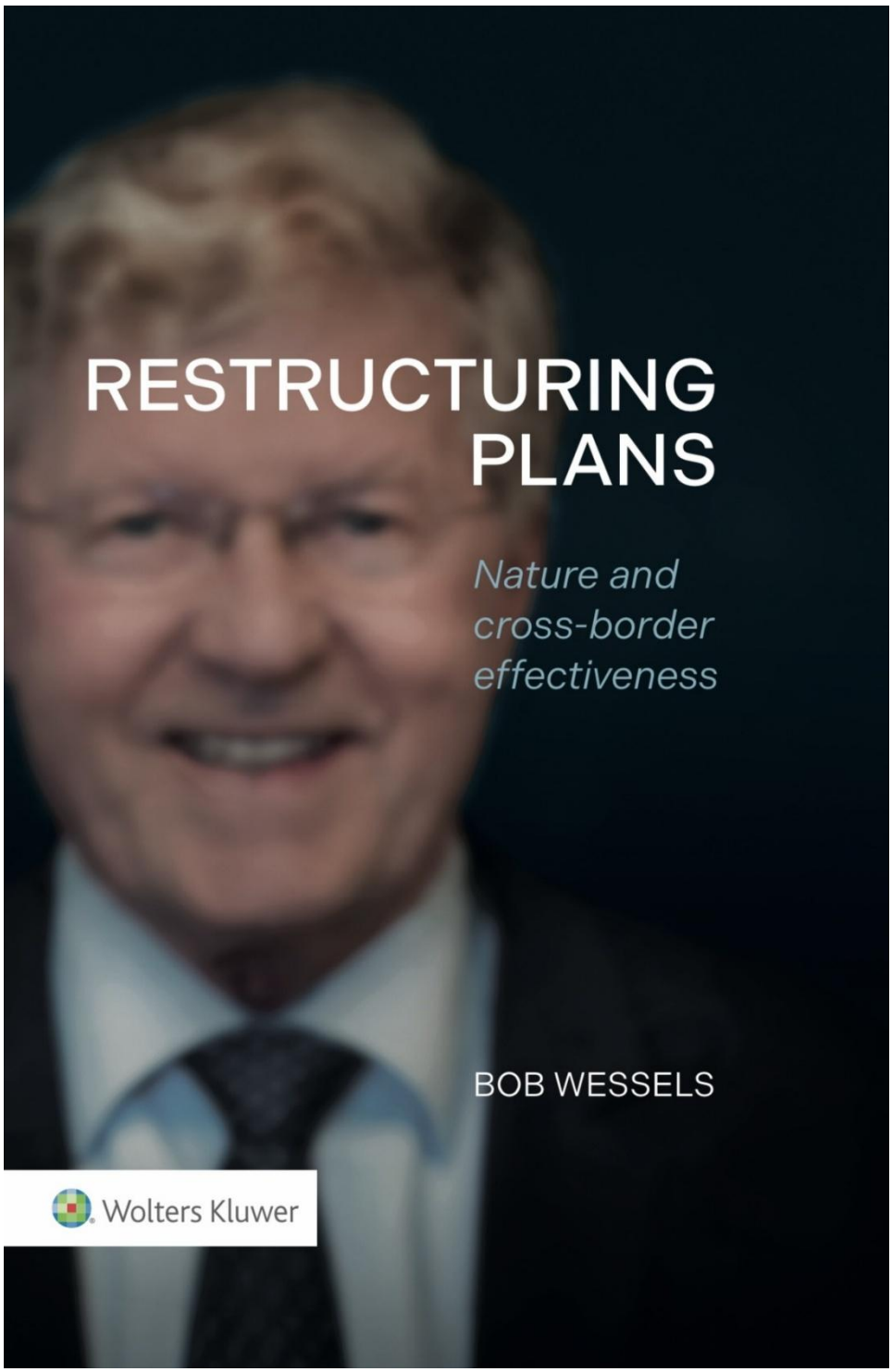
Proposal Restructuring Regulation

Black letter text



Proposal Restructuring Regulation – Black letter text

The text below is a black letter text for a proposal for an EU text for a regulation concerning a preventive restructuring framework and its cross-border effects

The text itself is included in Chapter 9 of the book of Bob Wessels, Restructuring Plans, Their Nature and Their Cross-border Effects (ISBN 978 90 1318 812 7), as published by Wolters Kluwer.

