

### 3. The Regulation of Cross-Border Insolvency and Restructuring in the EU

#### 3.1 Introduction: Cross-Border Insolvency in the EU

Insolvency law has a millennia old history, with some regimes tracing the roots of rules regulating the relationship between debtors and creditors as far back as the Hammurabi dynasty in Babylon in around 2250 B.C.<sup>1</sup> As commerce has developed over the centuries, so have the laws regulating the relationship between debtors and creditors.<sup>2</sup> The institutions of insolvency are said to have been transmitted to modern European commerce by bankers in Lombardy, Italy. The term ‘bankruptcy’ is said to be derived from *banca rotta*, a Latin phrase from ancient Rome that refers to the breaking of an insolvent trader’s bench to prevent him from continuing his business.<sup>3</sup> The needs of modern commerce – long-distance travel to and from the *foires* of the Champagne region of France; long-term credit terms; and the physical difficulty of transporting literally hard currency - led to the rules of the *lex mercatoria* in the Middle Ages. This provided certainty for commercial transactions and became the foundation for Western commercial law and, by extension, cross-border insolvency rules.<sup>4</sup> Over the centuries, insolvency has evolved from a purely punitive process to a process whereby unlucky entrepreneurs (and individuals) could achieve a second chance at their business models. However, the stigma of bankruptcy and insolvency has faded to different degrees among the Member States of the European Union, leading to a fair variety of approaches in insolvency frameworks. The multiplicity of approaches and the increased prevalence of cross-border insolvency cases led to actions in the EU aimed at both coordinating and harmonising insolvency and restructuring law. The latter of these aims has thus far been the most difficult to achieve owing to the jurisdiction specific characteristics of the underlying aims and approaches to resolving business distress among the Member States.

#### 3.2 History and Development of European Insolvency Coordination

A number of conventions on cross-border insolvency were agreed among a selection of jurisdictions before the European Insolvency Regulation (Recast) as it is now known.<sup>5</sup> The development of the European Community in 1957 set the groundwork for simplifying the formalities governing reciprocal recognition and enforcement of judgments, which came into force in the Brussels Convention of 1968.<sup>6</sup> The first European Preliminary Draft Insolvency Convention<sup>7</sup> came out of a working group in the 1970s and was aimed at establishing a single jurisdiction to deal with insolvency matters. This was a common theoretical idea (which had engendered considerable debate) among American insolvency academics, in addition to one or two academics at this side of the Atlantic<sup>8</sup>. It included conflicts of law rules that

<sup>1</sup> L Levinthal, ‘The Early History of Bankruptcy Law’ [1918] U Pa L Rev 223, 230.

<sup>2</sup> Andrew Keay and Peter Walton, *Insolvency Law: Corporate and Personal* (4<sup>th</sup> edn, LexisNexis 2017) 7.

<sup>3</sup> Paul Omar, *European Insolvency Law* (Ashgate 2004) 3.

<sup>4</sup> Jennifer L L Gant, *Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective* (Eleven International Publishing 2017) 84.

<sup>5</sup> Paul J Omar, ‘Genesis of the European Initiative in Insolvency Law’ (2003) 12(3) IIR 147, 147.

<sup>6</sup> Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 25 September 1968 [1972] OJ L 299/ 32, replaced by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2000] OJ L12/1.

<sup>7</sup> Draft Convention E Comm Doc 3.327/1/XIV/70-F on bankruptcy, winding-up, arrangements, compositions and similar proceedings [1976] (Preliminary Draft Insolvency Convention).

<sup>8</sup> See for example Lynn M LoPucki, ‘Co-operation in International Bankruptcy: A Post Universalist Approach’ (1999) (84)3 Cornell L Rev 696; ‘The Case for Cooperative Territoriality in International Bankruptcy’ (1999-2000) 98 Mich L Rev 2216; ‘Universalism Unravels’ (2005) 79 Am Bankr L J 143; Andrew T Guzman, ‘International Bankruptcy: In Defense of Universalism’ (2000) 98 Mich L Rev 2178; Jay Lawrence Westbrook, ‘A Global Solution to Multinational Default’ (2000) 98 Mich L Rev 2276; ‘Universalism and Choice of Law’ (2005) 23 Penn St Int’l L Rev 625; ‘Locating the Eye of the Financial Storm’ (2006-2007) 32 Brook J Int’l L 1019; ‘A Comment on Universal Proceduralism’ (2010) 48 Colum J Transnat’l L 503; Edward J Janger, ‘Universal Proceduralism’ (2007) 32 Brook J Int’l L 819; ‘Virtual Territoriality’ (2010)



were intended to deal with the assertion of jurisdiction by more than one court.<sup>9</sup> The insolvency convention went back to the drawing board several times for a number of reasons, including the accession of new Member States to the EU.<sup>10</sup> Despite over a decade of work on the insolvency convention, it was abandoned in 1985 after the failure to agree on a second draft.<sup>11</sup>

