Harmonisation of Insolvency Law in Europe

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Reports Netherlands Association for Civil Law 2012

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7.3. An Agenda for future work

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

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

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

Member States), and (iv) involve insolvency practice (courts, agencies and especially practitioners) into its development.1

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

196. *Consistency with international norms.* We are not hesitant to bring forward the UNCITRAL Legislative Guide as a non-binding guidance and standard setter for the organisation and furnishing of a national insolvency system. Under the heading "Provision of certainty in the market to promote economic stability and growth" the Guide observes that insolvency laws and its institutions (such as insolvency office holders, courts or supervising agencies) are critical to enabling a state to achieve "the benefits and avoid the pitfalls of integration of national financial systems with the international financial system. Those laws and institutions should promote restructuring of viable business and efficient closure and transfer of assets of failed businesses, facilitate the provision of finance for start-up and reorganization of businesses and enable assessment of credit risk, both domestically and internationally."2 As the first of its (presently) over 250 recommendations the Guide then suggests that in a national effective insolvency law the following key objectives should be implemented "….. with a view to enhancing certainty in the market and promoting economic stability and growth":
"(a) Provide certainty in the market to promote economic stability and growth;
(b) Maximize value of assets;
(c) Strike a balance between liquidation and reorganization;
(d) Ensure equitable treatment of similarly situated creditors;
(e) Provide for timely, efficient and impartial resolution of insolvency;
(f) Preserve the insolvency estate to allow equitable distribution to creditors;
(g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
(h) Recognize existing creditors' rights and establish clear rules for ranking of priority claims."

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

198. *Goals for the EU.* Rather recently within the EU supportive measures have been taken for the benefit of "delivering an area of freedom, security and justice for Europe's citizens" with the object of guaranteeing "…. respect for the human person and human dignity, freedom, equality, and solidarity are our everlasting values at a time of unrelenting societal

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

[2] UNCITRAL Legislative Guide on Insolvency Law (2004), see part 1.I.A.1.4.

and technological change", see the so-called Stockholm Programme.3 After the entry into force of the Lisbon Treaty, in December 2009, an Action Plan Implementing the Stockholm Programme has been published aiming actively at strengthening confidence in the European judicial area.4 It is clear that it focuses on the area of freedom, security and justice, and therefore stays within the (perceived) restrictions of Article 81 TFEU.5

199. The European Council in the 2009 Stockholm Programme acknowledges the need to adopt measures in the field of justice which support economic activity6 and, in the Action Plan, specifically provides for a proposal of amending the EU Insolvency Regulation. To this end, the Action Plan provides:
"Union law can make a concrete and powerful contribution to the implementation of the Europe 2020 strategy and mitigating the damage caused by the financial crisis. New EU legislation will be proposed whenever necessary and appropriate to strengthen our single market, helping businesses by removing administrative burdens and reducing transaction costs." The Plan then continues with a bucket full of ambitions: "Cutting red tape for business is a clear priority and the cumbersome and costly exequatur process that is required to recognise and enforce a judgment in another jurisdiction should systematically be consigned to history whilst maintaining the necessary safeguards. Ensuring that cross-border debt can be recovered as easily as domestically will help businesses trust our single market and *efficient insolvency proceedings can help recovery from the economic crisis* (italics by the authors). Cross-border transactions can be made easier by increasing the coherence of European contract law. Businesses are not taking sufficient advantage of the internet's potential to boost sales: Union law can help by increasing businesses' need for legal certainty and at the same time guaranteeing the highest level of consumer protection. Consumers need to be aware of their rights and provided with access to redress in cross-border cases. Finally, the increased use of alternative dispute resolution can contribute to the efficient administration of justice."7

200. What is interesting in this approach in this 2020 strategy is that it seems to contain an integrated approach, including many areas of law, such as civil procedural law, law of obligations, insolvency law, sales law, consumer law. Yet, most probably the suggestion that efficient insolvency proceedings can help recovery from the economic crisis is made within the context of cross-border judicial cooperation in insolvency cases (Article 81 TFEU). This also follows from EU Justice Commissioner Viviane Reding's address of February 2012, setting out policies to provide the EU Insolvency Regulation with a face-lift.8

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[3] European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF).

