Foreign Insolvent Debtor

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1. In this contribution I shall refer to the phenomenon of insolvent legal persons, as it is widely acknowledged, „legal norms of private international law applied to physical persons (individuals) can not be copied as such to the situation of legal persons."[1]. When examining the Regulation (EC) No 1346/2000[2] one might conclude that collective insolvency proceedings of a physical person (particular) such as the *Verbraucherinsolvenz* or the Belgian *réglement collectif de dettes* are also covered by the Regulation. However, the case law of courts in European states implies a far more cautious approach.[3]

2. The problem of collective insolvency proceedings abroad or in several states concern on a substantive level the statute of property (*lex rei sitae*) and securities, statute of persons, the statute of contracts and on the procedural level is always ruled predominantly by the compulsory *lex fori, this however implies difficulties with extraterritorrial effects of a decision opening collective insolvency proceedings.* It is true that international insolvency law is primarily concerned with the venue and international competence for a collective insolvency proceedings.[4] However the jurisdiction and the competence issues do not preclude the issue of effects of a foreign decision opening collective insolvency proceedings can have in another country.

3. One might examine the Convention on Insolvency Proceedings, opened for signature by the Member States at Brussels on 23 November 1995. However, this convention could not enter into force because one EU country failed to sign it within the time limit.[5] The same result, i.e. no entry in force can also be said of the European Convention on Certain International Aspects of Bankruptcy of 5 June 1990 followed only by 7 signatures not followed by ratifications and the UNCITRAL model law. The only workable results were obtained under the Regulation (EC) No. 1346/2000.

I. Foreign Debts as Debtor's Liabilities and Assets (Property) under the Doctrine of Universality of Property

4. There are three basic issues determining creditor's interests in an insolvency abroad. The first one is the issue of universality or territoriality, the second one is the issue of unity or plurality and the third one the issue of main and secondary insolvency proceedings.[6] The

1 Cf. Stanko Lapajne: Mednarodno in medpokrajinsko zasebno pravo, Ljubljana, 1929, p. 290.
2 Cf. Recital No 9 of the Regulation No 1346/2000.
3 Cf. Cour du Travail de Bruxelles, judgmenet of 17 Mai 2011 in case 2011/AB/00255, Rep. No. 2011/1442
4 Cf. Reinhard Bork: Einführung in das Insolvenzrecht, 5th edition, Tuebingen, 2009, p. 245 and 246.
5 http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/l33110_en.htm.
6 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, RCADI 230 (1993), p. 343 (371 – et seq.).

issue of universality and territoriality shall be examined under point II of this paper.

5. Assets and liabilities or property in sense of English language (*das Vermögen*, *le patrimoine*) are usually not defined by laws in civil law states. However, the notion of assets and property is the core notion of any enforcement proceedings, be it individual or collective insolvency enforcement.[7] Theoretically every legal subject, be it an individual or legal person should have one single, universal property (*unicité de patromoine*),[8] meaning that all assets and liabilities of the same legal subject everywhere in the world are subject to same legal occurrences and consequences. In legal systems based on civil law property comprises assets (*activa*) and liabilities (*passiva*) of a subject of law, the first being there to cover the second. The localization of property in several states is actually destroying the notion of a single property (assets) of a subject of law.[9] In civil law terms, the debts of a foreign insolvent debtor are covered by his liabilities. However, legal writers usually comment that „assets and liabilities of a single debtor in each separate state are considered as debtor's separate property and that property might be liquidated under the term of the *lex fori*."[10] Therefore under this regime of separate property the Regulation (EC) No 1346/2000 has introduced the term of secondary insolvency proceedings (Art. 27) aimed at liquidating and realizing the local assets of the foreign debtor.

II. Traditional Legal Obstacles on Extraterritorial Effects of Collective Proceedings Encountered by Creditors

6. Perhaps a simplification of this subtitle is required. The term of extraterritorial effects of a decision opening collective proceedings solely means that foreign debtors are protected against their creditors by collective insolvency proceedings pending before a foreign judicial or administrative authorities. First I shall use the standard definitions of issues likes territoriality and universality of an insolvency and other collective insolvency proceedings (like a concordat). Basically I shall adhere to the standard definitions according to which a state can react in two ways to insolvency proceedings opened abroad (i.e. outside its borders).