In 1984, the Council of Europe tried its hand at introducing an insolvency convention. In their draft, the principle of universality espoused by the convention drafted in the 70s, was mitigated by introducing more territorial concepts. This would allow for domestic law to trump the law of the leading insolvency jurisdiction, in some cases. It introduced a variety of territorial rights, such as the ability of the liquidator to exercise rights abroad, the rights of creditors to lodge claims abroad, and by suggesting prescriptions about the possibility of opening a secondary insolvency proceeding.<sup>12</sup> The Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention)<sup>13</sup> was introduced in 1995, but it failed for lack of universal adoption and ratification.<sup>14</sup>

An ad hoc working party was convened in the European Community by the Community Ministers of Justice in the early 1990s under the chairmanship of Manfred Balz. In 1995, a new ‘Convention on insolvency proceedings was introduced,’ which contained the possibility of opening secondary proceedings,<sup>15</sup> adopting the deviation from universality first introduced by the Istanbul Convention. It was in this draft convention that the modern version of the European Insolvency Regulation<sup>16</sup> emerged. This was accompanied by the Virgos Schmit Report,<sup>17</sup> which explained the strategy behind the convention and the historical reasons for it. This Convention was more complete than the Istanbul Convention, but it did not obtain the signature of all Member States – the United Kingdom was the only dissident.<sup>18</sup>

At the turn of the millennium, the European Parliament recognised that the time was likely ripe for another attempt at coordinating insolvency, so it instructed the Commission to convert the Insolvency Convention into a regulation and to use the Virgos Schmit Report as the basis for an explanatory memorandum.<sup>19</sup> Given the decades of work in trying to come up with a European method of dealing with cross-border insolvencies, the passing of the EIR was not a shock. The initiative aimed to improve and speed up cross-border insolvency proceedings as well as improve the functioning of the internal market. Among the many elements of the Regulation the idea of cross border judicial co-operation was included. The Regulation was accepted by all Member States, including the UK, and was adopted on 29<sup>th</sup> May 2000, and published on 30<sup>th</sup> June 2000. It was largely similar to the original proposals and came into effect on 31<sup>st</sup> May 2002.<sup>20</sup>

In 2012 the time came to review the EIR,<sup>21</sup> a task undertaken by a group of scholars from the University of Heidelberg and the University of Vienna.<sup>22</sup> The rapporteurs agreed that shortcomings of the EIR concerned its scope, jurisdiction, secondary proceedings, the publicity of secondary proceedings, and the lack of rules relating to groups of companies.<sup>23</sup> The recast of the EIR was therefore conceived with

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48 Colum J Transnat'l L 401; ‘Reciprocal Comity’ (2011) 46 Tex Int'l L J 441; Robert K Rasmussen, ‘Where are all the Transnational Bankruptcies? The Puzzling Case for Universalism’ (2007) 32(3) Brook J Int'l L 983; Edward S Adams and Jason K Fincke, ‘Coordinating Cross-border Bankruptcy: How Territorialism Saves Universalism’ (2008) 15 Colum J Eur L 43; Alexander M Kipnis, ‘Beyond UNCITRAL: Alternatives to Universality in Transnational Insolvency’ (2008) 36(2) Denv J Int'l L & Pol'y 155; Gerard McCormack, ‘Universalism in Insolvency Proceedings and the Common Law’ (2012) 32(2) Oxford Journal of Legal Studies 325.

<sup>9</sup> Omar (n 5) 149.

<sup>10</sup> Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 14.

<sup>11</sup> See the E Comm Doc III/D/72/80 (Draft Convention); Paul J Omar, ‘Genesis of the European Initiative in Insolvency Law’ 12(3) IIR 147, 154-155.

<sup>12</sup> Reinhard Bork and Renato Mangano, *European Cross-Border Insolvency Law* (OUP 2016) 14.

<sup>13</sup> European Convention ETS No 136 on Certain International Aspects of Bankruptcy [1990] (Istanbul Convention).

<sup>14</sup> Omar (n 3) 155-157.

<sup>15</sup> Bork & Mangano (n 10) 14-15.

