Bob Wessels

Restructuring Plans

Their Nature and Their Cross-Border Effectiveness

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PREFACE

Business is an integral part of the global economy. And the global economy has its impact on business. It can have an immediate impact on the survival of a company, especially its financial health. Businesses worldwide are confronting a confluence of challenging economic conditions. Continuous changes in international dynamics in trade and investing, technological challenges, ongoing geopolitical events, all can threaten their bottom line. In April 2025, the unpredictable and erratic policies of EU's largest trading partner surprised many countries, and consequently companies established there, with massive tariff increases. Its announcement and (precariously) implementation by the United States (and the random similar announcements since then) are a striking example. They provoked a lot of reactions and were, many times immediately, followed by similar announcements of import tariffs by other countries all over the world. Some of them affected specific industries (motorcycles, cars, alcoholic beverages, fish, etc.).

Another sudden external cause, impacting the smooth continuation of business deeply affecting many companies (and lasted for two years) was COVID-19 ('corona') in 2020. And recently, since early 2026 the US – Iran war, including the closure of the Strait of Hormuz, which has led to a months-long supply disruption in the history of the global oil market.

These recent developments are a testament of economic reality. In just a few days, the prospects for a successful, profitable business can change dramatically. The same may be true after extreme price increases in contracts, energy shortages, sudden non-delivery of assets due to interruption of a regional or global supply chain, and where this is of influence for a company's assets, water pollution and bird flu. A longer lasting cause that provided similar challenges for many businesses was the global financial crisis (mid 2007 – ca. 2011).

The effects on businesses are direct or indirect, both for large enterprises and for medium-sized and small enterprises to micro businesses. Doing business for many companies is an integral part of taking part in the global society, including its intrinsic developments. Market economies are influenced by measures taken by states and by external circumstances, such as ongoing changes in technology, AI-developments or the introduction of digital money (stablecoins). In the market itself, pressures and challenges occur directly by entrepreneurs competing with other entrepreneurs, mostly within the same industry. Some enterprises just do business from day to day, quietly simmering, being not innovative enough, e.g. in product development or in sales methods, such as the question to market and sell or not via internet. In the end, less competitive businesses fall into (financial) distress and may fail (and leave the market, voluntarily or via insolvency liquidation). They also may, often under new company leadership, find ways to restructure and restart. What happens if an important sales market supplier resource or a technology delivery services company suddenly face strong economic headwinds temporarily or for a longer period of time? Are companies, dependent on their activities, prepared for

this? There are companies that have their strategy and risk management well aligned with these tensions. However, many entrepreneurs will still be confronted with consequences for their financial variability and the question which legal rules can then be invoked to rescue the company and its business. Especially 'rescue' forms the core content of this book, with its focus on the European Union (EU).

Business risks are an unavoidable part of entrepreneurship. Corporate failure is an inevitable business reality, another step in a company's life cycle, often rather than a failure of management, a sin committed by those controlling the company. This approach was advocated over forty years ago, in the Cork Report, Insolvency Law and Practice – Report of the Review Committee (Chairman, Sir Kenneth Cork) (June 1982, Cmnd. 8558), London, HMSO ISBN 0 10 185580. The Cork Report formed the basis for the reform of insolvency law in the UK, centred on the Insolvency Act 1986. This approach has been broadened, driven by the modern market economy as well as changing perspectives on doing business, fuelled by international trade norms and a greater reliance on market forces and parties. The extent to which these will be influenced by (drastically) changing geopolitical relations cannot currently be determined.

Every bankruptcy is undoubtedly a life-changing event for the companies involved, affecting their suppliers, their creditors, their employees, their shareholders and their directors and the social-economic circles they interact with and geographical regions where they are located. However, in the broader economic context, bankruptcies serve a crucial function: they free up essential resources, such as skilled labour, capital, and know-how, which should be made available for innovative and future-proof business models. This is the only way to re-emerge a competitive, sustainable economy.

Being able to assess the risk of failure and the options available in case of a (looming) failure thus is essential for these entrepreneurs as well as for their investors – whether they invest their money (financial investors), working power (employees), their business contacts (suppliers, becoming creditors, and customers who can be (very) slow with payment) or their suppliers of services (energy companies; IT-companies). Here, the law can kick in. This can be done – apart from seizure or hard-on-hard litigation and money collection – based on existing contracts between the company and the counterparties or based on applicable rules for amending or terminating contracts, and ultimately via applicable rules of restructuring and insolvency law. These latter rules, traditionally, are formed and shaped by sovereign national countries, these rules following these countries' own legal-historian legacy, traditions, policies, business cultures, desiderata concerning protection of workers or small entrepreneurs and priority positions created for security right holders, such as banks, and priorities, many times for tax claims. Without exception, the rules created by national states are very different from each other. And, a national legal system principally applies to all enterprises, larger and smaller, operating locally or internationally.

Is there something like a shared and common approach to these companies facing insolvency? Over ten years ago, the United Nations Commission on International Trade Law (UNCITRAL) has highlighted the troubles of this highly different legal landscapes by stating that the many differences between national insolvency systems '… hamper the rescue of financially

troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases impedes capital flow and is a disincentive to cross-border investment …' (UNCITRAL Legislative Guide on Insolvency Law (2014), at. p. 13).