7. In the beginning it should explicitly be stressed that in private international law the issues of territoriality and universality refer solely to the effects of an collective insolvency proceedings.[11] However, the CJEU found that the Regulation (EC) No 1346/2000, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case, after the main insolvency proceedings have been opened in a Member State, the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met.[12]

7 Cf. Karl Larenz, Dieter Wolf: Allgemeiner Teil des Bürgerlichen Rechts, 9th edition, Munich, 2004, p. 379.
8 Cf. Karl Larenz, Dieter Wolf: Allgemeiner Teil des Bürgerlichen Rechts, p. 386 - 388
9 Cf. Bernard Audit: Droit international privé, 5th edition, Paris, 2008, p. 651.
10 Cf. Bernard Audit: Droit international privé, p. 653.
11 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, 374.
12 Case C-444/07, MG Probud Gdynia [2010] ECR I-417, operative part.

a. Traditional Principle of Strict Territoriality

8. The first principle is the ***principle of strict territoriality***. Legal writers explain that the principle is supported by the role played by judicial or other authorities in collective insolvency proceedings. When collective insolvency proceedings are opened, the property and interest of the debtor are administered by creditors. Realization and liquidation of property is an act *jure imperii* of the state.[13] It is also purported that public confidence in the economy is better protected under the principle of territoriality than of universality. Even the principle of *par condicio creditorum* should be better administered under the principle of territoriality as the classification in a determined group of creditors is performed by a single legal set of rules. The last argument is usually the nature of collective insolvency proceedings, as the divestment means a stay of individual enforcement. Such an effect can supposedly only be obtained under the principle of territoriality.[14] Courts or other authorities in a state operating under such a principle will not recognize a foreign collective insolvency proceedings.[15] In other words: the legal person under insolvency proceedings abroad does not lose its ability to administer its assets and dispose of such assets inside such a state. The consequence being that creditors are empowered to initiate enforcements *ut singuli*[16] in this state and thus avoid the consequences of a foreign insolvency. Usually the justification of such an undertaking is that creditors legitimately expect that they would be paid by the assets in their state.[17] As insolvency law is always deemed to be of a compulsory nature (national *jus cogens*) and measures undertaken under such law by a competent court or authority always comprise *acta jure imperii*, the strictly legal rationale of non recognition of effects of a foreign *acta jure imperii* in collective proceedings on a territory of another state operating under the principle of strict territoriality is a principle of sovereign equality of states under international law. The economic rationale is however more interesting. It is purported that the principle of territoriality offers a better way of liquidating the assets in insolvency (i.e. the bankruptcy estate), as it is sold in some sort of open tender or auction under the local law.[18]

9. Historically this principle has been developed as a consequence of purely national proceedings.[19]

b. Principle of Universality: Do European Regulation Actually Adhere to That Principle?

10. However, the development of international trade and in Europe also economic integration have rendered such a system obsolete. Indeed, the achievement of economic aim of insolvency proceedings actually requires their extraterritorial effects.[20] It has been stated by legal writers that large insolvency cases are transformed from a national to transnational issue.[21] The first answer has been the conclusion of bilateral conventions between the states.[22] Indeed it is easy to put assets of an insolvent company abroad and thus avoid *in*