[4] Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20.4.2010 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0171:FIN:EN:PDF).

[5] "The European judicial area and the proper functioning of the single market are built on the cornerstone principle of mutual recognition. This can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods." (p. 4).

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

[7] Action Plan Implementing the Stockholm Programme, at p. 5.

[8] Speech of Viviane Reding, Vice-President of the European Commission. EU Justice Commissioner, with the title "Taking Insolvency Law into the 21st Century to Ensure Justice for Growth", 1st European Insolvency & Restructuring Congress, Brussels, 9 February 2012, available at

201. We however submit that this would be much too narrow to satisfy the requirement of including "insolvency" as a true part of the legal skeleton for an internal market in the meaning of Article 114 TFEU. A design for an insolvency law that will meet the key objectives within the focus of EU policies on the longer term must in its substantial and procedural forms be brought into alignment with norms and principles which are predominant in non-insolvency law area and which may fundamentally differ from those within insolvency laws, such as in the area of securities law (rights in rem), contract law, including e.g. employment contracts, IP-contracts and contracts with consumers), company law (e.g. position of shareholders, position of management) or the rules applicable to avoidance of antecedent acts.9

202. We recommend that a further study be undertaken to clarify the basis within the Treaties of the EU to assess the core of the provisions which could form the foundation of an "internal market insolvency law". In our opinion this study should include further research into the present limits the Treaties may pose, such as the principles of subsidiarity and proportionality, as well as a provision like Article 345 TFEU ("The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership") and its consequences for the allocation of powers between the EU and the Member States as well as for its meaning for developing a European property law or the influence "insolvency" may have on "property".10 Such a study obviously will include research into the consequences for a suggested insolvency skeleton, which would flow from any provisions of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights.11

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

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http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/108&format=HTML&aged=0&language=EN&guiLanguage=en.

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

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

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

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

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

205. *Overriding objectives.* We have provided an overriding objective for the goals of insolvency law and noted that in an international context the overriding objective is the maximisation of value and the furthering of the just administration of the proceedings, see para. 46 and 148. Most probably it will be necessary to make a distinction in the form of administering an insolvent estate, i.e. liquidation and reorganisation. Liquidation is the general name for proceedings to sell and dispose of assets for distribution to creditors in accordance with the applicable (national) insolvency law.12 A "reorganization" is the process by which the financial well-being and viability of a debtor's business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern. This is the term used in the UNCITRAL Legislative Guide13, which formulates a "reorganization plan" (or: plan of reorganization) as thus a plan by which the financial well-being and viability of the debtor's business can be restored.14

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

[12] Compare UNCITRAL Legislative Guide (2004), para. 12, under B, "Glossary, Terms and definitions".

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

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

certain specific security, for fresh money that has been borrowed in certain well defined situations of financial distress?

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

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

209. In this second area (ii) it may very well be that the debate will concentrate on questions such as (a) the necessity of the requirement of an impending insolvency, (b) which interests to take into account for such a rescue, (c) the (possible) rights and duties the holders of these interests have during the process of negotiation of a reorganisation plan (which is, in its core, a multi-party agreement), and (d) the relative contexts between these interests. Such a debate will have to assess too the criteria to use to come to the result that maximisation of value indeed can be successfully achieved compared to the estimated result of a form of piece meal liquidation of assets, whilst the requirement of the furthering of the just administration of the proceedings should include measures to create and guard the right of unsecured creditors, mostly small businesses or consumers, to receive information timely and a level of involvement of these creditors in the furthering of such a rescue. These matters clearly need the input of non-insolvency specialists, such as corporate and contract lawyers (e.g. for creating rules for a Debt-Equity-Swap, a (partly) conversion of a contractual creditors-position into a shareholders-position), contract and trade lawyers (e.g. for such activities as the trade in poor claims, e.g. Non Performing Loans), corporate and financial lawyers (to discuss the desirability of rules applicable to the relation of the distressed debtor and certain reorganisations specialists, such as Private-Equity Funds) or employments and pension lawyers (for the rights and duties regarding termination or continuation of employment as well as the ramifications on pension rights or other retirement benefits).15

