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Report of the ERA Conference in Trier

On 19 and 20 March 2015, the Academy of European Law in Trier, Germany (Europäische Rechtsakademie ERA) held in cooperation with INSOL Europe an international conference on "cross-border insolvency proceedings – after the revision of the EU Insolvency Regulation." The conference was organized by Dr *Angelika Fuchs* and her team. The nine speakers shared their academic and practical expertise through highly interesting presentations on international insolvency law. The audience was made up of more than 70 lawyers, who came from various professional backgrounds and from many Member States of the European Union. Since there is no plan to collect and publish the speakers' contributions, this report will summarize their arguments in a brief yet informative manner.

At the time of the conference, the revision of the EU Insolvency Regulation (referred to as EIR)[1] was in its last legislative stages; "the Recast" herein refers to the latest available text version of the amended Regulation, dated 26 February 2015 (the position of the Council at first reading).[2] It was adopted without any further changes on 20 May 2015. The Recast will come into force in two years time, ie in summer 2017.

After the welcoming address by *Fuchs*, the first session was opened by the moderator *Robert van Galen*, President of INSOL Europe and Partner at the Dutch law firm NautaDutilh. Professor *Gerald Mäsch*, University of Münster, Germany, began his presentation by concentrating on the scope of the EIR while simultaneously considering the definition of "insolvency" and the content of the Annex A to the EIR. Regarding the territorial scope of application of the Recast, there will be no changes: the centre of main interest (COMI) of the debtor has to be in a Member State (however, Denmark is still not going to participate). Further, the case has to be cross-border but, as clarified by the ECJ in *Schmid*,[3] there is no general need to meet a "qualified internal market condition" which means is does not have to be two Member States. The material scope is, still, dependant on the exhaustive enumeration in Annex A

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1 Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/1 of 30 June 2000.

2 Position of the Council at first reading with a view tot he adoption of a Regulation of the European Parliament and of the Council on insolvency proceedings (recast), 16 636/14 of 26 February 2015 (formally adpoted by the Council on 12 March 2015). Interinstitutional file 2012/0360 (COD).

3 ECJ, C-328/12.

of the EIR, and the proceedings in question need to be collective but must not be confidential or with respect to financial institutions. Annex proceedings will not be excluded from the scope (art 32(1) and recital 6 Recast), though the legislator considered this earlier. It is a novelty, however, that pre-insolvency proceedings will be included (even if there is only the mere likelihood of insolvency, cf recital 10 Recast). Also, debtor-in-possession proceedings prior to ordinary insolvency proceedings will form part of the Recast's scope. Further changes can be seen in recitals 11 and 15 of the Recast. *Mäsch* concluded his presentation by looking at an example that concerned the limits of the material scope with regard to the British "Scheme of Arrangement" procedure.

In the discussion that followed, the criteria for an international setting were addressed, ie possible cross-border elements and connecting factors. Furthermore, Annex A and recital 9 Recast were discussed with regard to the exhaustive nature of enumeration, with the recitals 10 ff being considered as possible extensions.

Professor *Stefania Bariatti*, University of Milan and Of Counsel at Chiomenti Studio Legale, Italy, continued the session by presenting recent case law on jurisdiction under the EIR and by analysing the new definition of COMI. In *Nickel*,[4] the ECJ dealt with the relation between the Brussels Ia Regulation[5] and the EIR with respect to general commercial versus insolvency based disputes (cf recital 16 Recast). The court answered the applicability of Brussels Ia for payment of the service provider in the affirmative. Similarly, in *ÖFAB*[6] and *OTP Bank*,[7] it was decided that the liability claims in question are excluded from the exception in art 1(2)(b) Brussels Ia, which means these cases are not closely linked with insolvency proceedings but are covered by the Brussels Ia regime instead. Conversely, transactions can be set aside and reimbursement of payments can be claimed after opening of insolvency proceedings according to art 3(1) EIR, as held by the ECJ in *Schmid*[8] and *H (acting as liquidator of G. T.)*.[9] The court ruled in *Burgo Group*[10] on the relation between main proceedings at COMI and secondary proceedings in other Member States (eg place of registered office). Current preliminary ruling procedures concern this relation as well (*Nortel*[11]), while the other on-going cases of *Lutz*[12] and *Nike*[13] deal with art 13 EIR. *Bariatti* considered, then, the changes to the definition of COMI introduced in the Recast in order to prevent forum shopping (cf art 3 and recitals 24, 28–30 Recast, also introducing a limitation in time). Finally, she dealt with the new examination *ex officio* of the court's international jurisdiction (art 4 and recital

4 ECJ, C-157/13.
5 Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (recast), OJ L 351/1 of 20 December 2012.
6 ECJ, C-147/12.
7 ECJ, C-519/12.
8 ECJ, C-328/12.
9 ECJ, C-295/13.
10 ECJ, C-327/13.
11 ECJ, C-649/13.
12 ECJ, C-557/13.
13 ECJ, C-310/14.

