment proceedings and then export that Dutch suspension of payment proceeding to the US using Chapter 15, the US adoption of the Model Law.

Already in 2006, liquidator Mr. P. W. Schreurs applied to the US Court for recognition of the bankruptcy of several Vekoma companies (amusement park ride producer) using

190 One of my favourite quotes is “It’s tough to make predictions, especially about the future”. This quote is attributed both to Niels Bohr, a Danish physicist (<https://en.wikipedia.org/wiki/Niels_Bohr>) and Joe Dimaggio (also known as Yogi Berra, <https://en.wikipedia.org/wiki/Yogi_Berra#.22Yogi-isms.22>), see the perils of prediction, letters to the Editor in *The Economist* of June 15, 2007, available (for subscribers) here: <www.economist.com/blogs/theinbox/2007/07/the_perils_of_prediction_june>

191 Daniel Kahneman takes in his book *Thinking Fast and Slow*, Chapter 22, the view that it takes 10,000 hours of concentrated practice to become an expert. I did not track those accurately but I think I meet that threshold, although of course much time is spent to discussions of not so relevant topics, I don’t know whether that counts. In the end, it is for others, including the readers of this report, to decide if I am an expert in international restructurings.

Chapter 15. Judge Clark granted the petition and recognized the Dutch bankruptcy proceedings as main proceedings.[192]

As reported earlier, the main issues in the restructuring of both Versatel and UPC was that the entities had issued NY law-governed bonds. In order to be able to restructure those bonds and owing to the US Trust Indenture Act, an insolvency proceeding was required.[193] But since Magyar Telecom case,[194] we know that NY-governed law bonds can be restructured using a foreign insolvency proceeding, which then is exported to the USA using US Chapter 15. In theory, it is also possible to export Dutch composition in suspension of payments to the USA using Chapter 15. It all depends, of course, on the position of the majority of the bondholders – would they be willing to go this route and vote in favour of the Dutch suspension of payments proceedings?

UPC also had bank debt.[195] Currently, bank debt cannot be restructured in a Dutch suspension of payment proceedings, unless all holders of bank debt agree. Dutch suspension of payment proceedings cannot bind secured creditors and unsecured creditors. If and when WCO II comes into force, also the bank debt could be restructured, provided the majority of the class of bank debt is voting in favour and only a minority of the class of bank debt is against the restructuring.[196]

If the class of bank debt does not agree, a refinancing of bank debt is required.[197] Going to the UK via COMI-shift and trying to put a UK Scheme in place could currently help in a case of a minority[198] in the class of bank debt, but does not help if the class of bank debt does not agree simply because all the classes in a UK Scheme need to vote in favour.[199] Only Chapter 11 could do that trick in theory because of the fact that the bankruptcy judge

192 Details on case available (for subscribers) through: <http://globalinsolvency.com/taxonomy/term/751/0?page=1>.

193 See earlier in this report, Part 1.

194 Id.

195 The bank debt was restructured consensually.

196 See article 372(3) WCO II: "A class of voting creditors or shareholders has agreed to the composition if: a. the simple majority of the creditors and shareholders in that class and taking part in the vote have accepted the composition, and b. that majority represents at least two-thirds of the amount of claims of the creditors taking part in the vote or two-thirds of that part of the issued capital represented by the shareholders taking part in the vote."

197 See article 373(3) WCO II: "A class of creditors with a right of pledge or mortgage voted against the composition and the creditors that form part of that class pursuant to the composition receive a cash sum that is lower than the value, based on a private sale, of the property over which the right of pledge or mortgage is established."

198 Relevant majority as required in UK follows from Section 899 (1) Companies Act: "If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement."

199 See earlier in this report under sample 5.

is able to cram down a reorganization plan on the class of secured creditors even if it is a non-consenting class.[200]

In my view, what would happen in practice would depend upon the answer to the question as to what the majority of the relevant creditors (in this case bondholders) want. I assume that an important part, if not the most, of the debt of both Versatel and UPS was held by US banks and investors who will be more comfortable in their home jurisdiction. Assuming this is correct, the same would happen again in my view: thus Chapter 11 combined with Dutch suspension of payment could be a good option (unless the creditors were all US-linked and the debtor could rely on the Almatis precedent).

Hagemeijer *(2003) and* Kendrion *(2004) NL Out of Court Composition/Financial Restructuring*

If all stakeholders to a restructuring agree, the preferred consensual option is available and executed swiftly. However, all these workouts are negotiated in the shadow of the law,[201] i.e., the fallback position parties have if and when no consensual agreement is reached. The (legislative) changes in the international restructuring landscape have a big impact on the negotiation process. Parties[202] at the negotiation table are aware of those (legislative) chances. To illustrate, I have come across cases where a holdout creditor, understanding that he is most likely "schemed" in the UK, decided to accept the deal. That is also the precise reason why I am heavily in favour of getting the WCO II in place in the Netherlands as soon as possible. It will facilitate the negotiations and ensure that more consensual deals are put in place. This is simply because the holdout parties understand that the parties willing to do a restructuring have an alternative option if the holdout parties stay put, namely to use the WCO II route.[203] The UK Scheme route is only available for businesses that still have some cash to burn to pay for the expensive UK court process. I trust that in the Netherlands, we are able to execute WCO II quicker and cheaper.[204]

Hagemeijer and Kendrion might have been negotiated more easily if WCO II had been there, but the end result would most likely have been the same, i.e., a consensual out-of-court restructuring.

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200 See earlier in this report under sample 6.

201 See J.A.A. Adriaanse in Restructuring in the Shadow of the Law: Informal Reorganisation in the Netherlands, (2005).

202 Or in any event their trusted advisors.

203 See also my article (only in Dutch): "Wettelijk Faciliteren van (financiële) herstructureringen: het dwangakkoord", in Herstructurering en insolventie: naar een Scheme of Arrangement? Uitgave 2013 in de Zifo reeks nr. 9, also available at: <https://www.rechten.vu.nl/nl/Images/ZIFO%20deel%209%20Herstructurering_tcm22-407976.pdf>.