Thirty years ago, in the mid-90s of last century, this unmistakable view formed the foundation for the creation of the UNCITRAL Model Law on Cross-border Insolvency (MLCBI), presently in different shapes or forms applied in over sixty countries all over the world, later followed by the UNCITRAL Legislative Guide on Insolvency Law. Especially, the latter aims at identifying issues common to all insolvency proceedings and, while recognising numerous differences in policy and legislative treatment, recommends specific tools and ways to handle these issues both effectively and efficiently.

The European Union (EU), encompassing 27 Member States, also exposes rather the same picture. Since the 1990s, it is acknowledged that 'uniform', European solutions to business distress encounter many obstacles, including the widely differing national laws on security interests to be found in the Member States and the sometimes completely different preferential rights enjoyed by some creditors in insolvency proceedings. Significant differences in laws and regulations across Member States affect the functioning of consumer, labour, and capital markets, limiting firms' ability to seamlessly operate across EU Member States and prevent EU businesses from fully exploiting the benefits of a single market. It surely also influenced (and reduced) the attractiveness of cross-border investments originating from other Member States and from third (non-EU) countries. Mid-2025 the European Commission has adopted and since then drives a strategy for strengthening the competitiveness of the EU.

In the EU, in principle for all companies, the Preventive Restructuring Directive (2019/1023) wishes to counter these differences in insolvency laws and contribute to the proper functioning as one international market. The Directive dates from 2019 and since then until 2025 it has been implemented (in different shapes and forms, in alignment with allowed with the options the Directive provides) in all Member States. A close reading of the Preventive Restructuring Directive reveals that numerous provisions are formulated in general terms, sometimes obscurely or cryptically, and often leave much to the imagination. I will only mention this briefly in the text of this publication. Further detail is unnecessary to do justice to the subtitle of this publication: the nature of a preventive restructuring framework and its cross-border effectiveness.

This book investigates 'Preventive restructuring frameworks', which are the subject of Title III, Article 4 – 19, with no less than 66 subparagraphs, of the PRD 2019/1023. It analyses what a 'preventive restructuring framework' is, including its nature and its legal consequences, and the rules to apply when such a 'preventive restructuring framework', implemented in one of the EU Member States, is in need for recognition in another EU Member State. For the approach to the treatment of the topics and the discussion of questions that lead to (or encourage) solutions, I divided the book in nine chapters.

Chapter 1 depicts in quite some detail the current state of affairs of what is named European insolvency and restructuring law. It describes specifically in which way and with what

measures the EU has created its present system private international ('cross-border') law as well as its current (and ongoing) drive of harmonisation of insolvency and restructuring laws of the Member States. Chapter 2 explains the central goals of the Preventive Restructuring Directive (PRD 2019/1023) and the characteristics of a 'preventive restructuring framework' or 'restructuring plan' as presented, followed by Chapter 3 that examines the substantive minimum standards for preventive restructuring frameworks, to be transposed into the laws of the Member States. This chapter dives deep into the building blocks of the Directive that are characteristic of such a framework. These must be explained to understand the core of my argument and – at the same time and gradually – underline the differences with topics of traditional insolvency law.[1] These building blocks relate to the relative new concept in the EU of the 'debtor in possession' (DIP) and the newly introduced person of the 'practitioner in the field of restructuring' (PIFOR). Then follows an analysis of the negotiation process between the debtor and its counterparties (in principle both secured and unsecured creditors) which precedes and concludes with a restructuring plan, including the vital requirement of the availability of crucial business information. This chapter also presents rules and practices of stand-still in conjunction with where the Directive allows for a stay of creditors' individual enforcement actions. The chapter furthermore examines the 'threshold' to access a preventive restructuring framework, i.e. 'likelihood of insolvency', the duties of directors, the facilities of new and interim finance, and the way it is treated in a subsequent formal insolvency proceeding. The prescribed essential elements of a restructuring plan's contents are discussed, including class formation, voting and adoption by affected parties, and the confirmation of a restructuring plan, by a Member State's judicial or administrative authority. In the discussion in this chapter, it should be kept in mind that I am, on the one hand, attempting to understand the nature of a restructuring plan and, on the other hand, focusing on those elements that must be effective across borders.

Chapter 4 briefly describes the way the implementation of the PRD 2019/1023 in Member States has been realised between 2019 and 2025 and notes that the cross-border effects are barely addressed in either the recitals or the text of the PRD 2019/1023.

The next chapters turn the page to the rules of private international law in the EU, that can ensure the cross-border effectiveness of restructuring plans. This is (Chapter 5), first of all, the Insolvency Regulation (EIR 2015), which has been used by the European legislator as the leading legislative instrument in this regard. In addition (in Chapter 6), the Brussels Ibis Regulation has been shortly explained, because of its 'bankruptcy exception' and the fact that separate actions, for example the application by the DIP of a stay, could fall under its scope. In this chapter also attention has been given to the Rome I Regulation, because the negotiations and conclusion of a binding restructuring plan (as a multi-party contract) will raise questions about the applicable law of the obligations resulting from such a restructuring plan. Against the background of the distinct characteristics of a preventive restructuring plan, Chapter 7 then considers which EU legislative instrument could be beneficial to ensure a restructuring plan's desired cross-border effects. This chapter exposes gaps and biases, leading to the conclusion

1 Within the EU, 'traditional' insolvency is in the vast majority of cases a proceeding opened by a court, with hardly any powers for the debtor, but managed by a court appointed IP under court-control, fully collective regarding all creditors, very much asset-focused (bring all assets together, including via rules concerning transaction avoidance), value these assets, sell them, and divide the revenue among the creditors (pari passu) according to their ranking laid down in specific rules in national legislation.

that the present three private international law instruments are insufficiently tailored and specified to the characteristics of preventive restructuring frameworks to establish adequate cross-border effectiveness.