27 Recast) and the possibility to request judicial review (art 5 and recital 34 Recast).

It followed an in-depth discussion that centred on the relation of the EIR to both the Brussels Ia Regulation and the Lugano Convention, especially with regard to the *Schmid* case. Recital 6 Recast was also considered. Part of the discussion, additionally, concerned the relation between the ECJ decisions in *OTP Bank* and in *H (acting as liquidator of G. T.)* since these cases are based on different laws.

For the next session *Bariatti* took over as moderator and the audience were presented with an insightful discussion of the concluded amendments of the Recast: *Pál Szirányi*, Legal Officer at the European Commission/DG Justice, Brussels, spoke first about the conclusions of the revision of the EIR and asked whether one can call this a cause for success. He explained that the political aim of the Commission is to support the rescuing of businesses and to give honest entrepreneurs a second chance ("justice of growth"). The Recast should improve the existing conflict-of-laws framework, which is not easy since the Member States' insolvency laws differ noticeably. Amendments to the Recast's scope, as already discussed by the previous speakers, are intended to increase legal certainty. The lessons learned from the ECJ rulings in *Eurofood*[14] and *Interedil*[15] led to the clarification of the COMI concept in the Recast, as mentioned above. Secondary proceedings will not only allow liquidation but, in future, reorganisation, too. Additionally, "synthetic" secondary proceedings will be allowed if the main insolvency practitioner promises the creditors at the place of potential secondary proceedings preferred treatment but treatment under the law of the main proceedings (the Recast calls this a "undertaking"). Finally, regarding group insolvencies, the Recast has a set of special provisions ready (art 61–70) requesting cooperation, coordination and communication among and between insolvency practitioners and courts. Hence, his initial question can be positively answered; the Recast could be called a big step forward thanks to good cooperation among the Member States.

In the following discussion, the audience was especially interested in what the relation is between the recitals and the operative part of the Regulation; although recitals should just assist interpretation, they practically form the outcome of political compromises in the European legislative procedure. Additionally, the issue of changes in national insolvency laws and its impact on the Annex A EIR (Recast) was debated. The discussion continued with questions regarding secondary proceedings (cf case in *Burgo Group*, and art 38 Recast), and regarding definition of insolvency (cf recital 17 Recast).

Secondly, *Szirányi* continued with a short presentation on the state-of-play of the interconnection of insolvency registers across the Member States. The Recast deals with this in art 24–27. The national registers of (so far six[16]) participating Member States are collectively available and searchable online on one website

14 ECJ, C-341/04.
15 ECJ, C-396/09; followed by the decision of the Bundesgerichtshof (German Federal Court of Justice) of 1 December 2011 – IX ZB 232/10.
16 They are (as of March 2015): Austria, Czech Republic, Estonia, Germany, Netherlands and Slovenia.

"IRI" (accessible via e-justice.europa.eu), which has been active since July 2014.[17] The search function was demonstrated live and it proved to be very useful. It is, however, important to note that there is no unified European register; the data for the solely interconnected search website is provided by the Member States' registers and is their responsibility.

The next session was chaired by *Jean-Luc Vallens*, judge at the Cour d'appel de Colmar and Associate Professor at University of Strasbourg, France. Professor *Christoph Paulus*, Humboldt University of Berlin, presented the coordination of proceedings namely the relationship between main and secondary proceedings. In an ideal world, according to the principle of universality, there would be one single proceeding. However, in the real world, territoriality is governing cross-border insolvency, and this creates the risk that assets and values become irrecoverable. The EIR (and Recast) follow a modified universality with sub-proceedings and separate insolvency practitioners. This raises a question as to the hierarchy among the different proceedings and practitioners, and also if and how there can be a duty of communication and cooperation. From the debtor's and the creditors' perspective, this would seem like an imperfect law because there is no sanction for non-compliance with these duties by the practitioners (save laws governing their profession). *Paulus* went on to examine the incorporation of ECJ judgments by the amendments in the Recast. For instance, art 34 will, implementing *Bank Handlowy*,[18] read as "shall not be re-examined" instead of "may open". The above mentioned "undertaking" incorporates the English High Court's decision in *Collins & Aikman*[19] into art 36 ff Recast. Further, information duties for insolvency practitioners of secondary proceedings towards the main practitioner will be included in art 38(1) Recast, which is in reaction to the decision in *Nortel*.[20] To summarize, *Paulus* noted that the Recast clearly assigns secondary proceedings an ancillary function. It especially allows the main practitioner to get support out of secondary proceedings.