Details about the book are available on the publisher's website: https://shop.wolterskluwer.nl/Restructuring-Plans-sNPRESTPLA, where also some excerpts from the book can be viewed and downloaded.

See also the announcement on the blog of the author, https://bobwessels.nl/blog/2026-09-doc1-restructuring-plans-my-forthcoming-book/.

In the book the reader will be guided through the legal framework available in the EU for shaping policy in the area of (international) insolvency and restructuring law. It is submitted that the existing EU private international law rules (EU Insolvency Regulation; Brussels Ibis; Rome I Regulation) are of little use for (cross-border) restructuring plans. In the book, the black letter text below is explained and in separate chapters a comprehensive investigation is provided leading to a more adequate and effective cross-border system for restructuring plans. This is based on the author's view on the nature of a restructuring plan itself, with its own characteristics.

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Recommendations

CHAPTER 1 GENERAL PROVISIONS

Recommendation 001 (Definition restructuring plan)

Article 1 (Restructuring plan)

(1) A restructuring plan means a contact which entails changing the composition, conditions or structure of a debtor's assets and liabilities or any other part of the debtor's capital structure, such as sales of assets or parts of the business and, where so provided under national law, the sale of the business as a going concern, as well as any necessary operational changes, or a combination of those elements.
(2) Debtors have access to a restructuring plan, involving all or a significant part of its creditors when the requirements of 'likelihood of insolvency' and 'viability of the debtor's business', in the meaning of recommendation 005 and 006, are met.
(3) [align definition in (1) with 'pre-pack' definition in the Harmonisation 'certain aspects of insolvency' directive]
(4) [consider where 'sale of the business as going concern' fits in definition of (1)]
(5) [consider where 'to avoid … the cessation of the debtor's business activities' (see Article 1(1), second paragraph, EIR 2015) fits.

Recommendation 002 (Public and private restructuring plans)

Article 2 (Scope)

This regulation shall apply to contractual obligations of restructuring plans, including plans involving a conflict of laws.

Recommendation 003 (Debtor in possession)

Debtor in possession means a debtor who initiates, drafts and negotiates a restructuring plan, to which it is a party and who, during this process and after confirmation of the plan by the court, has total, or at least partially, control of its assets and affairs on a day-to-day operation of its business, unless this regulation provides otherwise.

Recommendation 004 (Group of companies)

A group of companies means a parent undertaking controlling, either directly or indirectly, one or more subsidiary undertakings.

Recommendation 005 (Likelihood of insolvency)

Additions to Article 2 ('Definition') PRD 2019/1023

Article 2(1)(13 draft)
(13) 'Likelihood of insolvency' means that it is more likely than not that the debtor

will become unable to pay its debts, which is to be accessed with a view to preventing the insolvency as well as ensuring the viability of the debtor in the meaning of Article 4(1) PRD 2019/1023.

Recommendation 006 (Viability of a debtor's business)

Additions to Article 2 ('Definition') PRD 2019/1023

Article 2(1)(14 draft)
(14) 'Viability of a debtor's business' means that the business is not in a state of overindebtedness in that at the relevant point in time, the liabilities of the debtor exceed the value of its assets and the occurrence of the debtor's inability to pay debts is more likely than not.