In this study, it is appropriate to say the I have not addressed all aspects of the EIR 2015 in depth. However, I have clearly outlined those elements that contribute to or are necessary for a better understanding of the cross-border effects of a framework.

Chapter 8 investigates the basics of a coherent cross-border EU instrument for efficient and effective preventive restructuring frameworks. It signals the shift within insolvency (from 'formal insolvency' to 'negotiated business rescue'), which has been (and still is) taken place, with individual changes to be distinguished in their development and their direction. These mirror representative and measurable aspects of this shift. The new paradigm represents norms and values as an embodiment of this shift. In the PRD 2019/1023 a preventive restructuring framework is presented as a flexible framework, to promote efficiency and reducing delays and costs. It can consist of 'one or more procedures', which can include various independent legal measures or tools to be utilized, without being part of a unitary, formal, and exclusive procedure. In Member States this mandates that these be combined in a coherent manner to ensure that such a framework affords affected parties the rights and safeguards outlined by the Directive. These underlying features lead to a normative figure, a legal figure related to 'restructuring', the goal of which is to prevent the debtor's insolvency and ensuring the viability of its business. This leads to the view that preventive restructuring frameworks contain three distinguished features: (i) its outcome involves a multi-party agreement, (ii) all parties are involved and mutually dependent on information provided and obtained, and (iii) the agreement is unique in its nature.

Chapter 9 provides forty-five recommendations forming my proposal for a Restructuring Regulation. These recommendations form the basis for an EU legislative instrument, aimed at providing an effective cross-border system for restructuring plans.

This book, and the research and thinking it required, have benefited from discussions with colleagues in the area of private international law and (contractual and statutory) restructuring and insolvency law. First and foremost, prof. Stephan Madaus (Germany), with whom I discussed, drafted and compiled over ten years ago the European Law Institute's instrument: 'Rescue of Business in Insolvency Law', between 2013 and 2017, and our interactions ever since. I owe gratitude to (former) colleagues of the Leiden University staff, who all lectured and worked on their own research projects, but from whom I also learned a lot along the way: Dr. Gert-Jan Boon, Dr. Shuai Guo, Dr. Ilya Kokorin, Defne Taşman and prof. Reinout Vriesendorp. Colleagues from the Leiden section private international law (Bryan Verheul and Dr. Jeroen van der Weide) ensured that I stayed on the right path on this difficult terrain. I have further discussed my ideas extensively with prof. Reinhard Bork (University of Hamburg, Germany), prof. Geert van Calster (Catholic University Leuven, Belgium), Dr. Anne Mennens (Wijn & Stael Attorneys, the Netherlands), prof. Irit Mevorach (University of Warwick, UK), prof. Elina Moustaira (National and Kapodistrian University of Athens, Greece) and prof. Eric Tjong Tjin Tai (Tilburg University, Netherlands). I thank them all for their willingness, brainpower and input. I completed my research on 30 March 2026.

I would like to state that for the contents of the following text I have used artificial intelligence (AI), mainly (open source) Perplexity, only in the function of what used to be known as a reference guide, encyclopaedia or a reasoned keyword book, not to assist in generating or drafting substantive content for this text or for instance for the analysis of data or cases or in the development of my ideas. I have not used AI for building arguments and conclusions either. As a reciprocal treatment I declare too that no part of the following text may be used or reproduced in any manor for the purposes of training artificial intelligence technologies.

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Bob Wessels
Dordrecht, the Netherlands
E bwessels@bobwessels.nl
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CHAPTER 1

General introduction

1.001. Theme of this book. In this chapter I will introduce my treatment of the subject of this book.

First, I will look back in an aim to better understand the future. In the present Chapter 1, I provide a brief overview of the current state of European insolvency law. It outlines the emerging lines in development: from ad hoc judicial solutions to—since 2002—a systematic approach of EU-driven regulation, initially in the area of private international law and, since 2011, focused on the harmonization of national insolvency laws of the Member States, with an increasing role for the market itself (with a role for the judiciary in the background) in taking the initiative for solutions to financial business problems. Over the past twenty-five years, the emphasis has shifted from traditional bankruptcy liquidation proceedings to negotiated solutions of financially troubled but viable businesses through a restructuring of the composition, conditions, and structure of a debtor's assets and liabilities to prevent insolvency and to ensure the debtor's long-term viability.

In Chapter 2, I outline the solution chosen by the legislator: a preventive restructuring framework available to debtors in financial difficulties where there is a likelihood of insolvency, with a view to preventing insolvency and ensuring the debtor's viability. This is laid down in the Preventing Restructuring Directive (PRD 2019/1023), adopted in 2019 and implemented in all EU Member States through the years until 2025. In this section, I introduce the harmonization method chosen by the EU legislator, the objectives of the directive, and the characteristics of a preventive restructuring framework.