13 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 380.
14 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 380.
15 Cf. Reinhard Bork: Einführung in das Insolvenzrecht, p. 247 and 248.
16 Cf. Elena Neuroni, Francesco Naef: Droit suisse de la faillite internationale: la faillite d'un système, AJP 11/2008, p. 1396 and J.A. Pastor Ridruejo: La faillite en droit international privé, RCADI 133 II (1971), p. 135(159).
17 Cf. Bernard Audit: Droit international privé, p. 653.
18 Cf. Bernard Audit: Droit international privé, p. 653.
19 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 366.
20 J.A. Pastor Ridruejo: La faillite en droit international privé, p. 158.
21 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, 365.
22 Cf. for example Art. 44 of Regulation (EC) No 1346/2000. In that article there is a list of 30 bilateral conventions

fraudem the consequences of an national insolvency if one operates under a strict principle of territoriality. Legal writers have accordingly observed that the principle of strict territoriality is not compatible with the principle *par condicio creditorum,* i.e. the basic principle of any collective insolvency proceedings.[23] Therefore an opposite principle was established, namely the principle of universality. It is argued that the principle of universality is not only supported by the above mentioned principle of *par condicio creditorum* but also by the uniform legal treatment of property belonging to the debtor. If one accepts the principle of unity of property, the collective insolvency proceedings should also adhere to that principle. The last two arguments in support of the principle of universality are the „rapidity of divestment and reintegration in commercial life" if a debtor's property is situated in several states and that a universal realization and liquidation is far more simple than several separate territorial realizations and liquidations.[24]

11. *De facto* the application of this principle concerns two issues; namely the recognition by the forum of the country where assets are of effects of collective insolvency proceedings in opened in another state (so called *universal effect*)[25] and the effects in other countries of collective insolvency proceedings opened in a state.[26] If a competent authority hands down a decision opening collective insolvency proceedings under the universality principle, then all assets worldwide are in insolvency. Such a state considers that that the effects of opening a collective insolvency proceedings operate worldwide and also implicitly that they will be recognized by other states.[27] However, the answer to the question, if such effects will be recognized in other states, is given by the private international law of such other states. In Slovenia the insolvency law refers to private international law. In other words, foreign decisions adopted in non EU states opening collective insolvency proceedings are recognized under conditions that the do not violate Slovenian *ordre public* (in its *a minima* scope). The principle of universality might be restricted by a requirement of reciprocity (as for example in Art. 101(1) Slovenian PIL Act).[28] One could therefore speak of *controlled universality.*[29] As far as the *ordre public* is concerned, even the principles of mutual recognition and of mutual trust do not preclude its application. Under Art. 26 of the Regulation No 1346/2000 any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual. If a decision in insolvency proceedings violates the right to access to a judge meaning that the creditor from another Member State was not able to contest the jurisdiction of the court having handed down the decision, then it cannot be recognized.[30]

12. As far as EU Member States are concerned, the main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States,

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concluded between EU Member States concerning also issues of collective insolvency proceedings. Art. 46(3) contains a commonwealth priviledge in bankcrupy law. Cf also Volken: L'harmonisation du droit international privé de la faillite, p. 367.

23 Cf. Elena Neuroni, Francesco Naef: Droit suisse de la faillite internationale: la faillite d'un système, p. 1397 and Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 378 and 379.

24 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 378 – 380.

25 Cf. Case C-444/07, MG Probud Gdynia [2010] ECR I-417, par. 22.

26 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, 372 and 373.

27 Cf. Reinhard Bork: Einführung in das Insolvenzrecht, p. 247.

28 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 375.

29 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 375.

30 French Court of Cassation (Cour de Cassation), judgment of 15 February 2011 in case 09-71436

without the latter being able to review the jurisdiction of the court of the opening State.[31] However, under Art. 26 of Regulation (EC) No 1346/2000 a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard and the right to be notified of procedural documents.

13. However, perhaps it should be recalled that international legal writing and case law pose four conditions for recognition of effects of a foreign decision opening collective insolvency proceedings in general, namely:
    - the decision opening collective insolvency proceedings must be effective under the law of the forum having opened collective insolvency proceedings, i.e. it shall not be void.
    - the law of the forum of opening of the collective insolvency proceedings does not limit the effects of a collective insolvency proceedings solely to its own territory.
    - judicial or other authorities of the state of opening of the collective insolvency proceedings must have international jurisdiction to hand down a decision in a collective insolvency proceedings,
    - the national *ordre public* does not oppose the recognition.[32]

15. The universality issue is explicitly addressed by Art. 16 of the Regulation (EC) No 1346/2000. The recognition is explicitly required under condition that a decision can be recognized „*from the time that it becomes effective in the state of the opening of proceedings*".