204 Just one example, the fees you pay to a Dutch counsel are simply lower, that helps a lot.

SAS *(2009) Enforcement NL of Security by Security Trustee*

The SAS case has set a precedent for more restructurings in the Netherlands using this technique.[205] The technique has also been used as an alternative for getting the cooperation of a trustee to sell the shares of a bankrupt holding company.[206] Dutch practitioners need to be aware of the fact that holding companies having their registered seat in the Netherlands are able to shift their COMI to the UK and then have the shares in the subsidiaries sold by way of a UK pre-pack following the European Directories precedent.[207] According to public available sources in the recent Imtech case,[208] there has been a fight among the liquidators and financiers on how to execute the sale of shares of certain subsidiaries. Liquidators in the Netherlands are of course able to pick their fight, and to the extent COMI-shift is impossible, in the period of at least three months before the application date of the bankruptcy, they will remain in charge of the bankruptcy of the Holding in the Netherlands. However, the Imtech case has drawn a lot of public attention also with (the advisors to) foreign investors and lenders. Such (advisors to) foreign lenders may advise the European Directories route in order to try to avoid a fight with those Dutch liquidators who might be focused on putting up a fight instead of being focused on a restructuring of parts of the business.[209]

A case such as SAS could have been restructured using a pre-pack together with a UK scheme.[210] The question is (if and when in place) whether both WCO II and EIR 2017 would provide an alternative option. The restructured business of SAS had legal entities in the Netherlands, France and UK. WCO II could help to restructure the secured debt of the Dutch legal entities, which had their COMI in the Netherlands,[211] provided the required majority of secured debt would agree. A composition plan in SAS should, among others, have two classes of secured debt – the senior secured debt and the junior secured debt.[212] The problem arose in SAS within the junior secured debt class, and this junior debt class would have voted against the composition. The judge in the Netherlands could, at the request of the company, have declared the composition universally binding upon the class of junior debt holders since this class received in the restructuring an amount of cash equal to the value, based on a private sale, of the property over which the right of pledge or

205 Pres District Court August 23, 2012, ELCI:NL:RBAMS:2012:BY1439 (Ramblas).
206 Pres District Court March 30. 2012, ECLI:NL:RBUTR:2012:BW0487 (Selexyz).
207 See earlier in this report on the European Directories sample.
208 See for example interview with liquidator Jeroen Princen in de Volkskrant dated September 15, 2015.
209 See for an overview of what happened during the first days in the bankruptcy of Imtech in the perception of the liquidators, their first report, available in English at: <www.bankruptcyimtech.com/media/en-1e-verslag-royal-imtech.pdf>.
210 Holly Neavill and Teun Struycken in European Debt Restructuring Handbook (2013), p. 119.
211 See earlier in this report, page 86 e.f.
212 Also bridge lenders.

mortgage is established.[213] The composition also contained release provisions of the UK and French legal entities. As explained earlier in this report,[214] it remains to be seen whether or not the scope of WCO II is such that a composition could also relate to foreign co-debtors and/or guarantors not having their COMI or an establishment in the Netherlands. Assuming for a moment that indeed WCO II has this scope, then the question needs to be answered as to whether (especially) article 8 EIR 2017 would not make this release unenforceable in the UK and/or France. Currently, the UK does not have an insolvency process in which the minority of a secured creditors class can be forced to accept a composition. Therefore, in my view, SAS would not have been restructured differently should EIR 2017 and WCO II have been in place.

EU Forum Shopping to Restructure Debt

EIR 2017 contains certain provisions concerning forum shopping. As reported earlier,[215] my takeaway of those provisions is that EIR 2017 will not stop the forum shopping in relevant cases such as Daiseytek, Deutsche Nickel, Collins & Aikman, Eurotunnel, Schefenacker, Wind Hellas and European Directories. It just requires some extra ahead planning to ensure that any shift of COMI is done to three months prior to the request for the opening of insolvency proceedings, which in my experience is in most matters feasible, given the fact that restructuring takes a long time.[216] The EIR 2017, furthermore, as mentioned earlier in this report, provides guidance regarding what one should do to effectively move the COMI.[217] The statutory basis for synthetic secondary proceedings is also to be considered as helpful in restructuring.[218] I am more sceptical as to the positive effect of the new provisions dealing group insolvencies, but time will tell if my scepticism is wrong.[219]

I have suggested that although article 8 EIR 2017 contains the same wording as the current article 5, the article should be read in such a manner that it does enable a restructuring of the underlying debt covered by the security in a EU main proceeding if and to the extent the insolvency law of the country in which the secured asset is located allows for this restructuring. Interesting as this idea might be, it does not have a huge effect on the possibilities of restructuring, since EU countries are lacking to ensure that their insolvency laws meet the criteria set by the EU Commission in its Recommendation.[220] A recent

213 Neavill and Struycken, note 210, p. 124.
214 See page 88 e.f. of this report.
215 See page 64 of this report.
216 See article 3(1) EIR 2017.
217 See page 64 of this report.
218 See article 36 EIR 2017.
219 I hope it is and that I am just infected by what happens to a lot of people getting older, especially who are working in the recovery part of the banking world where one only sees failed business and crooks.
220 Text available at: <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf>.

report shows that so far there has not been a lot of progress.[221] It remains to be seen whether the EU legislator will step up its effort and is going to start some harmonization effort on this route. Personally, I am in favour. For now, EU forum shopping is still on the restructuring table as an option in some cases, as it was before.