Because I am exploring the nature of such a framework, in Chapter 3 I elaborate on the substantive minimum standards of a preventive restructuring framework that can be derived from the PRD 2019/1023. Essentially, it involves an initiating company (debtor in possession or DIP), negotiating a restructuring plan with its counterparties (creditors and shareholders), the content of that plan, the vote on it, the judicial arrangement to bind dissenting voters to the plan (cross-class cramdown) and the confirmation of that plan by the court. I also shortly describe how the aforementioned framework has been implemented in Member States and the cross-border consequences that this negotiation process may have, as well as how the EU legislature has elaborated these cross-border effects in PRD 2019/1023. See Chapter 4.

For these cross-border effects, the EU legislator has relied on the Insolvency Regulation. This entered into force in 2002 and its content was revised in 2015 (EIR 2015). In 2017, this Insolvency Regulation (Recast) entered into force.

In Chapter 5, I go into the core topics of this regulation, particularly from the perspective of its application to Member States' preventive restructuring frameworks. Common questions of private international law, the scope of the regulation (the definition of 'public collective

proceedings'), the international jurisdiction of the court, the various types of judgments possible, and their recognition are discussed in detail. These and related topics are also discussed from the perspective of two other potentially applicable EU rules of private international law: Brussels Ibis (judicial cooperation in civil and commercial matters) and Rome I (regulation on the law applicable to contractual obligations). See Chapter 6.

Here I would like to point out that case law that resolves cross-border issues on the basis of national preventive restructuring frameworks (or: restructuring plans) is still scarce.

After having mapped out these PIL-schemes, in Chapter 7 I will explain in more detail what the shortcomings are for all three, both its structure and its set of rules as well as its application to individual subjects. For all three I come to the conclusion that they are unsuitable, poorly adapted or insufficiently aligned as a clear and predictable system for effectively taking into account the cross-border effect of a restructuring plan. They also do not provide sufficient justice to the unique characteristics that I derive from the features of the frameworks developed by the EU. This automatically brings me to chapter 8.

This chapter takes as its starting point the minimum standards as they have been accepted in the PRD 2019/1023 and confronts them in their most striking parts that can have cross-border effects, i.e. the powers of the DIP, negotiations with 'foreign' creditors, the invocation of a stay of individual enforcement actions, the court's confirmation of a restructuring plan and more, with the three EU instruments mentioned. The general conclusion here is that these are insufficiently aligned with the 'coherent' system of rights and safeguards that the PRD 2019/1023 aims to provide with a preventive restructuring framework (which '… may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law', Article 4(5) PRD 2019/1023). That coherent system appears to be rather shaky, especially since it is insufficiently attuned to three characteristic features of a preventive restructuring framework ('restructuring plan') that also determines its cross-border effects: a multi-party agreement, demanding utmost good faith of its participants, and being aligned uniquely to every individually agreed restructuring plan.

My wanderings and reflections ultimately lead to my own proposal for an EU instrument, a Restructuring Regulation. In Chapter 9 I indicate the most characteristic legal building blocks for such a Regulation.

1.1 Twenty-five years of European Insolvency Law

1.002. Three periods. In what legal-colloquially is called 'European Insolvency Law'[1], three consecutive, sometimes overlapping periods can be distinguished:
(1) The early period, roughly prior to 2002, the year the European Insolvency Regulation, adopted in 2000, came into legal effect in 2002 (EIR 2000)[2],

1 See my substantive objections to the use of the term 'European Insolvency Law': Wessels 2014, p. 131-158.
2 European Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30 June 2000.

(2) The cross-border period, starting in 2002, with the EIR 2000, which was succeeded in 2015 with a recast version, which came into legal effect in 2017 (EIR 2015)[3],
(3) A harmonisation period, which started with the initiative of the European Parliament in 2011 and is still continuing. Its first tangible result is the Preventive Restructuring Framework Directive[4], which in 2025 had been implemented in all 27 EU-member States. This Directive forms the core of this study. Furthermore, in 2022 a second wave of substantial insolvency topics ripe for harmonisation has been proposed. The European Commission published a proposal to harmonize 'certain aspects' of insolvency law.[5] The saying is that the PRD 2019/1023 concerns pre-insolvency (for a process to prevent insolvency) and post-insolvency (particularly 'discharge of debts'), whilst the second wave of harmonisation relates to 'certain aspects' of substantial national insolvency law itself.[6]

1.003. Proper functioning of the internal market. Central purpose in specifically the second and the third period is to develop and establish, with 'insolvency law', a better Europe (within the scope of the EU), especially as a building block in the creating and further development of an internal (Union) market.[7]

1.2 The early period of European Insolvency Law

1.004. 1977: transfer of undertakings and employees' rights. Until 2002 European Insolvency Law rather was under the radar. It only showed its presence in an ad hoc way, in different shapes and forms, although I add that its visibility has been limited. One of the first and very important signs has been in the area of the transfer of undertakings with the Directive with

3 European Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141 of 5 June 2015. The latest consolidated version dates 1 May 2025. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02015R0848-20251106. A revision is foreseen no later than 27 June 2027, see Article 90 EIR 2015 ('Review clause').

