

EUROPEAN INSOLVENCY REGULATION 1346/2000

Practical exercises in implementing the
judicial cooperation instruments in
civil and commercial matters

May, 13 – 15, 2015

Bucharest

HISTORY & BACKGROUND

- ◆ The Treaty Establishing the European Economic Community on 25 March 1957 - committed the member states to negotiating a convention to simplify the formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals.
- ◆ The European Union Convention on Insolvency Proceedings - opened for signature on 23 November 1995; signed by 14 of the 15 members of the EU (the exception being the UK) before the time allowed for signature expired in May 1996.
- ◆ The project was revived under the presidencies of Germany and Finland => Regulation 1346/29 May 2000, coming into force on 31 May 2002.

PRIVATE INTERNATIONAL INSOLVENCY LAW FRAMEWORK

- ◆ UNCITRAL Model Law on Cross-Border Insolvency + Guide (1997) - focuses on 4 elements identified as key to the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation
- ◆ ALI's Transnational Insolvency Project (1995-2000) - main objective - to provide a non-statutory basis for cooperation in international insolvency cases involving two or more of the NAFTA states (US, Canada and Mexico).
- ◆ ALI + III =>The Global Principles for Cooperation in International Insolvency Cases = procedural suggestions for increasing communications between courts and between insolvency administrators in cross-border insolvency cases (used in Nortel Network and Lehman Brothers, 70 insolvency proceedings in 17 countries all over the world)

PRESENT ISSUES

- ◆ EU Insolvency Regulation's initial aims:
 - (a) the proper functioning of the internal market (recital 2)
 - (b) preventing forum shopping (recital 4)
 - (c) improvement of efficiency and effectiveness in cross-border insolvencies
 - (d) harmonized conflict of law rules
- ◆ Shortcomings:
 - inflexible tool
 - no rescue culture
 - lacks alignment with other areas of EU law
 - uncertain / vague terms (COMI, the time of opening of proceedings)
 - recognition of insolvency related judgments
 - communication and cooperation between courts
 - no harmonisation
 - no group provisions

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- ◆ Art. 1 par. 1 - SCOPE (ratione loci, ratione temporis)
 - all MS except DK (may opt-in)
 - applies to cross-border, but intra-EU insolvency proceedings only
 - does not regulate cross-border insolvency proceedings involving MS and non-MS
 - applicable to proceedings opened after 31 May 2002
 - replaces various bilateral conventions and Council of Europe Convention of Istanbul 1990
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 - applicable to proceedings opened after its entry into application
 - replaces various bilateral conventions

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- ◆ C-527/10 – ERSTE BANK Hungary Nyrt
- ◆ Insolvency proceedings against BCL Trading opened in Austria on the 5th of December 2003 (time of the opening of the insolvency proceedings)
- ◆ Hungary becomes MS on the 1st of May 2004
- ◆ Hungarian civil proceedings concerning a right in rem (a security) commenced **on the 27th of January 2006**
- ◆ the money offered as security was situated in Hungary, not yet a MS at the time of the opening of the insolvency proceedings in Austria
- ◆ Art. 43 + art. 16 par. 1 + art. 17 par. 1 EIR : the judgment opening insolvency proceedings in a MS is to be recognized in all other MS from the time it becomes effective in the MS of the opening of the proceedings
- ◆ thus, from the 1st of May 2004, Hungarian courts were therefore required to recognize the Austrian judgment opening proceedings

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- ◆ SCOPE (ratione materiae)
 - ◆ applies to proceedings:
 - collective
 - insolvency (solely)
 - entail total or partial divestment of the debtor
 - a liquidator has been appointed
 - exhaustive list (Annex A)
- ◆ SCOPE (ratione materiae)
 - ◆ applies to proceedings:
 - public, including interim proceedings
 - based on a law relating to insolvency in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
 - a) the debtor is totally or partially divested of his assets **and** an insolvency practitioner has been appointed,
 - b) the assets and affairs of the debtor are subject to control or supervision by a court **or**

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- 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 his creditors, provided that the proceedings in which the stay is granted
 - ◆ provided for suitable measures to protect the general body of creditors
 - ◆ are preliminary to one of the proceedings referred to under a) or b) if no agreement is reached
- proceedings that may be commenced in situations where there is only a likelihood of insolvency, for the purpose of avoiding the debtor's insolvency or the cessation of his business activity
- exhaustive list (Annex A)

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- ◆ SCOPE (ratione materiae)
- ◆ NO limitation in respect of the debtor (natural person, legal entity, consumer, professional etc.)
- ◆ Art. 1 par. 2
- ◆ DOES NOT apply to :
 - insurance undertakings
 - credit institutions
 - investment undertakings which provide services involving the holding of funds or securities for third parties or to collective investment undertakings
 - groups of companies
- ◆ SCOPE (ratione materiae)
- ◆ NO limitation in respect of the debtor (natural person, legal entity, consumer, professional etc.). Special provisions for groups of companies
- ◆ Art. 1 par. 2
- ◆ DOES NOT apply to :
 - insurance undertakings
 - credit institutions
 - investment firms and other firms, institutions or undertakings to the extent these are covered by Directive 2001/24/EC as amended
 - collective investment undertakings