The Scheme of Arrangement Route

The UK scheme of arrangement route to restructure the debt might have been under attack if the EIR 2017 had resulted in the inclusion of the UK scheme in Annex 1 of the EIR 2017. Earlier in this report, it has been explained as to why this has not yet happened and that it does not seem likely that this route would be closed anytime soon by the UK practitioners.[222] Therefore, in cases like Rodenstock (2011), Estro (2013), Magyar (2013), Apcoa Parking (2014) and Van Gansewinkel (2015), parties are still able to opt for this route. The reasoning by UK judges in lower UK courts to accept jurisdiction in international cases might be inconsistent and chameleonesque, but those UK judges helped to save a lot of international business groups. This route is still under scrutiny, and it might be challenged successfully either in a higher UK court or in a court of a foreign jurisdiction. Therefore, if a debt restructuring option is available in the home country of the debtor, the stakeholders are likely to go for that route.[223] Estro (2013) and Magyar (2014) are samples in which only one or more Dutch legal entities were involved, with business activities in the Netherlands. It is highly likely that cases like Estro and Magyar will be restructured in the Netherlands using the WCO II option.[224]

221 See earlier in this report, page 62 e.f. Evaluation of the implementation of the commission recommendation of December 3, 2014 on a new approach to business failure and insolvency published September 30, 2016, available at: <http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf>. The conclusion of the report is: "In conclusion, it can be seen that among the Member States who replied, several Member States consider that they already largely comply with the Recommendation, and that a significant number of those which do not comply have not launched any reforms to date. While it is clear that the Recommendation has provided useful focus for those Member States undertaking reforms in the area of insolvency, it has not succeeded in having the desired impact in facilitating the rescue of businesses in financial difficulty and in giving a second chance to entrepreneurs because of its only partial implementation in a significant number of Member States, including those having launched reforms. These differences in the implementation of the Commission Recommendation mean continuing legal uncertainty and additional costs for investors in assessing their risks and continuing barriers to the efficient restructuring of viable companies in the EU, including cross-border enterprise groups."

222 See page 64 of this report.

223 Due to the fact that there were other jurisdictions than Dutch, UK and US involved in the cases of Rodenstock, APCOA and Van Gansewinkel, I leave the question how these restructurings would have been done now unanswered, I have limited my research for this report to Dutch, UK, USA law as it currently stands.

224 However, if and to the extent in Estro and/or Magyar debt release provision of third parties play a role article 8 EIR 2017 might make this impossible if and to the extent these third parties also provided security. In Magyar that seems to be the case: "The company's obligations under the Notes are guaranteed by Invitel and other companies in the group. The Notes are secured by a pledge over shares in the company and over

As long as not all EU countries have ensured that they have implemented the European Commission Recommendation of March 12, 2014, and given the uncertainty of how to deal with article 8 EIR 2017, it seems likely that stakeholders in international restructuring with legal entities and/or business activities spread over Europe still go to the UK and use a UK scheme to implement the restructuring. Again, if and to the extent no other viable restructuring option is available, I understand and endorse this position.[225] To be fair, I had some difficulty conceptually to accept the position taken in those cases where parties have changed the law applicable to their agreement, including the choice of jurisdiction by a majority vote simply because the exact text of the agreement allowed for it. Prior to the Apcoa case, I have never been involved in any negotiation over a finance agreement in which parties discussed the possibility to change law and/or jurisdiction over the term of the agreement as people simply did not think about it. Of course, that changed rapidly after the Apcoa case. By now, people are aware that they should consider this option.[226]

The US Chapter 11 Route

Earlier in this report, I have been sceptical about the Chapter 11 route,[227] given the thin basis for this option and the possibility for a debtor to shift without the permission of its (secured) creditors the restructuring forum to the US. In the Marco Polo case, the debtors involved were Dutch legal entities, and the secured creditors were opposing the shift. After WCO II has come into force, my suggestion to secured creditors of Dutch debtors is to put pressure on the management of its Dutch debtors to implement restructuring using the WCO II possibility and if the debtor refuses to do so, to come up with their own plan.[228]

the shares held by the company in Invitel and by other liens on substantially all the assets of the group.", see under 3 of High Court of Justice Chancery Division Companies Court [2013] EWHC 3800 (Ch), <www.bailii.org/ew/cases/EWHC/Ch/2013/3800.html>

225 Although earlier in this report I have raised my doubts re changing the law and jurisdiction applicable to the contract. On the other hand, sophisticated players should know by now and deal with the issue in the contract. I personally do not endorse the blocking of the UK Scheme option by putting an all lenders consent block on the change of law and jurisdiction clause of contract governed by Dutch law with choice of law Dutch court. My earlier doubts simply referred to the fact that people were not aware of this issue. Now they are, or at least, they should be aware.

226 In any event the trusted advisors are thinking about this option.

227 Due to the fact that there were other jurisdictions than Dutch, UK and US involved in the case of Almatis, I leave the question how the restructurings would have been done now unanswered, I have limited my research for this report to Dutch, UK, USA law as it currently stands.

228 See article 368(2) WCO II: "A creditor who anticipates that his debtor will not be able to continue to pay his due and payable debts may request a debtor as referred to in paragraph 1 in writing to proceed to offer a composition as referred to in that paragraph. If subsequently such a period has lapsed as to give the debtor a reasonable chance to offer a composition, but he has failed to do so, the creditor can offer a composition of its own volition, subject to immediate notification to the debtor." In restructuring jargon we call this option the lender led solution.

By doing so, secured creditors are placing themselves in a better position to challenge before the decision of the debtor to file for Chapter 11 before a US bankruptcy court.