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172 of 26 June 2019. Further also referred to as PRD 2019/1023. A revision is foreseen no later than 17 July 2026, see Article 33 PRD 2019/1023 ('Review clause').

5 Proposal for a Directive of the European Parliament and the Council harmonising certain aspects of insolvency law, COM/2022/702 final. See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52022PC0702. The Proposal targets three key dimensions of insolvency law: (i) the recovery of assets from the liquidated insolvency estate; (ii) the efficiency of proceedings; and (iii) the predictable and fair distribution of recovered value among creditors.

6 Directive (EU) 2026/799 of the European Parliament and of the Council of 30 March 2026 harmonising certain aspects of insolvency law, OJ L, 2026/799, 1.4.2026. Member States have been granted a period of not less than 33 months to implement the subjects of the Directive into national law. These 'certain aspects' are (see Article 1(1) CAD 2026/799): (a) avoidance actions, (b) tracing of assets belonging to insolvency estates, (c) pre-pack proceedings, (d) duty of directors to submit a request for the opening of insolvency proceedings, (e) creditors' committees, (f) key information factsheets. During the assessment of the proofs, I was able to include on a few points a reference to CAD 2026/799.

7 The present Chapter 1 and the first observations for this book's theme, find their roots in a 2023 lecture, see Wessels 2023.

regard to safeguarding employees' rights in the event of transfer of undertakings.[8] The Directive, quite remarkably, is rather silent on the question whether it applies in cases of insolvency.

1.005. ECJ 1985 (Abels-case). In a Dutch case of 1985, the European Court of Justice (ECJ)[9] concluded that Article 1(1) of Council Directive No 77/187/EEC does not apply '…. to the transfer of an undertaking, business or part of a business where the transferor has been adjudged insolvent and the undertaking or business in question forms part of the assets of the insolvent transferor.' The Court further stated that the Member States are at liberty to apply the principles of the Directive to such a transfer on their own initiative. The Directive, however, does apply – so the Court determines – where an undertaking, business or part of a business is transferred to another employer in the course of a procedure such as a 'surséance van betaling' (judicial leave to suspend payment of debts).[10] Although in this Directive 'insolvency' as a term was not covered in the text, it is obvious that there is a direct effect of the European rule into the national legal system of a Member State.

Just as a reminder, in 1985, the European Community (EC), the forerunner of the present European Union (EU), consisted of 10 Member States. These countries were: Belgium, the Netherlands, Luxembourg, France, Germany (West Germany), Italy, Denmark, Ireland, the United Kingdom (left in 2021 after 'Brexit') and Greece (joined in 1981). Some ten months after the aforementioned judgment, Spain and Portugal joined on 1 January 1986, increasing the number of Member States to twelve.

1.006. *1990: insolvency tour operator.* We are now quickly moving forward to more than a decade later! It took thirteen years before 'insolvency' again asked for attention, now as an event which was expressly considered in the Directive 90/314/EC regarding the insolvency of a Tour Operator. Article 7 provides: 'The organizer and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency'.[11] In this case 'insolvency' led directly via the Directive's implementation to a set of national rules in the legislation of the Member States.

1.007. *Other EU instruments.* In several other EU instruments 'insolvency' as a legal phenomenon was made a part of its provisions too, e.g. in the Directive 97/9/EC re Investor Compensation Schemes, Directive 2000/35 with regard to Late Payments in Commercial Transactions, Directive

8 Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61 of 5 March 1977.

9 The ECJ was renamed CJEU (Court of Justice of the European Union) in 2009.

10 ECJ 7 February 1985, ECLI:EU:C:1985:55 (*H. B. M. Abels v The Administrative Board of the Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie*). The Court observed: 'In addition, the rules on liquidation proceedings and analogous proceedings are very different in the various Member States. For that reason, and in view of the fact that insolvency law is the subject of specific rules both in the legal systems of the Member States and in the Community legal order, it may be concluded that if the directive had been intended to apply also to transfers of undertakings in the context of such proceedings, an express provision would have been included for that purpose.' The Court's observation '… that insolvency law is the subject of specific rules … in the Community legal order' is interesting, but rather mysterious.

11 CJEU 16 February 2012, ECLI:EU:C:2012:98 (*Jürgen Blödel-Pawlik v HanseMerkur Reiseversicherung AG*), decided that Article 7 of Council Directive 90/314/EEC is to be interpreted as covering a situation in which the insolvency of the travel organiser is attributable to its fraudulent use of the funds transferred by consumers.

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 Statute for a European company (SE) in which Article 63 provides: 'As regards winding up, liquidation, insolvency, cessation of payments and similar procedures, an SE shall be governed by the legal provisions which would apply to a public limited-liability company formed in accordance with the law of the Member State in which its registered office is situated, including provisions relating to decision-making by the general meeting'.[12]

1.008. Conclusion. In conclusion regarding 'insolvency': on an EU basis, scattered here and there only some insolvency matters are dealt with. These is a sign of a level of interaction between EU law and national law of Member States, but the interplay is coincidental, ad hoc, haphazard and limited to certain national islands of civil law. Examples include company law, labour law and consumer law. There is, as far as I can see, no evidence that these islands are interconnected, meaning that the specific national rules have been discussed or aligned in some way within a Member State itself or between Member States.