In the discussion afterwards, circumvention of rules applicable to main proceedings by opening up secondary proceedings was addressed. However, the concept of secondary proceedings comes with both advantages as well as disadvantages. Furthermore, the discussion touched upon the position of local creditors (cf art 37 ff Recast).

The next presentation was delivered by Dr *Bernard Santen*, Senior Researcher at Leiden Law School, The Netherlands, on the subject of the "three Cs": communication, coordination and cooperation. He focused on cross-border communication between courts and best practices for insolvency practitioners. The importance of communication etc is strongly increased in the Recast, both in the recitals and in the operative part (explicitly in art 41 ff). Moreover, it turns out there is an "omni-party duty", and also European and international organisations' guidelines become more binding. *Santen* continued with a presentation of

17 The complete URL to the website is https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do
18 ECJ, C-116/11.
19 [2006] EWHC 1343 (Ch).
20 [2009] EWHC 206 (Ch); for ECJ decision see supra.

a research project on soft law guidelines he conducted in a team with colleagues at Leiden. The outcome of the project are principles which are more conduct orientated and describe more precisely topics addressed by the EIR. Furthermore, he explained principles drawn up to govern the EU cross-border insolvency court to court cooperation (project website: www.eujudgeco.eu). Summing up, there would be a notable change from formal and ordinary insolvency proceedings towards active and efficiency orientated proceedings.

The subsequent discussion addressed the issue of the general change from traditional binding insolvency laws to cooperation-orientated solutions. From his experience in hosting workshops, *Santen* pointed out that judges would be mostly sceptical about this change for solely psychological reasons. An audience member contributed by explaining that personal liability for insolvency practitioners might arise out of laws regulating their profession, which would require the practitioners obeying the duties to communicate and cooperate.

Enterprise groups in insolvency was the subject of the following presentation, given by *van Galen* (introduced above). Groups would be, however not very distinctively, defined by unified control, common shareholdership and a parent undertaking, and create both synergy effects and conflicts of interests among the group entities. Conventional insolvency proceedings, on the other hand, are designed for single legal entities only. Therefore, one has to find a balanced solution for group insolvencies between the extremes of sole voluntary coordination and substantive consolidation proceedings. *Van Galen* examined five possible regimes which are set between these extremes: an insolvency practitioner with power to coordinate, a mutual insolvency practitioner, or joint administration. For group insolvency, restructuring scenarios would not be limited to the two options of asset sale or restructuring plan but would allow a coordinated sale or plan, a unified sale, or a consolidated plan, which *van Galen* presented in more depth. The Recast deals with groups as one of its new features. A group is defined in art 2(13) and (14). Art 56 Recast sets rules for coordination between insolvency practitioners, and art 57 deals with coordination between courts; practitioners and courts are obliged to cooperate, too. Moreover, art 61 ff govern group coordination proceedings. Overall, the Recast would introduce useful features but their advantages in practice can still be doubted; European law should support the group rescue plan or, respectively, an insolvency practitioner with power to coordinate.

Audience members touched upon various issues in the following discussion, leading up to the question as to whether there would not be a need for substantive consolidation regarding the law applicable to group insolvencies.

The session was completed with a round-table discussion between *Santen, van Galen* and *Mäsch,* and chaired by *Vallens.* They addressed the question as how best to coordinate insolvency in enterprise groups. Firstly, issues regarding communication were considered by the panel, especially problems relating to language. Although the insolvency practitioners in the Member States of the proceedings of the group's companies pursue (mostly) an identical aim, nonetheless cooperation is rather a question of trust. Problems regarding cooperation could, further, arise out of differing requirements in domestic laws; however, these could potentially be inconsistent with the superior European law and because of its *effet utile* be withheld from application. Moreover, general

differences in national laws could obstruct effective cooperation. Also, cooperation of creditors is necessary in order to handle insolvency more effectively. Lastly, the panel discussed whether it would be recommendable to further amend the Recast by including provisions focusing on special issues of group insolvency.

The last session of the conference, with *Paulus* as the moderator, began with a presentation by Dr *Rimvyds Norkus,* President of the Supreme Court of Lithuania. His topic was annex proceedings and the continued interplay with the Brussels Ia Regulation. Annex proceedings are cases "closely linked" to insolvency cases and, hence, exist at the borderline between the EIR (Recast) and Brussels Ia. A case will be governed by the EIR if it is sufficiently related to insolvency, and steps consequently out of general civil and commercial matters that are governd by Brussels Ia (cf exclusion of insolvency matters in art 1(2)(b) Brussels Ia Regulation). It is important to determine the applicable Regulation since the rules differ in various respects, for instance regarding the grounds for non-recognition and non-enforcement. Next, *Norkus* presented ECJ case law on the question of which proceedings can be qualified as annex proceedings (cases held to be "deriving directly" from insolvency) and which are thus governed by the EIR: *Gourdain,*[21] *Deko Marty,*[22] *SCT Industri,*[23] *German Graphics,*[24] *and Nickel.*[25] He deduced "insolvency-specific" to be the decisive criteria for delineation. However, it is not yet clear whether jurisdiction over annex proceedings would be exclusive (cf art 18 and 25 EIR and the opinion of GA Colomer in *Deko Marty* and the ECJ ibid and in *F-Tex*[26]). In *Schmid,*[27] the problem of annex proceedings against defendants from Non-Member States is addressed, with the outcome that art 3(1) EIR is applicable. Summing up, annex proceedings would still lack a clear definition and a clear delineation between scopes of application of EIR (Recast) and Brussels Ia would still be missing.