Recommendation 007 (Overarching provision)

(1) This regulation embodies the overriding objective of enabling debtors and affected creditors to discuss fairly and consult and negotiate with each other efficiently and effectively the goals of a restructuring plan, which aims to prevent insolvency and to ensure the debtor's viable business, whilst furthering the fair treatment of affected creditors' interests during the negotiation process leading to this plan.
(2) Parties are obligated to conduct themselves towards each other in accordance with the requirements of reasonableness and fairness.
(3) Parties shall at all times and towards any third party, other than an advisor to either party of whom they guarantee the same, observe absolute confidentiality regarding the knowledge and insights they have acquired during the negotiations concerning any facet of the business activities and the financial position of the other, unless the provision of such information is necessary to effectuate the restructuring plan, provided for in the plan itself or based on a statutory obligation.

Recommendation 008 (Aspects-request)

1 Before the restructuring plan is submitted for a vote, the debtor, the creditor, or the PIFOR, if appointed, may request the court to rule on aspects relevant to the establishment of a restructuring plan, including:
a. the contents of the restructuring plan;
b. the classification;
c. the admission of a creditor to the vote;
d. the procedure for the vote and the time limit within which the vote may reasonably take place after the agreement has been presented to the voting creditors and shareholders or communicated to them how they may take note thereof;
e. whether, if the debtor is a legal entity, it refuses the board consent without good reason for the submission of the homologation request.
2(1) The court shall handle requests made to it in accordance with paragraph 1 jointly as much as possible and shall decide them at a single hearing as much as possible.
2(2) The court may decide:
(a) to give the applicant a reasonable period of time to provide the missing information.

(b) to deem it necessary to appoint one or more experts in the context of a decision to be taken by it.
2(3) However, the court shall not decide until it has given the party whose interests are directly affected by the decision the opportunity to give a view in a manner to be determined by it and within a period to be determined by it.
3 If the court is requested pursuant to the first paragraph to give a ruling:
a. regarding the admission of a creditor or shareholder to the vote or regarding the amount of the claim of a voting creditor or the nominal amount of the share of a voting shareholder, the court shall determine whether and to what extent this creditor or shareholder is admitted to the vote on the agreement.
b regarding the refusal of the board of the debtor company to grant the consent referred to therein, and if the court finds that the board has no good reason for doing so, the court may, at the request of the restructuring expert, determine that its decision has the same force as the consent of the board.
4 The court shall not decide until it has given the debtor, the PIFOR if appointed, and the creditors whose interests are directly affected by the decision the opportunity to present their views in a manner to be further determined by the court and within a period to be determined by the court.
5 Decisions of the court under this rule are binding only on those creditors and shareholders who have been given the opportunity by the court under rule 008(4) to submit a view.

Recommendation 009 (Preliminary relief)

If the debtor has filed a commencement statement or if a PIFOR has been appointed, the court may, at the request of the debtor or the PIFOR, or ex officio, make such provisions and make such stipulation as it deems necessary to safeguard the interests of the creditors or shareholders.

Recommendation 010 (Courts)

(1) The court seised with any request in relation to a restructuring plan will summarily examine whether at the time of its judgment there is a likelihood of insolvency and that the aims of preventing insolvency and ensuring the viability of the business are feasible.
(2) In the absence of a choice of court, the court in the Member State of the debtor's registered seat will have jurisdiction.

CHAPTER 2 FACILITATING NEGOTIATIONS CONCERNING A RESTRUCTURING PLAN

Recommendation 011 (Commencement statement)

The debtor may record in a separate statement the day that he has commenced preparing a restructuring plan or that he has approached creditors about its preparations.

Recommendation 012 (Practitioner in the field of restructuring)

1 A 'practitioner in the field of restructuring' means any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks: (a) assisting the debtor and the creditors in drafting or negotiating a restructuring plan; (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a judicial or administrative authority; (c) taking partial control over the assets or affairs of the debtor during negotiations.
2 The chosen law shall govern the appointment, conduct, resignation and removal of a PIFOR, the capacity to act as a PIFOR, and the devolution of the office of PIFOR.
3 Its appointment shall be evidenced by a certified copy of the original decision appointing it or by any other certificate issued by the court which has jurisdiction.