1.3 The cross-border period of European insolvency law

1.3.1 Insolvency Regulation 2000 (EIR 2000)

1.009. Creation of a common market (1957). In the aftermath of World War II, when European nations sought to ensure lasting peace and economic stability, in 1957 based on the Treaties of Rome, the European Economic Community (EEC, now: EU) was established, with the aim to create a common market and promote economic integration. The insight that insolvency and restructuring law mattered for (cross-border) trade and investors gradually broke through. In the next decade, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Commercial and Civil Matters of 1968,[13] was established. It introduced the system of mutual recognition and enforcement of judgments across EU Member States. A judgment from one Member State, given in a civil or commercial matter, should be recognized and enforced in another EU Member State without any special procedure of which an exequatur procedure (a special formal declaration of enforceability) is the most common example. The Convention did set clear rules for international jurisdiction in civil and commercial matters (with as a general rule: a defendant must be sued in its country of domicile) and the recognition and enforcement of civil and commercial judgments.

12 For another example (from 2012), see the Proposal for a Regulation on the Statute for a European Foundation (FE), within which Article 36 ('Transfer of registered office'), paragraph 3 provides: 'The FE shall not transfer its registered office … if proceedings for winding-up, insolvency or similar proceedings have been brought against it …'. Proposal for a Council Regulation on the Statute for a European Foundation (FE), Brussels, 8 February 2012, COM(2012) 35 final, 2012/0022 (APP). I am not aware of any further legislative steps taken. Here, insolvency as a term seems rather narrow. The drafters certainly have not investigated the definition in the original EIR 2000.

13 OJ L 299, 31.12.1972, p. 32–42, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41968A0927%2801%29.

1.010. Bankruptcy exception. However, the Convention does not apply to revenue, customs, administrative matters, family law, arbitration.[14] and 'bankruptcy'. In Article 1(2) 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' were excluded. It is many times referred to as 'bankruptcy exclusion' or 'bankruptcy exception'. Following many civil law countries' civil system, 'bankruptcy' was regarded as a specific proceeding, sometimes dealt with by specific courts, with an insolvent debtor and a court-appointed 'liquidator', dealing with many creditors on the other hand.

1.011. Istanbul Convention 1980. The European Commission initiated the drafting process for what became a Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings in 1980.[15] Under the auspices of the Council of Europe a further developed draft text was reintroduced in 1990 as the Istanbul Convention on Certain Aspects of Bankruptcy[16] and it was an almost literal transcription of this text and its explanations that formed the content of the European Insolvency Regulation ('EIR 2000'), which went into force in May 2002.[17]

1.012. Insolvency Regulation 2000. The second phase in the development of European Insolvency Law began with the entry into force of the Insolvency Regulation, in May 2002 (EIR 2000). It is the end-result of a development of a policy in which 'insolvency' would be included in EU legal instruments regarding private international law, drafted in a systematic way. Unlike the early phase (with its scattered issues, without a clear legislative policy strategy regarding 'insolvency'), this EU instrument clearly introduced a coherent system of a distinct body of rules. Looking backwards, the Insolvency Regulation also has given an enormous boost to insolvency practice, education and research, especially in an international (European) setting.

1.013. Private international law, Article 81 TFEU. The Insolvency Regulation has a private international law angle, which has as its basis in (now) Article 81 Treaty on the Functioning of the EU (TFEU). The EIR 2000 is a legal instrument that forms a part of a more comprehensive framework of the private international (insolvency) law system of the EU. This wider framework consists of a variety of components, such as the (follow up to the Brussels Convention) Brussels I Regulation on International Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, to which the Insolvency Regulation fills the gap. Again, Article 1(1) of this regulation excludes from its scope insolvency proceedings relating to '… bankruptcy,

14 The Convention's successor (Brussels Ibis) explicitly excludes arbitration from its scope (Article 1(2)(d)), issues relating to its interface with arbitration have been contentious. In the West Tankers case (ECJ, 10 February 2009, ECLI:EU:C:2009:69 (*Allianz SpA v West Tankers Inc.*)) the uncertainty was highlighted in how far the Regulation's rules can affect arbitration-related proceedings. Although Brussels Ibis clarifies this to some extent (stating that it does not interfere with arbitral tribunals' powers and allowing courts to rule on the validity of arbitration agreements when incidental to their jurisdiction), some ambiguity remains, particularly in parallel litigation and enforcement scenarios. For more detail, see Leandro 2025 (I), para. 7.001 et seq.

15 The text is available at http://aei.pitt.edu/5480/ l /5480.pdf.

16 The text is available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007b3d0. For a general overview of the history of the EIR 2000 ('a view from the cathedral of the EIR…'), see Bork & Mangano 2022, nr. 1.32 et seq.; Leandro 2025 (I), para. 1.001 et seq.

17 Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 of 30 June 2000. Denmark is not bound by it.

proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.'[18]

1.014. General appreciation. The EIR 2000 entered in force on 31 May 2002, and it was the first major instrument dealing with cross-border insolvencies in the EU. It took several decades for the EU to agree on an aligned regulation of cross-border insolvencies. The adoption of unified rules on matters of international insolvency jurisdiction and applicable law was determined by the need to improve the efficiency and effectiveness of insolvency proceedings having cross-border effect, to ensure equal treatment of creditors (pari passu principle)[19] and to protect legitimate expectations and certainty of transactions. The overall idea underpinning the EIR 2000 was the unity and universality of one main insolvency proceeding opened in a Member State where the debtor has its centre of main interest (COMI). This will also be the jurisdiction to handle most of the insolvency-related issues under domestic insolvency law (lex concursus or lex fori concursus).