16. It is clear from Regulation (EC) No 1346/2000 that the Member States are required, on a mutual basis, to respect proceedings commenced in any one of them and that the opening of insolvency proceedings in a Member State is to be recognised in all the other Member States and is to produce the effects attributed thereto by the law of the State in which the proceedings are opened. In other words: a decision handed down by a competent judicial or administrative authority opening collective insolvency proceedings must be effective under national lex fori in order to be recognized abroad. It is not important if the decision is final.[33] If an appeal against such a decisions has suspensory effect, then such a decision is not capable of producing effects in all EU Member states. However, due to extremely complicated links between national insolvency law and the mentioned Regulation the *effet utile* of Art. 16(1) of the Regulation (EC) No 1346/2000 can only be achieved if the law applicable *ratione materiae* provides for extraterritorial effects of national collective insolvency proceedings.

17. A foreign insolvency abroad and recognition of effects of a foreign insolvency abroad do not *ipso jure* mean that the foreign courts will liquidate property in the territory of another state, this is up to the *forum* of the state of assets *(lex rei sitae)*. Firstly, universal effects imply that only one court has jurisdiction to hand down a decision opening and closing collective insolvency proceedings. Under the principle of universality assets in other states are in insolvency exactly from the time, when the decision of a national authority opening the collective insolvency proceedings becomes effective, if the effects of a decision opening collective insolvency proceedings have effects abroad. Under rules of international law

31 Case C-341/04 Eurofood IFSC [2006] ECR I-3813, par. 44.

32 Cf. Judgment of the Court of Appeal of Hamburg (*Hanseatisches Oberlandesgericht*) of 17 April 2008 in case 10 U 9/07, paras. 19 – 28 with reference to Geimer, Internationales Zivilprozessrecht, 4th Edition, Cologne, 2001, paras. 3511-3515.

33 Court of Appeal of Koper (Višje sodišče v Kopru), order of 16 February 2007 in case I Cpg 324/2006.

which were explained above, courts and other authorities do not have jurisdiction for liquidating and realizing assets abroad. However, the law of the *forum* of the opening of the collective insolvency proceedings is required to govern the treatment of assets situated in other Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject.[34] If national insolvency law of the forum of the opening of the collective insolvency proceedings does not permit individual enforcement proceedings relating to the pool of assets in the insolvency to be brought against the debtor after insolvency proceedings have been opened, the competent authorities of another Member State cannot validly order, pursuant to their national legislation, enforcement measures relating to assets situated in that state.[35] Therefore one should stress that the secondary insolvency proceedings are a way of conciliation of conflicts created between sovereignty issues and requirements of collective insolvency proceedings covering assets in several countries. Therefore Art. 27 *in fine* of the Regulation (EC) No. 1346/2000 indicates that the effects of secondary insolvency proceedings are restricted to the assets of a debtor within the territory of the state of secondary insolvency proceedings, these latter proceedings must be winding-up proceedings (Art. 3(2) Regulation (EC) No 1346/2000).[36] Indeed, the mechanism providing that only one main set of proceedings may be opened, producing its effects in all the Member States in which the Regulation (EC) No 1346/2000 applies, could be seriously disrupted if the courts of those States, hearing applications based on a debtor's insolvency at the same time, could claim concurrent jurisdiction over an extended period.[37] Because of the universal effect which all main insolvency proceedings must be accorded, the insolvency proceedings opened in a first Member State encompass all of the debtor's assets, including those situated in another Member State, and law of the first Member State determines not only the opening of insolvency proceedings but also their course and closure.[38] Therefore pending national litigation has to be suspended, if foreign collective insolvency proceedings are capable of being recognized.[39]

18. The disadvantages of the principle of universality are actually linked to the classic arguments of public international law. As long as public authority is geographically shared by sovereign states one might not apply universal notions.[40] However the Regulation (EC) No 1346/2000 is a development towards a system which is more open to universality, as one knows that this Regulation is to be „interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State".[41]