Recommendation 011 (Compensation during a stay)

Article 6 ('Stay of individual enforcement actions')

To include a new Article 6(8a) PRD 2019/1023:
(1) Member States shall ensure that debtors can use, consume, sell or dispose assets, owned by third parties, during the normal course of business.
(2) Member States shall ensure that third parties will be adequately protected.

Recommendation 014 (Provisional measures)

Application may be made to the court for such provisional, including protective, measures as may be available under the law chosen in the restructuring plan, even if the courts of another Member State have jurisdiction as to the substance of the matter.

CHAPTER 3 CHOICE OF LAW AND CHOICE OF COURT

Recommendation 015 (Choice of law)

1 Safe as otherwise provided in this Regulation, a restructuring plan shall be governed by the law chosen by the parties.
2 Any law specified in the restructuring plan shall be applied whether or not it is the law of a Member State.
3 The application of the law specified in the restructuring plan means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise provided in the restructuring plan.
4 The choice of law shall be made expressly and in writing, clearly demonstrated by the terms of the restructuring plan.
5 Contractual obligations in the restructuring plan or flowing from the legal relationship between parties include those obligations, that a court has confirmed upon the creditor and become binding upon dissenting voting classes, where the restructuring itself complies with the conditions as set in Article 11(1) PRD 2019/1023.
6 A restructuring plan to be binding shall be evidenced by a certified copy by the court which has jurisdiction.

Recommendation 016 (Disagreement on choice of law)

Disagreement as to the choice of law should be determined by a majority decision. The majority required for the adoption of the choice of law is 75 % of the number of claims or interests in each class or, where applicable, of the number of affected parties in each class.

Recommendation 017 (Replacing previous contracts)

1 The restructuring plan and its choice of law replaces, in respect of the matters referred to therein, all rights and obligations that have their origin in the contract concluded between the debtor and the individual affected parties, including any previously made choice of law, choice of court or rules on applicable law that would apply without a choice of law, unless this Regulation provides otherwise.
2 The change in the law to be applied shall not prejudice the rights of third parties and does not affect the formal validity of their contract.

Recommendation 018 (Choice of different laws)

The choice of law can be made regarding the entire restructuring plan, but also with regard to parts thereof.

Recommendation 019 (Choice of law and Union law)

The parties' choice of applicable law other than that of an EU Member State shall not prejudice the application of provisions of EU law, where appropriate as implemented in the Member State of the chosen forum, which cannot be derogated from by agreement.

Recommendation 020 (Absence of choice of law)
(1) To the extent that the law applicable to the restructuring plan has not been chosen in accordance with recommendation 015, the law governing the restructuring plan shall be determined according to the provisions of Union law.
(2) Union law will be the law, in relation to particular matters, which lays down conflict of laws rules relating to public collective proceedings, civil or commercial matters or contractual obligations, or the law of a Member State, which is applicable in the given situation.

Recommendation 021 (Adjustments to choice of law)
(1)(1) A contract conferring the right to make use of immoveable property shall be governed solely by the law of the Member State where the property is situated.
(1)(2) The court governing the restructuring plan shall have jurisdiction to approve the termination or modification of the contracts referred to in this article where the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court governing the restructuring plan.

(2) Payment systems and financial markets
To discuss.

(3)(1) Individual employment contracts shall be governed by the law chosen by the parties. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable.
(3)(2) To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the Member State in which or, failing that, from which the employee habitually carries out his work in performance of the contract.

(4) The effects of a restructuring plan on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

(5) The law chosen by the parties shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any means of challenging that act in the relevant case.