Recently, Delaware Bankruptcy judge Kevin J. Carey dismissed a Chapter 11 application of foreign affiliates of Northshore Mainland Services Inc.[229] Bankruptcy Judge Carey had to rule in relation to the so-called Baha Mar Resort in a resort development project in The Bahamas, which includes four new hotels, a Las Vegas-style casino and a Jack Nicklaus signature golf course. The completion date of the Baha Mar Resort was pushed several times in breach of the construction contract, which led to litigation among CCA Bahamas Ltd. (the obligor under the construction contract) and The Export-Import Bank of China (the lender) as well as a severe liquidity crunch. In June 2015, the legal entities that formed a part of the Baha Mar Resort opened several bank accounts in Delaware. On June 29, 2015, these entities filed the Chapter 11 cases in the Delaware Bankruptcy.[230] On September 4, 2015, the Bahamian court appointed provisional liquidators for these entities. CCA Bahamas Ltd. and The Export-Import Bank of China moved to dismiss the Delaware Chapter 11 cases. The following parts of the memorandum of Bankruptcy Judge Carey are important to note:

> The matter before me is truly an international case with the main contestants hailing from Wilmington, Delaware, to Beijing, China, to Nassau, The Bahamas. The central focus of this proceeding, however, is the unfinished Project located in The Bahamas.
>
> …
>
> I acknowledge the deep and important economic interest of the Government of The Bahamas in the future of the Project. However real and important as that interest is, it is no more important than the right of a company incorporated in the United States to have recourse to relief in a United States Bankruptcy Court. The Debtors' preference for restructuring under the protections of the United States Bankruptcy Code is understandable and entitled to some weight. Chapter 11 of the United States Bankruptcy Code, with all stakeholders participating, under these circumstances, would be an ideal vehicle for the restructuring of this family of related companies with the ultimate goal of finishing a

229 Bankruptcy Judge Kevin J. Carey in his memorandum regarding motion to dismiss cases, dated September 15, 2015, available at: <www.deb.uscourts.gov/sites/default/files/opinions/judge-kevin-j.carey/northshore-dismissal-combined.pdf>; see youtube report: <https://www.youtube.com/watch?v=Geiduz4sWo0&feature=youtu.be>.

230 See *New York Times*, July 31, 2015, available at: <www.nytimes.com/2015/07/22/business/a-complex-bankruptcy-case-with-baha-mar-and-a-chinese-contractor-lands-in-delaware.html?_r=1>.

project said to be 97% complete and, upon its exit from chapter 11, to be in sound financial footing, with appropriate treatment of creditors. I am consequently disappointed that the parties have been so far unable to formulate a consensual exit strategy, whether that would involve taking a plan to confirmation or providing for an agreed dismissal as part of a consensual resolution of their disputes. The Debtors, cleverly, have proposed a plan that leaves treatment of the Bahamian creditors for disposition outside of this Court. However, the proposed plan provides for treatment of the Debtors' two main adversaries (CCA and CEXIM) to be determined by this Court under the United States Bankruptcy Code. The Debtors' proposed plan, in effect, only invites further dispute, that is, litigation in this forum and in others. If I were convinced that denying the Dismissal Motions would have the effect desired by the Debtors – bringing CCA, CEXIM and the government of The Bahamas back to the bargaining table, I might consider denying the Dismissal Motions. But the evidence does not reflect this and I am not convinced this will happen in short order. I am convinced, however, that prompt judicial action will enhance the likelihood of a successful outcome.

Notwithstanding some agreed venue provisions in some of the relevant documents, I agree with Justice Winder's determination in his July 31, 2015 ruling that many stakeholders in the Project would expect that any insolvency proceedings would likely take place in The Bahamas, the location of this major development Project. I perceive no reason – and have not been presented with any evidence – that the parties expected that any "main" insolvency proceeding would take place in the United States. In business transactions, particularly now in today's global economy, the parties, as one goal, seek certainty. Expectations of various factors – including the expectations surrounding the question of where ultimately disputes will be resolved – are important, should be respected, and not disrupted unless a greater good is to be accomplished. Under these circumstances, I can perceive no greater good to be accomplished by exercising jurisdiction over these chapter 11 cases, except for that of Northshore. Northshore is a Delaware corporation with operations in the United States. Parties would expect Northshore's financial difficulties to be addressed in a proceeding in the United States. Furthermore, Northshore is not one of the PL Entities, since it is not the subject of any winding up proceeding in The Bahamas. Therefore, I will not dismiss the chapter 11 case for Northshore, unless upon further proceedings, upon separate motion, I am convinced that I should do so.

In short, only the US legal entity Chapter 11 proceedings was not dismissed, but Bankruptcy Judge Carey took the view that the appropriate bankruptcy forum with respect to the other entities was not the US but the Bahamas, simply because the relevant stakeholders would expect that any insolvency proceedings would likely take place in The Bahamas. This decision, if followed by other US Bankruptcy Judges, could restrict the possibilities of using Chapter 11 for foreign legal entities, especially in those situations where a foreign restructuring proceeding is available and used, as in this case. In any event, this decision of Bankruptcy Judge Carey ties in with what was defended earlier in this report, i.e., that for a switch of the restructuring forum to another jurisdiction such as the US, the majority of the creditors (including the secured creditors) that are in the money is required.

Conclusion

What Have We Learnt in Almost Fifteen Years of International Restructuring?

Part 1 of the report has highlighted that lawyers are resourceful in finding solutions and alternatives to get an international restructuring done. Judges in Europe, especially in the UK, have followed suite and have, in my view, been very instrumental in international restructuring cases. In some cases, the help of the US Chapter 11 was required.

Part 2 of this report dealt with the (legislative) changes in the period 2002 until now, also taking into account the Model Law, the changes of EIR to EIR 2017 and the draft Dutch WCO II as it currently stands. Options to restructure have multiplied from a twofold option (restructuring either in a formal reorganization proceeding of an insolvency proceeding or outside a formal insolvency reorganization proceeding) to a fivefold continuum of possibilities (Informal out of Court Restructuring, Enhanced Restructuring, Hybrid Proceeding, Reorganization Proceeding and Insolvency Proceedings). Further, in my view, having more options enhances the chances of a successful restructuring.

The Model Law provides for a truly global (and not only European) procedural mechanism to facilitate more efficient disposition of cases in which an insolvent debtor has assets or debts in more than one state. However, it still needs to be implemented in a lot of countries, including the Netherlands, which is slow in implementing this necessary tool for international restructurings. The Model Law should be implemented as soon as possible in as many countries as possible all over the world.