III. General problems a creditor is facing when having a foreign insolvent debtor

a. International Jurisdiction: COMI and the Exception of Establishment

34 Case C-444/07, MG Probud Gdynia [2010] ECR I-417, par. 43.
35 Case C-444/07, MG Probud Gdynia [2010] ECR I-417, par. 44.
36 Court of Appeal of Brussels (*Cour d'appel de Bruxelles*), judgment of 17 November 2009 in case 2009/QR/33, par. 12.
37 Case C-341/04 Eurofood IFSC [2006] ECR I-3813, par. 52.
38 Case C-444/07, MG Probud Gdynia [2010] ECR I-417, par. 43.
39 Cf. Judgment of the Court of Appeal of Hamburg of 17 April 2008 in case 10 U 9/07.
40 Cf. Paul Volken: L'harmonisation du droit international privé de la faillite, p. 383
41 Case C-191/10, Rastelli, not yet reported in the ECR, par. 29.

20. The importance of a COMI should be understood under its jurisdictional limb. The worst case scenario is actually the opening of two main international insolvency proceedings. One might refer to the *Maxwell* case referring to concurrent main insolvency proceedings in London and New York and the subsequent Anglo-American lawfare following that case.[42]

21. In *civil law* jurisdictions like Slovenia, the classic position in insolvency law is that national courts do not have jurisdiction to hand down a decision on opening of the collective insolvency proceedings, if the headquarters of a commercial company are in other country, even if such a company has an establishment within the territory of the state of the *forum*.[43] However, the introduction of the term of ***center of a debtor's main interests*** (henceforth: COMI) changed this classic conception. Under Art. 3(1) a court of a Member State within the territory of which is the center of a debtor's main interests shall have jurisdiction. There is a rebuttable presumption (*praesumptio juris tantum*) that the place of registered office corresponds to the center of a debtor's main interests.

22. The European Parliament recently repeated that „the Insolvency Regulation should include a definition of the term 'centre of main interest' formulated in such a way as to prevent fraudulent forum-shopping. The European Parliament suggests that a formal definition should be inserted, based on the wording of Recital 13, which is concerned with the objective possibility for third parties to ascertain it".[44]

23. The issues encountered in legal practice linked to the COMI are: where is actually a COMI? Does a company operating and incorporated in Spain which has its premises and business in Spain and also trades in England and has a head office in London, a COMI in the UK? The answer of English courts (*Enron Directa Limitada Case* in 2002).[45] One might also refer to the *MG Rover* case. The parent UK company filed for insolvency proceedings in the UK under UK law in April 2005. At the same time subsidiaries incorporated under laws of different EU Member States filed for insolvency proceedings in UK under UK law. The English courts concluded that the COMI of each subsidiary is also in the UK and that UK courts have jurisdiction.

24. The above mentioned *praesumptio juris tantum* does not mention any presumption for individuals as debtors. There is especially no presumption that the COMI is linked to the domicile of a physical person. Indeed, as far as individuals are concerned such an interpretation can not be deduced either from the wording or the recitals of the Regulation (EC) No 1346/2000.The determination of a COMI of an individual shall be performed without an *a priori in favor of a domicile of an individual.*[46] However, even if one might agree with the Belgian court's decision, the term 'centre of a debtor's main interests' in Art. 3(1) of Regulation (EC) No 1346/2000 must be interpreted by reference to European Union

42 Christoph G. Paulus: Die ersten Jahre mit der Europäischen Insolvenzverordnung, RabelsZ 70(2006), p. 458(460-461).

43 Court of Appeal of Brussels (*Cour d'appel de Bruxelles*), judgment of 8 April 2004 in case 2003;AR;2003.

44 Document A7-0355/2011, Annex to the motion for a resolution: detailed recommendations as to the content of the proposal requested, Part 1: Recommendations regarding the harmonisation of specific aspects of insolvency and company law, point 2.2.