(6) Where, by an act concluded after the day that the debtor has commenced preparing a restructuring plan or has approached creditors about it the debtor disposes, for consideration, of: (a) an immoveable asset; (b) a ship or an aircraft subject to registration in a public register; or (c) securities the existence of which requires registration in a register laid down by law; the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

(7) The effects of a restructuring plan on a pending lawsuit or pending arbitral proceedings concerning assets that are totally or partially under the debtor's control and used in the day-to-day operation of their business shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

Recommendation 022 (Choice of court)

Parties can agree about the international jurisdiction of a court through a choice of court agreement.

Recommendation 023 (Exclusive jurisdiction)

The court or courts of a Member State on which a restructuring plan has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a debtor or an affected creditor, if relations between those parties or their rights or obligations contained in the restructuring plan are involved.

Recommendation 024 (Disagreement on choice of court)

Disagreement as to the choice of court should be determined by a majority decision. The majority required for the adoption of the choice of court is 75% of the number of claims or interests in each class or, where applicable, of the number of affected parties in each class.

Recommendation 025 (Avoiding conflicting judgments)

1 Where the court designated in the restructuring plan has established jurisdiction in accordance with the restructuring plan, any court of another Member State shall decline jurisdiction in favour of that court.
2 Rule 1 also applies if an affected creditor or the debtor tacitly consents to the jurisdiction of the courts of another Member State.
3 A non-designated court seised of a request to open insolvency proceedings against the debtor shall immediately give notice to the debtor and give it an opportunity to be heard on the request.
4 Where the court designated in the restructuring plan has granted a temporary stay of individual enforcement proceedings in order to allow for negotiations between the debtor and its creditors, any court of another Member State, at the request of the debtor, may stay the opening of insolvency proceedings for a period not exceeding six months, provided that suitable measures are in place to protect the interests of creditors that are not involved in the adoption of a restructuring plan.
5 Any court of another Member State may, at the request of an affected creditor, allow individual enforcement actions, in well-defined circumstances, where such a course of action is duly justified and where: (a) enforcement is not likely to jeopardise the restructuring of the business; or (b) the stay would unfairly prejudice the affected creditor.

CHAPTER 4 INFORMATION

Recommendation 026 (Information)

Article 8 PRD 2019/1023 (Content of restructuring plans; information)

Article 8(0 draft)
1 Save as otherwise provided under 7 or 8 (below), the debtor's duty is to fully disclose all relevant business information to all affected creditors, to enable them to act or to make an informed decision on whether a restructuring plan is feasible.
2 Relevant business information includes information regarding business structure, organization of management, debtor's books, documents, other data carriers, records, (electronic) data, financial and operational forecast, planning, operations or evaluation of activities.
3 Relevant business information also includes memoranda of understanding and letters of intent, or agreements existing between creditors in relation to the debtor or existing contracts between the debtor and any other affected party allowing to restructure or optimize its debt obligations (maturities, ranking, collateral, subordination, providing (parts of) interim or new financing) dated sixty days or less before a threshold of commencement of formal insolvency has been reached.

4 Relevant business information includes 'irregularities' concerning the debtor or any other affected party, known to the debtor or the affected party reasonably know to them.
5 Disclosure will take place as freely and rapidly as is reasonably practicable.
6 The debtor should be able to keep certain information confidential.
7 The court may order on the request of the debtor or ex officio that the debtor may keep certain information confidential.
8 The court may order on the request of the debtor or a creditor that either the creditor or the debtor provides more information (as a supplement to or a specification of already available information).

Recommendation 027 (Information with regard to choice of law and choice of court)

Article 8 ('Content of restructuring plans') PRD 2019/1023.

Article 8(g)(vii draft?) add:
'the proposed choice of law and choice of court'.

Recommendation 028 (Information with regard to valuation)

Article 8 ('Content of restructuring plans') PRD 2019/1023.
Add a paragraph to Article 8(h):

A statement of reasons includes the expected value that can be realized if the restructuring plan is confirmed.