<sup>16</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L 160/1 (hereafter referred to as the “EIR”).

<sup>17</sup> Miguel Virgos and Etienne Schmit, ‘Report on the Convention on Insolvency Proceedings’ (Council of the European Union 1996).

<sup>18</sup> Bork & Mangano (n 10) 15; Omar (n 3) 161.

<sup>19</sup> Bork & Mangano (n 10) 15.

<sup>20</sup> Omar (n 3) 162-163; Bork & Mangano (n 10) 15.

<sup>21</sup> Required by EIR Art 46, which states that “no later than 1 June 2012 and every five years thereafter, the Commission shall present to the European Parliament, the Council, and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.”

<sup>22</sup> Burkhard Hess, Paul Oberhammer, and Thomas Pfeiffer, et al, ‘External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings’ (JUST/2011/JCIV/PR/0049/A4, University of Heidelberg and University of Vienna 2012) (Heidelberg-Luxembourg-Vienna-Report).

<sup>23</sup> Bork & Mangano (n 10) 16-17.

the intention of further embracing the rescue culture; dealing with groups of companies; and considering IT facilities. Among the options presented, it was decided to modernise the existing regulation while preserving the balance between creditors and between the competing principles of universality and territoriality.<sup>24</sup> The EIR Recast was passed on 20<sup>th</sup> May 2015.<sup>25</sup>

### 3.3 *The Key Features of the EIR Recast*

The EIR contains rules that provide procedural uniformity for European cases in the area of insolvency law (relating to both corporate and personal insolvency) and related procedures. It sets out the parameters for establishing Member State jurisdiction, choice of law, and the recognition and enforcement of foreign insolvency judgments.<sup>26</sup> (The JCOERE project relates to corporate entities only).

The EIR applies to companies whose Centre of Main Interests (COMI) is in a Member State of the European Union. It is designed to provide uniform rules regarding choice of jurisdiction (forum) and choice of law. Generally, the country possessed of the COMI has exclusive jurisdiction to open main insolvency proceedings and these must be given immediate, full, and unqualified recognition in every other affected Member State. As to choice of law, the general principle (although there are important exceptions) is that the law of the Member State within which main proceedings are opened will govern the conduct and effect of the insolvency proceedings.<sup>27</sup> By providing full and unqualified recognition, the EIR applies the concept of limited universality, meaning that the proceeding is universal and produces enforceable effects throughout the EU, including over the authority of the insolvency professional and over all creditors of the entity in the whole of the EU. The limited aspect of the EIR is associated with the provisions in the EIR which recognise the ability of parties to open a secondary proceeding in another Member State.<sup>28</sup> Primarily, secondary proceedings are intended to protect local creditors whose claims might be treated differently in the primary proceedings due to differences in legal frameworks.<sup>29</sup> To support this aim, the Regulation also provides for choice of law provisions in relation to certain specific issues.

The effectiveness of the EIR in curbing forum shopping between EU jurisdictions also depends to some extent on the harmonisation of substantive rules. Where there are significant differences in legal frameworks and no “gatekeeping” devices present to prevent it, debtors and their practitioner advisors are likely to select a jurisdiction that most benefits their particular situation and outcome goals.<sup>30</sup> There are debates surrounding the concept of choice of forum. It could be said that the flexibility of an effective procedure in one jurisdiction will benefit the EU economy overall, as well as those professionals of a jurisdiction who run such procedures.<sup>31</sup> On the other hand, there is a view that choice of forum is driven by the search for particularly favourable legal frameworks. In academic debates, choice of forum is sometimes associated with claims that it engenders a ‘race to the bottom’ but not all commentators agree that this is a noticeable effect. The purpose of the EIR is to prevent abusive forum shopping, where an entity has no real connection to a particular jurisdiction. The COMI test determines the selection of a jurisdiction by the debtor. It must be borne in mind that the requirement to apply the COMI test and establish jurisdiction only applies to procedures listed in Annex A of the EIR and this is repeated in the EIR Recast.

Prior to the passing of the Recast EIR, a number of Member States had also developed supplementary legislation or rules that required national courts to cooperate with foreign insolvency courts where main proceedings had been opened.<sup>32</sup> Codes and best practice guidelines were also developed in the time

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<sup>24</sup> Commission Staff Working Document Impact Assessment SWD (2012) 416 final accompanying the document Revision of Regulation (EC) 1346/2000 on insolvency proceedings [2012].

<sup>25</sup> Bork & Mangano (n 10) 23.