45 Alexandra Kastrinou: European Corporate Insolvency Law: an Analysis of the Corporate Rescue Laws of France. Greece and the United Kongdom, Thesis submitted in December 2009 at the University of Leicester.

46 Cf. Appelate Court in Labour and Social Matters of Brussels (*Cour du Travail de Bruxelles*), judgment of 17 May 2011 in case 2011/AB/00255, Rep. No. 2011/1442. The Belgian court indicates several elements that might be taken into consideration for determing the COMI of an individual: nationality, family, establishment of an individual, place of registration of a car, place of employment, information od creditors that the debtor is residing in another country.

law.[47] The Belgian appellate court should have referred the case to CJEU.

25. However, an establishment within the territory of the state of the *forum* under Art. 3(2) of the Regulation (EC) No 1346/2000 derogates from the general rule in Art. 3(1) with the exception that insolvency proceedings under the establishment rule do not have universal effect. Indeed, the effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State. Such proceedings are also referred to as secondary proceedings and are restricted to winding-up proceedings. Such proceedings are opened without consideration of the debtor's COMI. Conditions for opening secondary insolvency proceedings can not be replaced by the conditions governing the opening of main insolvency proceedings.[48]

26. It is inherent in the principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction having regard to Article 3(1) of the Regulation (EC) No 1346/2000, i.e. examine whether the centre of the debtor's main interests is situated in that Member State. In that regard, it should be emphasised that such an examination must take place in such a way as to comply with the essential procedural guarantees required for a fair legal process.[49]

27. The notion of establishment is not restricted just for example to building sites. It refers not just to an administrative and managerial activity but also an economic activity really performed in the country of the *forum*.[50]

28. Where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of Regulation (EC) No 1346/2000, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the regulation.

29. If an interested party, taking the view that the centre of the debtor's main interests is situated in a Member State other than that in which the main insolvency proceedings were opened, wishes to challenge the jurisdiction assumed by the court which opened those proceedings, it may use, before the courts of the Member State in which they were opened, the remedies prescribed by the national law of that Member State against the opening decision.[51]

b. What if the debtor moves its COMI?

26. Art. 3(1) of Regulation (EC) No 1346/2000 must be interpreted as meaning that the court of

47 Case C-396/09, Interedil, not yet reported, par. 44.
48 Cf. Bundegerichtshof, Order of 8 March 2012 in case IX ZB 178/11,
49 Case C-341/04 Eurofood IFSC [2006] ECR I-3813, par. 41.
50 Court of Appeal of Brussels (*Cour d'appel de Bruxelles*), judgment of 17 November 2009 in case 2009/QR/33, par. 12.
51 Case C-341/04 Eurofood IFSC [2006] ECR I-3813, par. 43.

the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request but before the proceedings are opened.

c. Lex concursus Forever: Is there no Unity in Substantive Collective Insolvency Law in Europe?

27. One might be surprised that the Regulation (EC) No 1346/2000 does not contain any substantive rules. The case law *prima facie* supports such a finding. The first sentence of Article 43 of Regulation (EC) No 1346/2000 must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. In other words, the Regulation applies the principle of immediate application of procedural law. This might *a contrario* mean that there is no substantive unification. Indeed, according to recital 6 in the preamble to Regulation (EC) No 1346/2000, the regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.

28. Art. 4 of the Regulation (EC) No 1346/2000 refers to the *lex concursus.* Save as otherwise provided in this Regulation, 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. The law of the forum of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. The question is what is the law applicable to insolvency proceedings. In other words, what is the *vis attractiva concursus*?