According to Article 46 EIR 2000, no later than 1 June 2012 the European Commission had to present a report on the application of the EIR 2000 with a proposal for its adaptation (if necessary). Despite the general acknowledgement of the EIR 2000's success, after fifteen years of its existence, it had become clear that some of its provisions needed adjustment, while other developments required totally new rules.

1.3.2 Insolvency Regulation (recast) (EIR 2015)

1.015. Need for renewal. As a result, a new insolvency regulation was adopted in 2015, the European Insolvency Regulation (recast) No. 2015/848 (EIR 2015). This new EIR Recast entered into force on 26 June 2017, and it replaced the original EIR 2000.[20] Like EIR 2000, EIR 2015 only concerns the intra-EU effects of insolvency proceedings of the debtor whose COMI is located in a Member State. EIR 2015 does not regulate the effects opened in third States for Member States, nor the effects of insolvency proceedings opened in a Member State for non-Member States. The need for a renewal was based on the European Commission's identification of five main shortcomings of the EIR 2000 that it urged to address.

1.016. Main shortcomings EIR 2000. First, the EIR 2000 did not, in principle, cover national procedures which provide for the restructuring of a company at a pre-insolvency stage ('pre-insolvency proceedings') or leave – during a restructuring or an insolvency – the existing management in place ('hybrid proceedings').

Second, the application of the ground rule of international jurisdiction of a court, which is the centre of main interest (COMI) of the insolvent debtor, has given rise to much controversy.

18 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351 of 20 December 2012 (Brussels Ibis).

19 On this, see Van Zwieten 2018, para. 8-02: 'The most fundamental principle of insolvency law is that of pari passu distribution, all creditors participating in the common pool in proportion to the size of their admitted clams'. See also Mokal 2024, p. 443.

20 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141 of 5 June 2015.

Abusive forum shopping (pre-insolvency change of COMI to secure a more favourable insolvency law regime), was also an issue.

Third, in practice, opening of secondary insolvency proceedings (in parallel to main insolvency proceedings) had shown to disturb efficient administration of the insolvency estate. The EIR 2015 introduced the possibility that the insolvency practitioner in main insolvency proceedings could give an undertaking to local creditors in the other Member State that they will be treated as if secondary insolvency proceedings had been opened. In such an 'as if' situation, the court seized of a request to open secondary insolvency proceedings should be able to refuse that request if it is satisfied that the undertaking adequately protects the general interests of local creditors. In this way the opening of a secondary proceeding could be avoided, minimising the possible nuisance value of especially foreign creditors.

Four. It was also noted that the EIR 2000 did not impose duties of cooperation and communication on courts. Such duties were seen as a useful tool, for example, to ensure that the judge in the main proceedings is informed of relevant developments in the secondary proceedings before deciding on further actions.

Five. There was no obligation to publicize information on the opening of insolvency proceedings. However, the publication of and access to such information is crucial for facilitating the lodgement of claims and coordination of insolvency proceedings.

Finally, the EIR 2000 did not deal with the insolvency of a multi-national enterprise group. There was no compulsory coordination of the independent insolvency proceedings opened for a parent company and its subsidiaries (a so-called coordination proceeding) which would allow maximizing both the value of the group's assets and the prospects for successful restructuring.[21]

1.017. Addressing concerns. To one extent or another, the EIR 2015 tackles all the concerns mentioned above. While keeping the fundamental principles and framework of the EIR 2000 intact (COMI, main and secondary proceedings, authoritative power of lex concursus, automatic recognition of insolvency and related judgments, cross-border cooperation, etc.), the EIR 2015 has a wider scope and extends to proceedings which promote the rescue of economically viable but distressed businesses, and which give a second chance to entrepreneurs. It also clarifies the concept of COMI providing it more structure and certainty (presumptions regarding international jurisdiction, its examination and judicial review of the opening decision, Articles 3, 4 and 5 EIR 2015). Moreover, the new EIR 2015 introduces new communication and cooperation duties (extending these to courts and between IPs and court, see Article 41-44 EIR 2015). Two other innovations of the EIR Recast include group coordination proceedings (including duties for all its actors and the courts to cooperate, Articles 56-59 EIR 2015) and rules concerning the establishment of insolvency registers and (electronic) interconnection of such registers of all Member States, Articles 24-30 EIR 2015.

1.018. EIR 2015 recast text. In all, in the EIR 2015 the text of the former Insolvency Regulation doubled in size. The EIR 2000 contained 33 Recitals, 47 Articles (in 5 Chapters), and three Annexes which formed an integral part of the original EU insolvency regime. The aim of the Annexes was to facilitate the application of the EIR 2000. They served to provide liquidators (in the EIR 2015 renamed as 'insolvency practitioners') and courts with a simple method to

21 See Heidelberg-Luxembourg-Vienna Report 2013. For an overview of critique, see Hess, Oberhammer & Pfeiffer 2014.

verify whether an insolvency proceeding in question or a liquidator would fall within the scope of the EIR 2000. Between 2002 and 2015 these Annexes have been revised ten times, to include Member States' changes of national insolvency law. The text of the EIR 2015 contains 89 Recitals, 92 Articles (in 7 Chapters) and four Annexes.[22] The EIR 2015 is twice as voluminous compared to the text of the former regulation.