The EIR 2017 could have brought a revolution in European international restructuring cases if the UK Scheme had been included as an insolvency proceeding under the EIR 2017 and if a proper system of group pre-insolvencies had been implemented. That did not happen, and the UK Scheme is still alive and kicking and will, in my view, be used in the foreseeable future to deal with international group restructurings. The proposed system for the group insolvencies seems too complicated and is only voluntary, so one could question it effectiveness.

In this report, one of the questions considered is how article 5 EIR (article 8 EIR 2017) should be understood. The position has been defended that article 5 only restricts the effects of a foreign main proceeding with regards to secured assets in another Member State to the extent the foreign main proceedings would result in a more extensive infringement of the security rights than would have been the case if those secured assets would have been subject to a local insolvency proceeding. In other words, article 5 EIR should be read in such a manner that it does enable a restructuring of the underlying debt covered by the security in a EU main proceeding if and to the extent the insolvency law of the EU country in which the secured asset is located allows for this restructuring. Although an interesting idea, as such it will not have a huge impact on the possibilities of restructuring in an international environment. This is simply because in a lot of EU countries (including the Netherlands – although WCO II changes that – and the UK), it is impossible to restructure the secured debt in any manner against the wishes of the secured creditor.

The changes in EIR 2017 do not unnecessarily restrict forum shopping to restructure international businesses and are helpful because of some clarifications dealing with the dos and don'ts while forum shopping and by providing a EU statutory basis for the UK practice of synthetic secondary proceedings.

WCO II (if and when implemented) is a revolution in the Netherlands bankruptcy scene. But, the extent to which WCO II could also play an important role in international restructurings remains to be seen. When applying WCO II, Dutch judges need to answer the question of jurisdiction. Most likely they will accept jurisdiction if the composition of the WCO II is proposed by a debtor with its COMI or an establishment in the Netherlands. Most international groups have a debtor in the Netherlands; so potentially, the scope for applying WCO II could be broad. However, the Dutch judges also need to answer the question as to whether or not all the guarantors and joint debtors need to have a COMI or establishment in the Netherlands. If that is the case, WCO II will be of limited use for international restructurings. If Dutch Courts took the view that if Dutch law and Dutch jurisdiction has been chosen by contract, the Dutch court has also jurisdiction to decide on a composition, WCO II could in theory have a much wider impact. The plan is to ensure that WCO II falls under the scope of EIR 2017. If so, the effect of a composition plan on secured assets within the EU outside the Netherlands is, given the uncertainty on the effect of article 8 EIR 2017, not yet crystal clear.

In Part 3 of this report, the sample cases of Part 1 are revisited, applying the (legislative) chances of Part 2.

Most likely both Versatel and UPC would still use both Chapter 11 in the US and the suspension of payment in the Netherlands to get deal certainty.

Hagemeijer and Kendrion could have benefitted from WCO II, but given the fact that stakeholders there came to a consensual deal, there is no reason to expect that they would not have done so and even quicker in the shadow of WCO II.

SAS would still need to use the enforcement route in the Netherlands[231] because of the fact that the UK does not have a proper mechanism in place to force the minority of a secured creditors class to accept a composition.

Daiseytek, Deutsche Nickel, Collins & Aikman, Eurotunnel, Schefenacker, Wind Hellas and European Directories would most likely still use the EU forum shopping possibility also after EIR 2017 is implemented as a new option on the restructuring table.

Rodenstock, Apcoa Parking and Van Gansewinkel would still use the UK Scheme route, having no alternative available. Estro and Magyar as Dutch legal entities could take the WCO II route unless Section 8 EIR would make this route impossible.[232]

In this report, the US Chapter 11 route of Almatis and Marco Polis is criticized. As such, it is understandable that in a situation where the bankruptcy law of the home country of a debtor does not facilitate a restructuring, an alternative jurisdiction is sought. International businesses are accustomed to be confronted with rules from different countries and are therefore much more flexible than purely local businesses and local creditors with respect to the application of foreign laws. They simply pick and choose their restructuring forum. Personally, I endorse this flexible and pragmatic approach if the switch of forum is supported by the majority of creditors (including secured creditors) that are in the money. In the end, it is the money of those (secured) creditors that is at stake. In the cases in which forum shopping in Europe took place over the past fifteen years, either by way of moving the COMI as required by the EIR or by using the UK scheme of arrangement route, the majority of the relevant stakeholders that were in the money apparently have accepted the change of the restructuring forum. Such a change of forum is then imposed upon the minority of the relevant stakeholders, which is, in my view, the essence of the restructuring process.[233]

As long as only one of the stakeholders is able to trigger a switch of forum, such as in the Chapter 11 route in which case the management of a business seems to be able to pick the restructuring forum without the consent of a class of creditors that are in the money,[234] I have much less sympathy. Management of a company could try to use the US Chapter 11 debtor in possession route to stay in control over the business against the wishes of the economic owners of the business.

231 Available other options are a pre-pack UK administration route or UK Scheme.

232 See Part 3 of this report note 224.

233 For my views on whether or not a restructuring could be imposed upon a class of creditors which is in the money see note 90.

234 Due to the possibility of cramming up a reorganisation plan on a class of creditors which are in the money, including secured creditors.

To conclude, it has been an interesting ride for the past fifteen years; let us hope that the next fifteen years will be equally interesting.