Recommendation 029 (Third part releases)

The text of the following recommendation has been published and delivered by Michael Veder and Adrian Thery.[1] It goes as follows:
'If the restructuring plan provides for an amendment or release of rights of creditors against securities, co-debtors and guarantors of the debtor, the court may confirm the plan if the following conditions are met:
(i) the guarantee to be amended or released is an upstream guarantee provided within a group of companies;
(ii) the release is crucial to facilitate the restructuring;
(iii) there is an identity of interests between the debtor and a third party (typically an intra-group indemnity relationship or upstream guarantee) and allowing continued claims against the third party will have significant impact on the debtor's estate;
(iv) the third party contributes substantial value (monetary or otherwise) to the restructuring; and
(v) the required majority majority of creditors affected by the release (as if it were a separate class) has adopted the restructuring plan'.

Veder and Thery suggest in addition a paragraph to (presently) Article 15 PRD 2019/1023 ('Effects of restructuring plans') with the wording:

[1] See Veder & Thery 2017, p. 259 et seq.

'Unless the restructuring plan provides otherwise, the restructuring plan does not affect rights which creditors can exercise towards sureties, co-debtors and guarantors of the debtor.'

CHAPTER 5 ADOPTION, VOTING AND CONFIRMATION

Recommendation 030 (Minimum requirements for notifications)

Article 10(2)(c) ('Notifications of the restructuring plan') PRD 2019/1023.
Member States shall ensure that the requirement of Article 10(2)(c) ('notification of the restructuring plan has been given in accordance with national law to all affected parties') at least provides:
(i) that the notification clearly indicates, in good time before a specific date for the vote (and the deadline to be observed for voting) on which specific date and hour the plan will be voted upon.
(ii) the announcement of a rule in principle: no extension of the voting term granted.
(iii) the announcement of the possibility of electronic/digital voting.

Recommendation 031 (Right to vote, clear date)

Art 9(2) jo Art 8(1)(i draft) PRD 2019/1023.
The plan should include a specific reference date for casting a vote.

Recommendation 032 (Right to vote, no extension)

Art 9(2) jo Art 8(1)(ii draft) PRD 2019/1023.
1 In principle the rule should be: no extension of the announced date for casting a vote.
2 In exceptional circumstances an extension of 24 hours could be granted by the court.

Recommendation 033 (Feasibility test)

Article 10 ('Confirmation of restructuring plans') PRD 2019/1023.
The test of Article 10(3) (sometimes called 'feasibility test'), allows judicial or administrative authorities to refuse confirmation where the restructuring plan would not have **'… a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business'.**

Recommendation 034 (Public creditors)

Recital 52, last line, of the PRD 2019/1023 explains that as a consequence of the best-interest-of-creditors test, where 'public institutional creditors' have a privileged status under national law, Member States could provide that the plan cannot impose a full or partial cancellation of the claims of those creditors.' The text should be included in the PRD 2019/1023.

Recommendation 35 (Automatic recognition)

A judgment from a Member State based on this Restructuring Regulation in relation to the restructuring plan is automatically recognized in other Member States without any special legal or administrative procedure being required.

Recommendation 036 (Grounds for refusal)

The application of a provision of the law chosen by the parties may be refused only if such application is manifestly incompatible with the public policy of the forum.

CHAPTER 6 DUTIES OF DIRECTORS AND AFFECTED CREDITORS

Recommendation 037 (Duties of directors)

Where there is a likelihood of insolvency, directors have due regard, as a minimum, to the following:
(a) the interests of creditors, equity holders and other stakeholders;
(b) the need to take steps to avoid insolvency; and
(c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

Recommendation 038 (Duties of affected creditors)

Affected creditors:
(a) should have due regard to the interests of the debtor;
(b) should refrain from conduct and actions that hinder or prevent compliance with the director's duty in the meaning of [recommendation 037(b) ('the need to take steps to avoid insolvency');
(c) should avoid actions that are counterproductive to the director's duty in the meaning of [recommendation 037(c) ('the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business').