1.3.3 Key topics of the EIR 2015

1.019. Most important changes. For the purposes of the argument I am building, it is useful to list the most important topics of the EIR 2015. Key topics of the regulation include:

1 *Public collective proceedings*. The gateway to the EIR 2015 exists for a certain procedure. Article 1(1) provides that the EIR 2015 shall apply '… to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
(a) debtor is totally or partially divested of its assets, and an insolvency practitioner is appointed;
(b) the assets and affairs of a debtor are subject to control or supervision by a court; or
(c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).'

The provision continues (one to last line in this paragraph) with the application of the EIR 2015 to a certain type of proceedings, where entry is possible in case of 'likelihood of insolvency'. Where the proceedings referred to in Article 1(1) may be commenced '… in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities'.

The proceedings referred to in this paragraph are listed in Annex A.[23]

2 *International jurisdiction for 'public collective proceedings'* (in short: insolvency proceedings). These rules establish which Member State's courts have international jurisdiction to open insolvency proceedings based on the centre of main interests (COMI) of the debtor, see Article 3 ('International jurisdiction') paragraph 1 EIR 2015. These proceedings then are called main insolvency proceedings.

22 Annex A: listing all the (national) names of insolvency proceedings; Annex B: listing all (national) names of insolvency practitioners; Annex C: listing all repealed regulations, including the EIR 2000, and Annex D: a correlation table of articles of the EIR 2000 and articles of the EIR 2015. Annexes A and B have been revised on the basis of Regulation (EU) 2025/2073 of the European Parliament and of the Council of 8 October 2025 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B. O.J. L 17.10.2015. These revised Annexes A and B entered into force on 6 November 2025.

23 The EIR 2015 follows the EIR 2000 in that it does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC, or to collective investment undertakings. Such proceedings are excluded from the scope of this Regulation, since '… they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention,' see recital 19 and Article 1(2) EIR 2015. Regarding resolution mechanisms and winding-up proceedings concerning financial institutions, see Haentjens 2023, para. 7.01ff.

Under the EIR 2015 secondary proceedings (Articles 34-52 EIR 2015) may be opened in another Member State where the debtor has an establishment, i.e. a place of day-to-day operations where the debtor carries out a non-transitory economic activity with human means and assets (without being itself a legal person). The opening of secondary proceedings may be stopped by the IP in the main proceedings, providing an 'undertaking' to the creditors in the Member State where such proceedings could be opened, containing the promise that these creditors would receive a treatment 'as if' indeed secondary proceedings would have been opened, see Article 36 EIR 2015.[24]

3 *Different goals of collective proceedings.* The scope of the Regulation covers both winding-up or liquidation proceedings as well as so-called 'pre-insolvency' proceedings. The latter also are known as 'preventive restructuring frameworks' aimed at preventing insolvency. They support early intervention to rescue businesses in financial distress. In such proceedings a court does not appoint an insolvency practitioner. Such a preventive restructuring framework process starts at the initiative of the debtor itself. Article 2(3) defines a 'debtor in possession' (or: DIP) as a debtor '… in respect of which insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of the rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or at least partially in control of its assets and affairs.'

4 *Recognition of these proceedings.* The main achievement of the EIR 2000 is that insolvency proceedings and their effects opened in one Member State are recognized in all other Member States. Recognition fosters legal certainty and facilitates cross-border communication and cooperation between main and secondary proceedings.

The main benefit of using the EIR 2015 framework is indeed found in an EU-wide automatic recognition of any judgment issued in main insolvency proceedings according to Article 19 ('Principle') paragraph 1 and Article 20 ('Effects of recognition') paragraph 1 EIR 2015 with respect to the decision to open such proceedings in the Member State of the debtor's COMI (Article 3(1) EIR 2015). In addition, as a result of Article 32 EIR 2015 ('Recognition and enforceability of other judgments'), paragraph 1, automatic recognition is also available for any other (than the 'opening') judgment including the confirmation of a restructuring plan ('… and compositions approved by that court').[25] Any statutory or judgment-based stay or restructuring plan would have immediate cross-border effects within the EU.

5 *Applicable law*. A set of ten provisions determines which national insolvency laws govern the insolvency proceedings and their substantial and territorial effects. As a general rule, the law of the Member State where main or secondary proceedings are initiated or are opened applies (principle of *lex fori concursus*). That law with all its detailed rules will determining the law applicable to measures adopted in a court procedure. Article 7 ('Applicable law') paragraph 1 EIR 2015 explains that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened.[26] The

24 Sometimes these proceedings are referred to as 'virtual' or 'synthetic' secondary proceedings.
25 CJEU 21 January 2010, ECLI:EU:C:2010:24 (*MG Probud Gdynia sp. z o.o.*), para. 26.
26 The lex concursus determines in particular a list of thirteen topics, specifically mentioned in Article 7(2)(a)-(m) EIR 2015.