<sup>26</sup> *idem* 25.

<sup>27</sup> Gerard McCormack, ‘Universalism in Insolvency Proceedings and the Common Law’ (2012) 32(2) *Oxford Journal of Legal Studies* 325, 339.

<sup>28</sup> Bork & Mangano (n 10) 15; Emilie Ghio, ‘Cross-border Insolvency and Rescue Law Theory: Moving Away from the Traditional Debate on Universalism and Territorialism’ (2019) 29(12) *ICCLR* 713, 722.

<sup>29</sup> Ghio (n 28) 722-723.

<sup>30</sup> Bork & Mangano (n 10) 92.

<sup>31</sup> Gerard McCormack, ‘Reforming the European Insolvency Regulation: A Legal and Policy Perspective’ (2014) 10(1) *J Priv Int L* 41, 48 and ‘Jurisdictional Competition and Forum Shopping in Insolvency Proceedings’ (2009) 68(1) *CLJ* 169.

<sup>32</sup> Bork & Mangano (n 10) 199.

between the passing of the original EIR and its Recast.<sup>33</sup> The EIR Recast refers to these guidelines in Recital 20.<sup>34</sup> It was however determined that the Recast regulation should also contain a prescription of an extended obligation for courts to cooperate and communicate.<sup>35</sup> As such it introduced Articles 41-44 and Articles 56 and 57 into the Recast EIR. These are based on Art 4 of the Treaty of the European Union (TEU) and the principles of sincere co-operation and mutual trust, which in turn aim to establish an area of freedom, security, and justice, and on the provision concerning judicial co-operation in civil matters.<sup>36</sup>

Regardless of whether a procedure is included in Annex A of the EIR Recast, continued differences in insolvency and restructuring frameworks will continue to provide a broader menu of choices to cross-border enterprises in the EU. Entities will continue to either shift COMI within the rules of the EIR Recast, or to utilise frameworks that are not included within the Regulation if they provide an easier means of access along with better potential outcomes. We would view this as particularly true of rescue frameworks. These continued differences stem from the difficulty mentioned at the beginning of this Chapter that the EU has had in its harmonisation attempts regarding insolvency law frameworks.

### 3.4 *The Harmonisation Debate over European Insolvency and Restructuring*

Harmonisation has been a topic of debate in the EU since the creation of the European Economic Community in 1957. It is a process in which diverse elements, in this case the laws of Member States, are combined or adapted to each other to form a coherent whole, while also retaining their individuality.<sup>37</sup> Uniform and harmonised laws help to avoid conflicts of law situations, so harmonisation efforts tend to be practical in nature.<sup>38</sup> However, unification and harmonisation can only be achieved if approved by the EU Member States.<sup>39</sup>

In our context, harmonisation of insolvency law in the EU has continued to be a topic of discussion. In 2010, INSOL Europe prepared a report discussing the need and feasibility of harmonisation of insolvency law.<sup>40</sup> This report was presented to the European Parliament Committee on Legal Affairs and advocated substantive harmonisation in several areas of insolvency law, including thresholds, filing, verification, rescue plans, ranking and priority, among many others. Beyond supporting improvements in procedure connected with the EIR Recast, the INSOL report also appeared to support real harmonisation of insolvency law across the EU.<sup>41</sup> The INSOL report argued a familiar point, that the differences in insolvency frameworks between the Member States are an incentive for firms to forum shop in order to use the most convenient and financially beneficial insolvency framework and venue, regardless of the location of their assets or activities.<sup>42</sup> The INSOL report also contended that forum shopping jeopardises transparency and legal predictability while decreasing the chances of restructuring insolvent firms.<sup>43</sup> What followed, however, was primarily the reform of cross-border insolvency *procedural* rules in the EIR Recast, rather than introducing any harmonised substantive rules. The PRD is an example of a more ambitious harmonisation project:

“The differences among Member States in procedures concerning restructuring, insolvency and discharge of debt lead to uneven conditions for access to credit and to uneven recovery rates in the Member States. A higher degree of harmonisation in the field of restructuring, insolvency, discharge of debt and disqualifications is thus indispensable for a well-functioning internal

<sup>33</sup> See for example the European Communication and Co-operation Guidelines for Cross-Border Insolvency of 2007 (CoCo Guidelines); the EU Cross-Border Insolvency Court-to-Court Co-operation Principles and Guidelines of 2014 (Judge Co Guidelines); and The III/ALI Global Principles for Co-operation in International Insolvency Cases.