Report on the Fifth Annual Conference of the Netherlands Association for Comparative and International Insolvency Law

Amir Adl Rudbordeh[*]

Introduction

The fifth annual conference of the Netherlands Association for Comparative and International Insolvency Law ("NACIIL", or in Dutch: "NVRII") was opened by the chair of the conference, Prof. Reinout Vriesendorp. Prof. Vriesendorp introduced the two speakers of the day: Prof. Michael Veder and Johan Jol. The conference began with a review, presented by Veder, of the implementation of the European Insolvency Regulation's Recast (2015/848 [hereafter the "EIR Recast"]), published in May 2015. In the Netherlands, the Dutch legislature has been quite reluctant to enact new and improved insolvency laws until now. Nevertheless, we are anticipating the enactment of various legislative proposals. The question is, however, whether we would want Dutch legislation to compete with the UK for the position of the "favourite" within the European insolvency practice? This was the final question that was addressed during the presentation of Johan Jol and that will be discussed at the end of this Report.

Main Features of the New European Insolvency Regulation

Veder presented an overview of the main features of the EIR Recast and compared it with the current EIR. As can be concluded from the European Commission's impact assessment of December 2012 (SWD(2012)416 final), the EIR has functioned rather well in practice. And if it is not broken, do not fix it. However, the Commission acknowledged that there were a few shortcomings of the EIR that needed to be addressed, the main ones being the allocation of jurisdiction, the relationship between the main and the secondary proceedings, the publicity of proceedings, the scope of application, and groups of companies.

* Graduate (cum laude) of the dual LLM in Insolvency Law of Radboud University and Nottingham Law School.

First, it has been mentioned that there was little doubt as to retaining the centre of main interest (COMI) concept for the allocation of jurisdiction. The understanding of the COMI concept has also been made relatively clear by way of interpretations provided by the CJEU. The EIR Recast has incorporated the case law of the CJEU into Recital (30), more specifically on the rebuttal of the COMI presumption. Although this does not change much on a conceptual level, it does reinforce the existing legal doctrine. With regard to individuals, however, the EIR Recast will now provide for a rebuttable presumption, where none existed under the EIR. This addition relates to the EIR Recast's aim of preventing abusive forum shopping. As the problem of abusive forum shopping among individuals became overt in the course of time, amendments seemed necessary to counteract such incentives. The main amendment in this respect is the six months suspension period, which basically entails a waiting period of six months after a relocation of the habitual residence, before a COMI can be established. A similar debate on the adverse effects of abusive forum shopping by way of COMI-shifting could be conducted with regard to companies. However, the Commission has contended that COMI-shifts are often supported by the creditors or have even been initiated by them. Therefore, it would seem that there is no real problem in this specific area. Still, an attempt has been made to prevent abusive forum shopping in this area as well by way of a three months suspension period. However, it has been argued that because the suspension period applies only to *a shift* of the registered office (article 3(1) EIR Recast) rather than changing the COMI itself, it might not be very effective in achieving its aim of preventing abusive forum shopping.

Veder continued by briefly touching upon the relationship between main and secondary proceedings. The EIR currently regulates the cooperation, collaboration and exchange of information between liquidators. Within the EIR Recast (articles 41 and 42), these obligations to communicate will be extended to national courts, which should be noted as a desirable improvement. With respect to the possibility of initiating secondary proceedings, the primary reasoning behind it was to ensure the protection of local creditors. In addition, it has been contended by the drafters of the EIR that secondary proceedings can also have an auxiliary function in relation to the main insolvency proceedings. For example, the insolvency practitioner in the main proceedings might wish to initiate secondary proceedings in order to administer the insolvency proceedings more efficiently. In practice, however, secondary proceedings are rarely initiated by insolvency practitioners, as they normally add to the costs and complexity of the proceeding. Secondary proceedings may also be an obstacle when aiming to sell the company as a going concern, as secondary proceedings will have to be liquidation proceedings and the assets within the jurisdiction of the secondary proceedings will then fall outside the reach of the insolvency practitioner in the main proceedings. The EIR Recast will allow for secondary proceedings to be reorganization proceedings. More importantly, a statutory basis will be provided for so-called synthetic secondary proceedings (article 36 EIR Recast). This entails a promise to local creditors of a Member State in the case of an "establishment" of the debtor to treat their claims in the main proceedings as if there were secondary proceedings, in order to avoid the actual opening of such proceedings. Although such synthetic secondaries work well as a developed practice in England, the idea behind this remedy might have been killed by the EIR Recast's complication of the practice. Now that the EIR Recast requires the approval of all known local creditors and that of the national court, one might argue that the initial added costs and complexities of secondary proceedings will be replaced by other costs and complexities.

However, perhaps a far more important issue of the EIR that needed to be addressed was that of publicity. The publication or registration of the opening of insolvency proceedings is currently not mandatory under the EIR. Hence, there are proceedings within certain jurisdictions that may have been opened, yet not publicly announced or ascertainable. The question arises as to how one would know whether proceedings have been opened when there is no publication or registration. Considering that publication is not required for the main insolvency proceedings to have their legal effects resulting from the EIR, one can see the issues arising with regard to legal certainty and effectiveness of cross-border insolvency proceedings, especially for foreign stakeholders. This problem has been addressed by the EIR Recast by requiring Member States to provide for an electronic insolvency register that is publicly accessible. These electronic insolvency registers will then be interlinked in 2019 by way of a European e-Justice portal.

The EIR Recast also contains an extended scope of application from the rather classical understanding of insolvency proceedings under the EIR (article 1(1)), which would currently have to entail a collective procedure with the partial or total divestment of a debtor and the appointment of a liquidator. This broadening of its application is very much understandable, as insolvency proceedings have changed significantly since the time of negotiating the EIR, when there were mainly liquidation proceedings. Present-day instruments under insolvency law have shifted their aim towards the promotion of rescue and reorganization. Such instruments, however, often do not meet the definition of an insolvency proceeding as stipulated in article 1(1) EIR, and have therefore not been included in Annex A. Hence, such "new" insolvency instruments do not enjoy the guarantees of recognition provided by the EIR, which could very well jeopardize their effectiveness in cross-border situations. Moreover, the Commission has, in its Recommendation of March 12, 2014 (2014/135/EU [*OJ* 2014, L 74/65]), called upon Member States to adopt rescue-orientated insolvency proceedings. This makes the amendment of the EIR to also include rescue proceedings all the more logical.