In the discussion afterwards, the relation between Brussels Ia and EIR was addressed again, with regard to provisional measures in cross-border cases. Then, the importance for a sharp distinction between the two Regulations was stressed and examined. The relation of both Regulations to cases where the defendant resides in a Non-Member State was also discussed. Lastly, it was noted that the scope of application of the two Regulations differs, which would lead to different outcomes when applied to borderline cases.

Tom Smith QC, Barrister at South Square chamber London, United Kingdom, continued with his presentation on "applicable law and carve-outs: insolvency, cross-border security and rights *in rem.*" It is essential that a bank or other lender can enforce its security in one jurisdiction where the borrower is in insolvency proceedings in another jurisdiction; cross-border business requires this legal certainty. For this reason, there is a carve-out for security rights in art 8 from the

21 ECJ, C-133/78.
22 ECJ, C-339/07.
23 ECJ, C-111/08.
24 ECJ, C-292/08.
25 ECJ, C-157/13.
26 ECJ, C-213/10.
27 ECJ, C-328/12.

otherwise generally applicable *lex forum concursus* in art 7 Recast. Mostly, the *lex situs* will apply to security rights, which the EIR (Recast) actually refers to as "rights *in rem*." Such rights are, however, not clearly defined. The Recast contains an extended list of definitions (or tests) where assets are seen to be located, art 2(9), but without resolving all questions. It is still not perfectly clear how the expression "shall not affect" is meant to be read. Moreover, it is crucial but yet certain whether art 8 Recast protects the underlying secured debt. *Smith* presented three example cases illustrating his prior explanations and thoughts. By this, inter alia, it became apparent that the issue of characterization of a security right (according to the *lex situs*) is important; secondary proceedings may affect security rights, though.

In the following discussion, the meaning of treatment according to *lex situs* generally and for the insolvency proceedings was debated. The discussion turned again to the very important practical issue, namely, what the relation between security right and underlying debt would be in the light of art 8, which would seem quite artificial if it would not relate to the protection of the underlying debt, too. It was, tangentially, commented that close-out netting was intentionally deleted from the Recast draft.

The final presentation was given by again *Szirányi*, this time looking beyond the EIR to the Recommendations by the Commission of 12 March 2014, an official though not legislative act, and their impact.[28] The Recommendations aim to encourage the Member States to strengthen the "rescue culture" in their national insolvency laws in a two-folded way. Firstly prevention, that means to have aid mechanisms ready for ailing companies in order to allow them to restructure their business. Secondly giving honest entrepreneurs who once failed with their business a second chance. The discussion with the audience revolved around the details of the Recommendations.

The recent speakers – *Bariatti, Norkus, Smith* and *Szirányi* – gathered for the second round-table discussion, chaired by *Paulus*, and looked ahead to the future of European insolvency law. The more and more advancing policy of rescuing than punishing in insolvency law was the first issue debated. However, there would often be only low success rates in rescuing businesses. The panel discussed whether there would be an option to extend insolvency laws to wider "restructuring" purposes. Besides that, the practical implications of cross-border insolvencies were discussed, especially with regard to communication and coordination on an international level. Finally, it was suggested that it could be useful to concentrate issues at certain courts in the Member States although there would expectably be resistance from the local insolvency practitioners.

The conference ended with concluding remarks by *Paulus*. He pointed out open issues which remain for further discussion. Inter alia, special rules for SMEs should be considered since the principle of "one size fits it all" cannot be right for the purposes of insolvency law. Moreover, it is questionable whether unity of insolvency law is still the best way or whether there is a need for more specialization. Also, in today's business world, the typical business relationship is not only

28 COM(2014)1500 final.

between two entities (debtor–creditor); but rather there are multi-relation situations that require coordination and increase the risk of changes to the persons in charge of decisions.

Fuchs expressed her thanks to both all speakers and the audience, and earned plaudits for the indeed very well organized conference, which even included the seldom opportunity to observe a sun eclipse during one of the coffee breaks.