<sup>34</sup> Bob Wessels, ‘Themes of the Future: Rescue Businesses and Cross-Border Co-operation’ (2014) 27(1) *Insolv Int* 4, 8.

<sup>35</sup> Renato Mangano, ‘From “Prisoner’s Dilemma” to Reluctance to Use Judicial Discretion: the Enemies of Co-operation in European Cross-Border Cases’ (2017) 26(3) *IIR* 314, 314-315.

<sup>36</sup> Treaty on the Functioning of the European Union (TFEU) Art 67 and 81.

<sup>37</sup> Martin Boodman, ‘The Myth of Harmonisation of Laws’ (1991) 39(4) *American J Comp L* 699, 700-701 citing the *Oxford English Dictionary* Volume 5, 98 (“harmony”).

<sup>38</sup> John Goldring, ‘Unification and Harmonisation of the Rules of Law’ (1978) 9 *Fed L Rev* 284, 285.

<sup>39</sup> *idem* 286.

<sup>40</sup> INSOL Europe, ‘Harmonisation of Insolvency Law at EU Level’ (European Parliament DG Internal Policies, Policy Department Citizens’ Rights and Constitutional Affairs 2010).

<sup>41</sup> Paul Omar, ‘Modern Prospects for European Insolvency Law Harmonisation’ (15 September 2019) <<https://www.globelawandbusiness.com/blog/modern-prospects-for-european-insolvency-law-harmonisation>> accessed 9<sup>th</sup> December 2019.

<sup>42</sup> Federio M Mucciarelli, ‘Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension’ (2013) 14 *Eur Bus Org L Rev* 175, 176.

<sup>43</sup> INSOL Europe (n 40) 26-27.

market in general and for a working Capital Markets Union in particular, as well as for the resilience of European economies, including the preservation and creation of jobs.”<sup>44</sup>

By pursuing a harmonisation strategy, the Commission is acting in line with its prior policies.<sup>45</sup> Harmonisation is also a “remedy against negative externalities produced by domestic legislations of Member States.”<sup>46</sup> If insolvency laws were harmonised in the EU, regulatory arbitrage and forum shopping at the expense of creditors and other stakeholders would be reduced. In addition, all creditors would know in advance with certainty which rules would apply in the case of their debtor’s default.<sup>47</sup> A drive towards wholesale harmonisation may, however, effectively ignore the jurisdiction specific characteristics of individual Member States, including local interests and needs.<sup>48</sup> Therefore, sometimes for good reason, harmonisation of insolvency has been considered impractical and unfeasible. However, in order to introduce an effective EU wide restructuring regime aimed at rescuing distressed businesses, some level of harmonisation is needed to discourage forum shopping and reduce the knock-on effects that this has on creditors and other stakeholders.<sup>49</sup>

On the other hand, one could take the view that it has long been recognised that harmonisation of traditional insolvency proceedings is not politically feasible.<sup>50</sup> The Commission’s aim of harmonising restructuring processes seems to be driven mainly by the goal of creating equal refinancing conditions for all businesses in Europe under financial distress.<sup>51</sup> While the Commission’s initial Proposal for a Preventive Restructuring Directive<sup>52</sup> created a set of minimum principles, upon which a preventive restructuring framework could be built among the Member States it became clear, however, through the draft iterations of the PRD, that significant political resistance was met, which is reflected in the compromised version that was eventually passed.<sup>53</sup>

The overall result of the implementation of the PRD is likely to be quite far from a fully harmonised position, with the consequence that debtors may continue to suffer from an uneven playing field when it comes to the prospect of achieving a value-preserving restructuring when facing financial distress.<sup>54</sup> The options provided for in the PRD means that there will be divergences in design choices among the Member States.<sup>55</sup> This will likely result in a raft of new preventive restructuring frameworks<sup>56</sup> that meet the PRD’s minimum standards but remain quite different given the scope afforded to implementation. Criticisms of the PRD are reflected in the following statement:

“At the end of the day, it appears that the drafters of the Directive sought to address pressures and objectives which are too divergent to be coherent. The preventive proceedings, as initially envisaged, were largely inspired by the second-generation Chapter 11 restructurings, but also by the British Schemes of Arrangement, while keeping in tune with the lessons derived from the law and economics movement.”<sup>57</sup>

As a result, where possible, debtors may choose to shop for the most convenient and beneficial forum for their restructuring services.