Finally, the largest amendment to the EIR has been due to the regulations regarding groups of companies in the fifth chapter of the EIR Recast. The EIR Recast provides rules on the coordination of insolvency proceedings that relate to the same debtor or to several members of the same group of companies (Recital (6) and articles 56-60 EIR Recast). However, where laws at a European level normally find their roots and similarities in national law, there were no particular national laws that could be used as an inspiration in this respect. Therefore, the provisions under Chapter 5 are novel and achieved with some difficulty. The EIR Recast will provide for so-called group coordination proceedings. In order to subsequently create a more stable and solid procedure, the role of a coordinator has been introduced. The coordinator will have to be an independent insolvency practitioner who will assist and monitor the group coordination proceedings. The EIR Recast thereby unifies the different proceedings within a group of companies, while leaving the actual legal entities separated. Whether these group coordination proceedings will be (frequently) used in practice, remains to be seen.

The Future of International Restructuring Following the Implementation of WCOII and the Amendment of the European Insolvency Regulation: The Best Is yet to Come!

The presentation given during the second part of the annual conference can be viewed as a short summary of Johan Jol's full Report. The presentation raised questions and stimulated discussions. The first part of the presentation consisted of an overview of the most important cases, sampling the restructuring and forum shopping practice of EU-based companies, for example, cases such as *Versatel* (2002) and *UPC* (2003), where a Dutch suspension of payment was combined with a US Chapter XI procedure; or *Hagemeijer* (2003), where there was a fully consensual restructuring (for details on these cases, see Johan Jol's full Report). Also interesting is the restructuring in *Schoeller Arca Systems* (2009), where a new kind of restructuring was introduced, namely, the transfer of debt by way of execution of shares. In this case, the debt from one part of the company was transferred to another by way of provisions in the inter-creditor agreement, regulating the release of debt after the execution of shares. Therefore, the crux of the matter lies in the provision of the inter-creditor agreement. Within the largely similar *European Directories* case ([2010] EWHC 2406 (Ch)), there was some debate as to the correct interpretation of the relevant provision in this regard. Fortunately, the Court of Appeal ([2010] EWCA Civ 1248, paragraph 22) ultimately interpreted the provision in its most logical way, allowing for the transfer of debt towards the part of the company that was intended to be cut off. Because of this approach taken by the English court, many other companies were also restructured in a similar fashion.

Since the introduction of the EIR, a lot of forum shopping has taken place. See, for instance, *Wind Hellas* ([2009] EWHC 3199 (Ch)) with its COMI-shift from Luxembourg to the UK, or, more recently, *European Directories* ([2010] EWHC 3472 (Ch)), where a Dutch company COMI-shifted to the UK. These cases dealt with holding companies whose shift of COMI was accepted by the English court simply owing to a relocation of the office where the management took its decisions and the negotiations with creditors took place. Although a COMI-shift of an operating company would be much harder, it still begs the question of whether the location of the centre where all the negotiations take place should be of such a decisive influence on the COMI. Opinions could differ widely on this matter. From the discussions during the conference, however, one might say that the inclusion of creditors in these negotiations is a commonly shared value that strikes at the heart of the forum shopping problematics.

One of the tools that the English law offers to companies wishing to effectuate a restructuring is the scheme of arrangement. For many years now, companies have been forum shopping to the UK in order to make use of a scheme because of its (formerly unique) capability to cram down a dissenting minority of creditors. Such a cramdown mechanism can be very useful in cases where the requirement of full consensus stands in the way of an efficient restructuring, as for example in *Rodenstock* ([2011] EWHC 1104 (Ch)). Yet one should keep a close eye on the fairness and legal certainty towards (secured) creditors. See, for example, *Apcoa Parking* ([2014] EWHC 1867 (Ch)), where the UK High Court of Justice decided, for the first time, that it had jurisdiction to sanction a scheme on the basis of a facilities agreement whose governing law and jurisdiction clauses had been changed to English law and the English courts by a majority of lender's consent. See also more recently, the case of *Dtek Finance* ([2015] EWHC 1164 (Ch)), where a quick change of the law and jurisdiction applicable to the financial documents was recognized and accepted as a basis on which the English court could have jurisdiction. A somewhat different matter is forum shopping out of the EU, more specifically, to the jurisdiction of the US for a Chapter XI procedure. These types of shifts are perceived as undesirable from Johan Jol's perspective as a banker. This has to do with the fact that a secured creditor can be forced to continue to finance a debtor, even if the majority of the class of secured creditors is against it. See, for example, the case of *Marco Polo* ([2011] Bankr. S.D.N.Y. Case No. 11-13634).

The second part of the presentation seeks to provide a brief insight into the changes in the international restructuring landscape. The options available in cases of insolvency have been broadened significantly in recent years. The recent trends in international restructuring seem to provide a wide variety of options, which can be classified as follows: out-of-court restructurings (purely consensual), enhanced restructurings (consensual supported by code of practices), hybrid proceedings (pre-packs), reorganization proceedings, and, ultimately, formal liquidation or bankruptcy proceedings. The question was subsequently posed as to whether more options increase the chances of a successful restructuring. From the ensuing discussions at the conference, one might conclude that the real question that should have been posed was whether the options put in place have the potential to address the needs of the stakeholders. A single proper and yet flexible restructuring procedure could prove to be just as successful as a variety of procedures each holding their own advantages.