210. *Flexible legislation.* Any regulation or rules of governance for these complex, multi-disciplinary and sometimes cross-border insolvency issues is to be dealt with in an efficient

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

and predictable way. These last requirements many times flow from the very nature of a financial distressed position. Individual legal measures as well as the full legal skeleton of such measures should, on the other hand be sufficiently flexible and capable of adapting to changes in circumstances and market conditions in which businesses operate. The inherent tension between "predictability" and "flexibility" will result in including discretionary powers, both for insolvency office holders as well as for a court involved. The legal skeleton may not only lead to hard law measures, but certainly – as a result of the quite ordinary way of creating (international) insolvency law in the last two decades – include (European) insolvency soft law instruments. It should therefore be assessed which topics call for which legal measure as well as whether some results may be better achieved with soft law alternatives.16

211. Here we provide the example of a "protocol". During the last two decades in several cases the experience has been that existing legislation, or the lack of it or its conflicting rules have resulted in efforts of insolvency practitioners to negotiate and tailor-make specific, *ad hoc* solutions, many times including the approval of the courts involved. This development has led to the use of an instrument called "protocol" or cross-border insolvency agreement. In his inaugural lecture of 2008 Wessels has submitted that the stage of a non-binding recommended approach of working with protocols could be regarded as the Lex Mercatoria in international insolvency cases. He possed the question whether the experience that several parts of such protocols as these were applied in international practice seem to reflect a certain pattern, these could now be regarded as "customary international law" and therefore in terms of international public law could have the status of a source of law within the meaning of Article 38 of the Statute of the UN International Court of Justice.17 He concluded however that the merit of a protocol lies in the individuality of every case and the necessity to resolve practical matters. These observations more recently have found support in countries such as Brazil18 and Australia.19

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

[17] Article 38:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

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

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

212. In a European context, especially in German literature, the debate is rather ongoing about the hybrid legal nature (contractual, procedural) of a protocol concluded between insolvency office holders in different jurisdictions (concluded in their "public" function, resulting in a "public law" contract?) and the way such a protocol can be arranged into German (insolvency) law.20 In literature published in the Netherlands similar questions have been raised: can a cross-border insolvency agreement arrange for provisions which are contrary to the mandatory rules that apply to each of the insolvency office holders? Can it be enforced to the whole body of creditors? Which rules apply when such an agreement is countersigned by the court? Is the legal context of mutual duties so strong that it also establishes a claim from one insolvency office holder versus the other in main and secondary proceedings to indeed conclude such an agreement? Will an agreement in itself be binding also against third parties who are not a creditor?21 We note that the Rome I Regulation on the law applicable to contractual obligations, in addition to allowing for a specific choice of law, "….. does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention."22 It could be debated whether such a reference could be made, for instance, to the "Principles of European Contract Law". In general a "reference" has to be understood as a reference to substantial law and not the provisions of conflict-of-laws. So such a reference can not deviate from mandatory provisions determined by the law, which has been indicated by objective conflict-of-law rules.23 Without doubt, a "protocol" or a cross-border insolvency agreement now is at the forefront of creating a workable solution in many complex matters, some of which we have described above. If the use of protocols is the preferred way to go forward, this will arouse another set of legal problems and discussions as for instance to the law applicable. We recall that legislation in Slovenia and in Greece already makes reference to such an instrument. It is submitted that it should be discussed, within a European context, to start to think about "Principles for Insolvency Protocols", to at least prevent some of the disputes and to create a certain level of predictability and certainty in an area which in itself is interesting, but not without problems. It goes without saying the participants to the debate certainly will include non-insolvency specialists.

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

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

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

[22] Recital 13.