### *3.5 Jurisdiction in Cross-Border Restructuring Cases: Forum Shopping.*

Nevertheless, one of the key aims of the EIR Recast is to reduce abusive forum shopping:

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<sup>44</sup> PRD, recital 8. See also Horst Eidenmuller and Kristin van Zweiten, ‘Restructuring the European Business Enterprise: the European Commission’s Recommendation on a New Approach to Business Failure and Insolvency’ (2015) 16 Eur Bus L Rev 625, 650.

<sup>45</sup> Horst Eidenmuller and Kristin van Zweiten *idem* 651.

<sup>46</sup> Mucciarelli (n 42) 197.

<sup>47</sup> *ibid.*

<sup>48</sup> Alberto Alesina and Enrico Spolaore, ‘On the Number and Size of Nations’ (1997) 112 Quarterly J Econ 1030.

<sup>49</sup> Gert-Jan Boon, ‘Harmonising European Insolvency Law: The Emerging Role of Stakeholders’ (2018) 27 IIR 150, 165.

<sup>50</sup> Vasile Rotaru, ‘The Restructuring Directive: a Functional Law and Economics Analysis from a French Law Perspective’ (2019) Working Paper published by Droit et Croissance.

<sup>51</sup> Horst Eidenmuller, ‘Contracting for a European Insolvency Regime’ (2017) 18 Eur Bus Org L Rev 273, 275.

<sup>52</sup> Proposal for a directive COM(2016) 723 final of 22 November 2016 on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU [2016] 2016/0359 (COD).

<sup>53</sup> Jennifer Payne, ‘Restructuring Reform in Europe: the European Commission’s draft Directive’ (2017) March JIBFL 149, 149-150; Horst Eidenmuller, ‘Contracting for a European Insolvency Regime’ (2017) 18 Eur Bus Org L Rev 273, 286.

<sup>54</sup> Eidenmuller & van Zweiten (n 45) 652.

<sup>55</sup> *idem* 651.

<sup>56</sup> Reinhard Bork, ‘Preventive Restructuring Frameworks: A “Comedy of Errors” or “All’s Well that Ends Well?”’ (2017) 14(6) ICR 417, 425..

<sup>57</sup> Rotaru (n 50) 20.

“It is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping).”<sup>58</sup>

The EIR Recast, however, has been unable to definitively preclude forum shopping given the often-liberal interpretation of COMI by some national courts. This can happen in circumstances when forum shopping is perceived as a means to increase the chances of a successful and efficient restructuring, which is in the interests of all creditors.<sup>59</sup>

In other systems such as the US, choice of forum can be key for the debtor to maximise returns to creditors and shareholders, as well as to avoid costs associated with considerable court oversight. Other elements such as the control by the debtor and the balance of favour between creditors (mainly the secured creditors) and debtors are factors in forum choice.<sup>60</sup> The choice of a forum is governed by jurisdictional rules that dictate the level of association that a debtor must have with a jurisdiction in order to use its insolvency procedures. Where such rules are lax, it is more likely that debtors will try to utilise the most favourable jurisdiction for the resolution of their financial difficulties.<sup>61</sup> However, gatekeeping rules are only effective if they cover the procedures that attempt to circumvent them:

“...those who want a special legal regime governing loss distribution when a firm fails or closes at the same time it defaults to creditors must expect to see in bankruptcy many cases that do not belong there, and many cases outside bankruptcy that belong in bankruptcy.”<sup>62</sup>

Applying this analysis to the European context, even though the aim of the EIR Recast is to avoid this kind of forum shopping, if it is possible to create a flexible rescue procedure that meets all of the criteria of the PRD while keeping the procedure outside of the remit of the EIR Recast, a jurisdiction may well choose to do so. This decision would be in order to compete with jurisdictions such as the UK, which continues to benefit from global restructurings utilising the Scheme of Arrangement. In relation to the UK prior to Brexit the Scheme of Arrangement was not covered by the EIR Recast and this is therefore a perfect example of the problem raised in this section.

Recital 13 of the PRD refers to the EIR Recast by claiming that the PRD should be “fully compatible and complementary to that Regulation by requiring Member States to put in place preventive restructuring procedures which comply with certain minimum principles of effectiveness.”<sup>63</sup> This Recital also recognises that in order to achieve compatibility with the EIR Recast, the procedures created in implementation of the PRD provisions may also be included in Annex A of the EIR Recast, and therefore subject to the test of COMI. However, Annex A has several specific parameters to be satisfied for the inclusion of procedures in it, such as the requirement that proceedings be public and collective. This means that all or a significant proportion of creditors should be included as long as the proceedings do not affect the claims of creditors who are not involved.<sup>64</sup> Further, procedures in Annex A should also be those in which assets and affairs of a debtor are subject to control or supervision by a court.<sup>65</sup> The provisions of the PRD do not necessarily include these same parameters, which gives jurisdictions implementing the PRD the ability to create procedures that do not satisfy the Annex A criteria and therefore fall outside of it.