The next topic discussed related to the UNCITRAL Model Law on cross-border insolvencies of December 1997. This law has been implemented by various states around the world, including the UK and the US. The Netherlands, however, has yet to implement such a law, making it difficult to seek recognition in the Netherlands of non-EU bankruptcies. The question that was subsequently posed was whether the Netherlands should now also implement the Model Law. When compared with the situation as it currently stands, which is having no law on this matter at all, one could contend that an implementation of the Model Law will prove advantageous. The attendants at the conference seemed to be somewhat unanimous on the position that, indeed, something would be better than nothing. Still, the next question then becomes whether the Netherlands should seek to improve upon the Model Law, and if so, in what respect? The Model Law is meant to serve merely as a guide and should be shaped to fit the state concerned. During the annual conference, some advocated the possibility of using the 2007 law proposition made by the Dutch Commission on Insolvency Law (the Dutch government's advisory committee on insolvency law). More specifically, Title 10 of the 2007 law proposition has been mentioned, which proposes a combination of the Model Law and the EIR, seeking to establish a coherent framework between transnational recognition and EU legislation.

After this discussion, the presentation continued by questioning the correct interpretation of article 5 EIR. As it currently stands, Johan Jol agrees that the article stipulates that the rights in rem of creditors or third parties over assets that are situated in a Member State other than the one in which main proceedings have been opened shall not be affected by the opening of such insolvency proceedings. However, there is currently a discussion within the literature regarding this article, and it relates to the distinction that can be made between the claim of the secured creditor and the security itself. This distinction is one that is not commonly made within the EU. Yet, once this distinction is made, one might be able to affect the claim of the creditor in the main proceedings, without affecting the security. It has also been stated in the External Evaluation Report on the EIR (JUST/2011/JCIV/PR/0049/A4) that this possibility cannot be excluded. One could take the view that it is possible to affect the underlying claim, if (and to the extent that) the national law on which the security is based allows it, without affecting the security itself. In this respect, it has been argued that one could read the judgement of the CJEU in the *ERSTE Bank Hungary Nyrt* case (C-527/10, paragraph 36) as providing for such a distinction, possibly making the subject even more debatable. This would, in essence, mean that article 5 EIR would entail a conflict-of-laws rule. During the conference, however, the point has been raised that in such a case the article would not be referring to any particular jurisdiction, making its application unattainable. Indeed, it seems that article 5 EIR should perhaps be interpreted as an all-encompassing "hard and fast rule". Yet regardless of whether article 5 EIR (or article 8 EIR Recast) should be interpreted as a "hard and fast rule" or as a conflicts of law rule, both speakers agreed that the article should be changed, as it can currently lead to undesirable outcomes. The protection of secured creditor's rights could perhaps be obtained in other, less stringent ways. Fortunately enough, one of the drafters of the EIR was in the audience, who explained that the intention of the article was not to protect the secured creditors, but the liquidator, who would not have to find his/her way in various foreign laws. This clarification somewhat raises the question as to what is holding back the amendment of article 5, especially since it has remained unaltered under the new article 8 EIR Recast.

Discussion and Concluding Remarks

The conference concluded with a discussion on the newly proposed Continuity of Enterprises Act ("Wet Continuïteit Ondernemingen II" [WCO II]), which will reform the Dutch bankruptcy laws to a considerable extent. In the final part of Johan Jol's Report, he analyses whether companies would rationally opt for this newly proposed Dutch system, had it been available in the cases examined in his Report. According to Johan Jol, only two cases would have been conducted differently. This has much to do with the fact that people will want to stick with the system that they are used to, but it also relates to the issues arising from article 5 EIR, as an EIR-based proceeding.

The question that was subsequently raised by Johan Jol was whether or not the Dutch legislature should go a step further and be more welcoming in the acceptance of jurisdiction in cross-border insolvency situations. A comparison has been made to the UK, where the courts accept jurisdiction with regard to foreign companies relatively easy. This ease of acceptance has consequently resulted in more forum shopping to the UK, resulting in London being viewed as the present-day restructuring capital of Europe. Should the Dutch legislature rise to the occasion and present such a far-reaching reform? Although this notion is very much understandable, some nuances have been made during the discussions. As the new Dutch bankruptcy procedure will be one that, in all probability, will fall under the scope of the EIR Recast, it will also have to abide by its rules. If the COMI of the relevant company is not in the Netherlands, the Dutch court may not accept jurisdiction to open main proceedings. The difference in this respect with the UK is that the scheme of arrangement does not fall within the scope of the EIR and probably also not under that of the EIR Recast, and therefore does not have to require the COMI to be in the UK. Therefore, if one would want to ease the acceptance of jurisdiction in cross-border insolvency situations, a law would be required that *does not* fall under the scope of the EIR, simultaneously eliminating the problems related to article 5 EIR. In addition, a court judgement under such a law would have to pass the hurdle of foreign recognition, similar to that of the UK scheme of arrangement. Nevertheless, the option of such a procedure is possible. Whether it would, in practice, also be as successfully used as the UK scheme of arrangement is a different question.

The question has been raised whether it would be an option to have an EU Directive with regard to the recognition of procedures that deal with insolvencies yet fall outside the scope of the EIR (Recast) or are simply not listed in its Annex A. In this way, such procedures could similarly obtain the benefits of universality. Such a Directive would seem all the more logical when considering the Commission Recommendation of March 12, 2014 (2014/135/EU [*OJ* 2014, L 74/65]), calling upon Member States to adopt rescue-orientated insolvency proceedings, while remaining silent on the issue of their recognition. It seems, however, that it has been the intention of the Commission to include such proceedings within the scope of the EIR Recast, and in that way regulate the recognition of those proceedings (Commission Report COM(2012)743 final, p. 6). On the other hand, there seems to be a greater tendency in the recent literature to hold that the UK scheme of arrangement falls outside the scope of the EIR Recast. Of course, the aim of the drafters of the EIR Recast is very much understandable. If insolvency procedures would be able to have the benefit of universality, while circumventing the requirements of a COMI, then such procedures would create an unfair advantage compared with other insolvency procedures, and jeopardize harmonization. The "free pass" that currently seems to be in the hands of the UK scheme of arrangement creates a tension that raises the question whether other Member States are going to stand on the sidelines or join the competition.