CHAPTER 7 LEGAL CONSEQUENCES OF THE CONFIRMATION OF A RESTRUCTURING PLAN.

Recommendation 039 (Binding force)

If a restructuring plan is adopted and confirmed, the plan should be final and binding upon an affected creditor who received adequate individual notice and over whom the court would have jurisdiction in ordinary commercial matters under the local law.

Recommendation 040 (Entitlement to enforcement)

The judgment for confirmation constitutes an enforceable title for the benefit of the voting creditors with claims against the debtor that are not disputed by the debtor.

Recommendation 041 (Consequences of a failure to comply with the restructuring plan)

1 The content of the restructuring plan or the chosen law determines whether the debtor is in default in the event of a failure to perform the obligations arising from the restructuring plan, as well as whether, in that case, he is obliged to compensate the damage suffered by the affected creditors as a result.
2 At the request of the debtor, an affected creditor or ex officio, the court may grant the debtor a deferral of at most one month to still fulfil its obligations arising from the restructuring plan.
3 A legal claim for performance of an obligation arising from the restructuring plan lapses after six months from the start of the day following that on which the creditor became aware of the existence of his claim (the default) and in any event one year after the claim arose.
4 Similar rule for legal claim for damages.
5 To include rules for interruption.

CHAPTER 8 EU and non-EU Member States

Recommendation 042 (States)

1 The EU should develop a regulation, binding all EU Member States, concerning inbound judgements from non-EU Member States offering predictability and certainty regarding a system of recognition, applicable law, coordination, and enforcement within the EU.
2 The scope of this regulation should cover proceedings having their basis in insolvency law as well as processes known as preventive restructuring frameworks, schemes of arrangement, restructuring plans and similar rescue tools.
3 For trade agreements, such as concluded between the EU and non-EU trading bloc (as to be specified by the EU) the EU should develop bespoke legal mechanisms which include mutual recognition and enforcement, (international) jurisdiction and validity and enforcement on bankruptcy, winding-up, judgements in civil and commercial matters, and where appropriate mediation arrangements, dispute resolution, arbitral awards and mutual assistance in these matters between courts.

Recommendation 043 (Courts)

1 In every Member State only one court should have exclusive jurisdiction concerning inbound judgments from non-EU Member States in the meaning of recommendation 042(1).
2 The EU and the Member States must ensure that courts selected according to rule 1, have the legal powers and obligations for cross-border judicial coordination of cross-border cases, both in 'insolvency proceedings' as well as in 'restructuring processes', including judicial coordination with non-EU courts.
3 In proceedings which run parallel in the court in a Member State (in the meaning of rule 2) and non-EU courts in relation to 'insolvency proceedings' as well as in 'restructuring processes' between the same parties on the same subject matter, the EU and Member

States, should encourage the development of a set of guidelines to facilitate the coordination of such cases.

Recommendation 044 (Parties)

1 In parallel proceedings in the meaning of recommendation 042(3) involving courts in EU-Member Sates and non-EU courts in relation to 'insolvency proceedings' as well as in 'restructuring processes' between the same parties on the same subject matter, the debtor and its counterparties should consider establishing protocols, to facilitate communication and coordination between these parallel proceedings.
2 Protocols should take into account best practices as established by model provisions recommended in studies from scholars and practitioners.

CHAPTER 9 FINAL PROVISIONS

Recommendation 045 (Relationship with other act and international instruments)

(1) This Regulation shall supersede, in respect of the matters referred to therein, regulations governing international jurisdiction, law applicable and recognition and enforcement of judgements contained in instruments of Union law laid down in conflict-of-law rules to contractual obligations, civil and commercial proceedings or insolvency proceedings.
(2) This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict of laws rules relating to contractual obligations, civil and commercial proceedings or insolvency proceedings.
(3) However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.