It has been shown that the non-inclusion in Annex A of a procedure may lead to greater use of an effective and efficient procedure throughout the EU and globally as the COMI test does not have to be

<sup>58</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141/19, recital 5.

<sup>59</sup> See *Re Codere Finance (UK) Ltd* (2015) EWHC 3778 (Ch):

“In a sense, of course... what is sought to be achieved in the present case is forum shopping... In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts, but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.”

<sup>60</sup> Westbrook ‘Theory and Pragmatism’ (n 61) 460.

<sup>61</sup> For a general discussion on choice of forum and forum shopping, see Douglas Baird, ‘Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren’ (1987) 54 U Chi L Rev 815 and Jay Lawrence Westbrook, ‘Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum’ (1991) 65 Am Bankr L J 457 and ‘A Global Solution to Multinational Default’ (2000) 98 Mich L Rev 2279.

<sup>62</sup> Baird (n 61) 819.

<sup>63</sup> PRD, recital 13.

<sup>64</sup> EIR Recast, art 2 (1).

<sup>65</sup> EIR Recast, art 1(1)(c).

met. The UK Scheme of Arrangement is a prime example of a procedure that has benefited from extensive use by many different jurisdictions. This is partly due to the fact that it is effective and fast, but also widely accessible because it does not require COMI, only a “sufficient connection” to the UK to establish jurisdiction. While the absence of the Scheme from Annex A means that they will not have EU wide recognition, it also means that UK courts have “a wider jurisdictional base in that they may sanction schemes where the relevant foreign company has a ‘sufficient connection’ with the UK even though its COMI may not be in the UK.”<sup>66</sup> Sufficient connections have been found in circumstances that appear to be tenuous, such as relying on the extension of credit facilities containing English choice of law and jurisdiction clauses.<sup>67</sup> Thus, there are clear benefits to not fitting within the EIR Recast. Where the EIR Recast does not apply, there are other legal methods of recognising and enforcing decisions on insolvency cases in European, private international, and domestic law.

### 3.6 Recognition and Enforcement: Including Restructuring Frameworks in Annex A

There are two main schemes of recognition and enforcement for civil and commercial proceedings available to companies in the EU, which are mutually exclusive when it comes to insolvency proceedings. The Brussels 1 Regulation applies to civil and commercial proceedings while specifically excluding insolvency and analogous proceedings from its remit.<sup>68</sup> Instead, these insolvency proceedings are governed by the EIR.<sup>69</sup> However, the term “analogous proceedings” is not that helpful as the EIR does not expressly define what could be proceedings related to or analogous to insolvency.<sup>70</sup> This uncertainty has not been fully resolved by case law.<sup>71</sup>

The UK has managed to utilise the Brussels 1 Regulation to increase the effectiveness of Schemes of Arrangement. However, there are gaps<sup>72</sup> between these two Regulations, and the Scheme of Arrangement does not appear to fit neatly under either. No one is being sued in a Scheme, so it is difficult to fit it within Brussels I, as it is technically a procedure of UK company law, governed by Part 26 of the Companies Act 2006. Because it is not an insolvency procedure but a procedure based in company law, it is specifically excluded under Recital 16 which states that the EIR Recast will not cover “proceedings that are based on general company law not designed exclusively for insolvency situations” as these “should not be considered to be based on laws relating to insolvency.” In contrast, the EIR Recast clearly states that:-

“This Regulation 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 appointed.”<sup>73</sup>

It will also apply where the assets of a debtor are subject to court control or supervision;<sup>74</sup> if a temporary stay is granted to enable negotiations.<sup>75</sup> It adds a further line that potentially brings procedures enacted subsequent to the PRD within the EIR Recast:

“Where the proceedings referred to in this paragraph 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.”<sup>76</sup>

The non-inclusion of a procedure in Annex A<sup>77</sup> will explicitly limit the application of the EIR Recast. If a restructuring process is not in Annex A, the Regulation will not apply.<sup>78</sup> Despite its non-inclusion in the EIR, the global use of the English Scheme has proved advantageous to the UK, allowing it to become a global hub for insolvency and restructuring. There is nothing in the PRD that requires that the new

<sup>66</sup> Gerard McCormack, ‘Reconciling European Conflicts and Insolvency Law’ (2014) 15 EBOR 309, 319.