29. Does the *actio pauliana* fall under the *vis attractiva concursus*? The answer is that Art. 1(1) of Regulation (EC) No 44/2001 must be interpreted as meaning that, an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings, is covered by the concept of civil and commercial matters within the meaning of that provision.[52] Therefore Art. 3(1) of the Regulation (EC) No 1346/2000 must be interpreted as meaning that courts of a Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear an *actio pauliana* against an opposite party that has a place of registered office in another state.[53]

30. Is a state authority empowered under national law to apply for insolvency proceedings covered by the European notion of insolvency law? Some national decisions might induce the impression that national law determines who is the creditor.[54] The term 'creditor' in Art. 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency proceedings, must be interpreted as not including an

52 Case C-213/10, F-Tex SIA, not yet reported, operative part.
53 Bundesgerichtshof, judgment of 19. May 2009 in case IX ZR 39/06.
54 Court of Cassation of France (*Cour de Cassation*), judgment of 13 Septembre 2011.

authority of a Member State whose task under the national law of that State is to act in the public interest, but which does not intervene as a creditor, or in the name or on behalf of those creditors.[55]

31. However, the CJEU has adopted an important substantive finding already in par. 54 of the **Eurtofood** case. Indeed, in the case of a decision handed down based on the debtor's insolvency, where that decision involves divestment of the debtor referred to in Annex C to the Regulation, such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator and the divestment of the debtor, have taken effect.[56]

32. The next breach has then followed in the **Seagon** decision. Art. 3(1) of Regulation (EC) No 1346/2000 must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.[57] Taking into account that intention of the legislature and the effectiveness of the regulation, Art. 3(1) thereof must be interpreted as meaning that it also confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them.[58]

d. Insolvency Law and Privatizations

30. Some countries in transition have excluded certain enterprises foreseen for privatization as incapable of being the subject of collective insolvency proceedings or at least apply special insolvency rules for such enterprises.[59] This is more an issue of state aid regulation than insolvency. However, creditors must also know, if they deal with such enterprises.

e. Duty to inform creditors

31. Under Art. 40 and 42 of the Regulation (EC) No 1346/200 any creditor must be informed of his obligation to lodge a claim. However, consequences for not complying with such information are ruled by national law.[60]

32. The terms of the Regulation (EC) No 1346/2000 do not offer any basis for the interpretation that a foreign creditor represented by a Slovenian attorney is adequately informed of legal consequences of the opening of insolvency proceedings and of his obligation to lodge a claim and the consequences of omitting already by publication on the Slovenian AJPES web page, where information on insolvencies are published. The Regulation has provided for the protection of foreign creditors of a debtor in insolvency regardless of the fact that the creditor has an agent in the state.[61]

55 Case C-112/10, Zaza Retail, not yet reported, operative part.
56 Case C-341/04 Eurofood IFSC [2006] ECR I-3813, par. 54.
57 Case C-339/07, Seagon [2009] ECR I-767, par. 28.
58 Case C-339/07, Seagon [2009] ECR I-767, par. 21.
59 Alexander Trunk: Entwicklungslinien des Insolvenzrechts in den Transformationsländern, RabelsZ 70 (2006), p. 563 (573 and 574).
60 Cour d'appel d'Orléans, judgment of 8 Octobre 2009 in case 07/02272.
61 Court of Appeal of Ljubljana (Višje sodišče v Ljubljani), order of 18 November 2010 in case III Cpg 1322/2010.

e Shall a creditor apply for secondary insolvency ?

33. The procedural simplification and benefit of secondary insolvency proceedings under Chapter III of the Regulation No 1346/2000 is the fact that the judicial authority having jurisdiction over secondary insolvency proceedings is not required to examine if conditions and requirements like insolvency for opening collective insolvency proceedings are fulfilled, as this issue has already been resolved by opening the main insolvency proceedings.[62]

IV. Conclusion

34. In this paper I have not dealt with all questions that a foreign creditor has to answer. I have tried to show that some questions might already be answered by applying classic principles of international law like universality and territoriality. However, the Regulation (EC) No 1346/2000 has starting to introduce new modern legal concepts created by mixed civil-common law doctrine. Therefore, the interpretation is divergent in several jurisdictions. Such a result is far away from satisfactory. This is the main finding when dealing with foreign insolvencies and studying case law.

62 Court of Appeal of Brussels (Cour d'appel de Bruxelles), judgment of 17 November 2011 in case 2009/QR/33, par. 10.