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

confidence of creditors and the general public in the key role players in insolvency matters. A "bottom up" approach will also open the doors to surprising sources for further consideration, such as the work of the European Bank for Reconstruction and Development (EBRD), which is working alongside the Serbian Bankruptcy Supervisory Authority (BSA) on a project to improve the regulation, supervision and discipline of insolvency administrators.24 The result coming from said dialogue could well be a set of non-binding best practices for insolvency office holders (either appointed in purely national cases or in cases to which the EU Insolvency Regulation applies) and could include a "comply or explain" mechanism, either for individuals which are candidates for appointment or a countries' association (or associations) for such professionals.25

214. Finally: *Balance*. Any rule within the envisaged legal skeleton should be based on a fair balance between the (often competing) interests of creditors and other parties concerned. We provide one example, the position of secured creditors in situations of "rescue" or "insolvency". Article 5(1) of the EU Insolvency Regulation), reads: "The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings." A majority in literature follows the so-called "hard and fast"-rule. The opening of insolvency proceedings in Member State A does not affect whatsoever the right in rem on a insolvent debtor's assets located in Member State B, although it is fully acknowledged that this treatment given to holders of rights in rem in Article 5(1), leads to "excessive" overprotection26 or is – against the background of the strong rise in Europe of rescue of reorganisation methods and proceedings during the last decade – regarded as a " conceptual failure of the Regulation."27, which lead to a territorial split of the assets between these Member States, which is detrimental to its value28, and to the sheer impossibility for the insolvency office holder in the main insolvency proceedings, opened in Member State A, to administer the estate29 or to implement a European wide rescue plan.30 To find a right

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

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

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

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

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

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

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

balance between the interests of the estate (including all unsecured creditors) and secured creditors abroad seems to be to include measures to prevent the creation of the unjustifiable bonus, only due to the internationality of the case for secured creditors in cross-border insolvencies. It does not do justice to the balance that in national insolvency laws is sought between the interests of the secured creditor on the one hand and the interests of the estate (and the unsecured creditors) on the other. Within the context of the Insolvency Regulation it seems appropriate to discuss as a solution to apply (in Member State B) the *lex rei sitae* (the insolvency law of the Member State in which the secured assets are located), therefore to confine the unlimited powers of a holder of a right in rem. But does such a solution in this (limited) cross-border context provide the right balance? Are secured creditors not overly protected on the whole, in legislations which have excluded or protected financial creditors from any consequences of insolvency? In 2007, Verougstraete (Chairman of the Belgian Court of Cassation) chastised the present state of such legal systems, characterising these as unreasonable and submitting that Europe deserves a new approach of collective insolvency proceedings. Here too securities law and insolvency law should walk hand in hand to find a fair balance.31

215. After awide-ranging survey of the background to what we present as key indicators for a future legal skeleton of insolvent law, it is time to shut down the computer. One fact is undeniable: harmonisation of insolvency law in Europe is on the political agenda.32 What should now be the most preferable approach? We consider it as of use to take a step back. In the introduction it was signalled that "harmonisation" and "insolvency law" for many centuries have been an awkward couple. A first observation for a future agenda is that insolvency lawyers should learn from the legislative process of the "Europeanisation" of contract law.33 This process is still ongoing, but the first resolutions of the European Parliament date from over 20 years back. Would it be feasible and desirable to work with a system of "options" in addition to existing norms within insolvency?34 We feel that learning from successes and mistakes made in comparable processes may be beneficial for the drafting of any future agenda in this field.35

216. Secondly, we feel that what is needed for this first step in this area of harmonisation of law is genuine European legal scholarship, based on historic and comparative study, therefore

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

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

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

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

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

too the establishment of multi-jurisdiction groups of researchers and practitioners.36 The technique to be followed would reflect what earlier in the Report has been described as the Open Method of Coordination (OMC) which in addition to the use of the more traditional hierarchic forms of legislation, allows the use of other instruments (soft law). The OMC method includes certain common goals and the means to learn from one another how these goals should be achieved, which also take into account the development and spreading of best practices in an aim to achieve greater convergence towards the main EU goals. Where "harmonisation" of "insolvency law" in its combination will deal with complex, politically sensitive policy areas which involve a great degree of uncertainty as to which solution will achieve the results desired, the OMC could become the method of choice.37

What the next step will be is to be awaited. Our recommendations seem modest, but in the light of history and the experience of any process of reviewing insolvency legislation they seem sensible to us, meaning by baby steps.38 Any grand achievement begins with a leap of faith and every 10 mile walk with a first step. *Dimidium facti, qui coepit, habet.*39

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

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

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

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