<sup>67</sup> *Re Drax Holdings Ltd* [2004] WLR 1049.

<sup>68</sup> See Brussels 1 Regulation, art 1(2)(b).

<sup>69</sup> See Case C-339/07 *Seagon v Deko Marty Belgium NV* [2009] ECR I-767.

<sup>70</sup> McCormack (n 66) 315.

<sup>71</sup> Case 133/78 *Gourdain v Nadler* [1979] 3 CMLR 180.

<sup>72</sup> McCormack (n 66) 317.

<sup>73</sup> EIR Recast, art 1(1)(a).

<sup>74</sup> EIR Recast, art 1(1)(b).

<sup>75</sup> EIR Recast, art 1(1)(c).

<sup>76</sup> EIR Recast, art 1(1)(c) – first sub paragraph.

<sup>77</sup> EIR Recast, art 2(4) and also referred to in art 1(1)(c) second sub paragraph.

<sup>78</sup> Case C-461/11 *Ulf Kazimierz Radziejewski*.

procedures are entered into Annex A. For example, if the new restructuring procedure is derived from a nation's company law framework, as opposed to its insolvency framework,<sup>79</sup> the framework will not be covered by the EIR Recast.

If the aim of the Commission was to ensure that the EIR Recast and the PRD dovetail perfectly, the discussion in the previous paragraphs, and the example of the UK Scheme of Arrangement, raises questions over this policy goal. In contrast, however, the Irish Examinership, and the French Sauvegarde are covered by Annex A and the EIR Recast. This issue has been considered by some commentators,<sup>80</sup> but will be discussed further in JCOERE Project Report 2.

That said, there are many benefits to being included under the EIR Recast that go beyond simply competing in the global restructuring market, as it provides certainty and foreseeability of outcomes, which as aforementioned, provides a positive environment for effective co-operation and communication in cross-border restructuring cases.

While the PRD is unlikely to lead to the complete harmonisation of preventive restructuring frameworks, allowing for the flexibility that it does, means Member States will be able to adapt their restructuring frameworks to the real conditions of their markets. As noted by Berkowitz, Pistor, and Richard:

“...the economic efficiency of insolvency law depends on the economic conditions and characteristics of the financial markets of each country, as well as the sophistication of the institutions and actors involved in the restructuring of a viable business.”<sup>81</sup>

Accordingly, the argument could be made that too much harmonisation in this area could have a counterproductive effect on Member State economies, as it would not be possible to fully adapt the frameworks to domestic economic conditions. Regardless, there is likely to be some harmonisation around a common core of the PRD,<sup>82</sup> and the introduction in general of more effective and efficient restructuring frameworks will be good for the economy of the EU.

### *3.7 Conclusion*

Chapter 3 has explored the history and background of cross-border insolvency and the developments in coordination of cross-border insolvency cases over time. In the EU, this culminated in the introduction most recently of the EIR Recast, which aims to coordinate cross-border cases procedurally without introducing any aspects of substantive harmonisation of insolvency law. The PRD, however, is the first attempt of the EU to introduce harmonisation in what is essentially insolvency-like procedures aimed at preventing formal insolvency. Chapters 6,7, and 8 address potential divergences in the Member States.

### *3.8 Chapter 4: Context of Preventive Restructuring in the EU*

Chapter 4 will explore the evolution of preventive restructuring in the EU, as it has emerged out of normal insolvency frameworks. This will include an analysis of the underlying insolvency law theories. As the idea of a collective procedure occurring prior to insolvency is fundamentally contrary to traditional insolvency law principles, there are many debates and controversies among academics. These will be discussed in detail. The more controversial provisions include the stay or moratorium, aspects of majority decision-making, and cross-class cram-down. Apart from the obvious impairment of creditors rights and whether that is indeed fair, the justification of compelling dissenting classes of creditors (cram-down) has created a tremendous amount of controversy. This may also cause significant differences in the frameworks implementing the PRD which must be introduced by the end of 2021.

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<sup>79</sup> Dominik Skauradszun and Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' (2019) 16(4) ICR 193, 200.

<sup>80</sup> Lorenzo Stanghellini and Andrea Zorzi, 'Coordinating the Preventive Restructuring Directive and the Recast European Insolvency Regulation.' (2019) 77 Eurofenix 22.

<sup>81</sup> Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 European Economic Rev 165.

<sup>82</sup> Rotaru (n 50) 23.