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- ◆ Debatable issues:
 - ◆ proceedings applicable to solvent, but distressed debtors (e.g. *sauvegarde* in France)
 - ◆ varying degrees of divestment of the debtor - 'debtor in possession'
- ◆ Liquidators (Annex C) – temporary liquidators ?
- ◆ New provisions in Art. 2 - Definitions
 - ◆ Extended scope
 - ◆ 'debtor in possession' = debtor in respect of whom insolvency proceedings have been opened which do not necessarily involve the appointment of an insolvency practitioner or the complete transfer of rights and duties to administer the debtor's assets to an insolvency practitioner and where, therefore, the debtor remains totally or partially in control of his assets and affairs
 - ◆ Insolvency practitioner (Annex B)

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- ◆ Debatable issues:
 - ◆ decision opening insolvency proceedings – C-341/04 EuroFood IFSC Ltd = ‘decision handed down by a court of a MS to which application for such a decision has been made, based on the debtor’s insolvency and seeking the opening of proceedings referred to in Annex A, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C. Such divestment implies that the debtor loses the powers of management that he has over his assets
 - ◆ New provisions:
 - ◆ judgment opening insolvency proceedings" includes:
 - (i) the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings, and
 - (ii) the decision by a court appointing an insolvency practitioner.
- (no reference to divestment)

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International jurisdiction – Art. 3 par. 1 + recitals 13, 14

- The courts of the MS within the territory of which the COMI of the debtor is situated shall have jurisdiction to open insolvency proceedings.
- autonomous concept
- No general definition of COMI
- Rebuttable presumption: ‘In the case of a company or a legal person, the place of the registered office shall be presumed to be the COMI in the absence of the proof to the contrary.’

International jurisdiction – Art. 3 par. 1 + recitals 29, 30

- The courts of the MS within the territory of which the COMI of the debtor is situated shall have jurisdiction to open insolvency proceedings (‘main proceedings’).
- autonomous concept
- **Definition:** The COMI shall be the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.

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- ECJ jurisprudence:

- 1) C-341/04 EuroFood IFSC Ltd

Where a debtor is a subsidiary with its registered office in another MS, the presumption 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.

- ◆ COMI of a company (legal person)-rebuttable presumption:

‘The registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. This presumption shall only apply if the registered office has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings.’

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1) C-341/04 EuroFood IFSC Ltd (continuation)

That could be so 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 that Regulation.

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- ◆ 2) C-1/04 Staubitz-Schreiber

The court of 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.

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3) C-396/09 Interedil

A debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted.

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3) C-396/09 Interedil (continuation)

Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State; where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of its new registered office.

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4) C-191/10 Rastelli Davide

Council Regulation (EC) No 1346 /2000 of 29 May 2000 on insolvency proceedings 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.

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- ◆ C-191/10 Rastelli Davide
- ◆ (continuation)
- ◆ Regulation No 1346/2000 is to be interpreted as meaning that, in the above mentioned situation, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is the place of the registered office, it is necessary that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened.

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- ◆ COMI of a professional (natural person)- rebuttable presumption:
‘In the case of an individual exercising an independent business or professional activity, the centre of main interests shall be presumed to be that individual's principal place of business in the absence of proof to the contrary. This presumption shall only apply if the individual's principal place of business has not been moved to another Member State within a period of 3 months prior to the request for the opening of insolvency proceedings.’

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- ◆ COMI of any other individual (natural person)- rebuttable presumption:

In the case of any other individual, the centre of main interests shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This presumption shall only apply if the habitual residence has not been moved to another Member State within a period of 6 months prior to the request for the opening of insolvency proceedings.

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- ◆ International jurisdiction – Art. 3 par. 2 – **Territorial proceedings**
- ◆ Where the COMI of a debtor is situated within the territory of a MS, the courts of another MS shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses **an establishment** within the territory of that other MS. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
- ◆ International jurisdiction – Art. 3 par. 2 - **Territorial proceedings**
- ◆ Where the COMI of a debtor is situated within the territory of a MS, the courts of another MS shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses **an establishment** within the territory of that other MS. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

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- ◆ C-396/09 Interedil

The term 'establishment' within the meaning of Article 3(2) of Regulation No 1346/2000 must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity. The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.

- ◆ Art. 2 par. 10

Def: "establishment" means any place of operations where the debtor carries out or has carried out in the three months prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets;

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- ◆ International jurisdiction – Art. 3 par. 3, 4
 - ◆ If insolvency proceedings open under par. 1, all proceedings opened subsequently under par 2 => secondary proceedings and must be winding-up proceedings
 - ◆ Territorial proceedings (par. 2) may be opened prior to opening of the main proceedings **only if:**
 - 1) Par. 1 proceedings cannot be opened because of the law of the MS in which COMI is situated
 - 2) creditor with domicile in MS where establishment is situated or whose claims arises from operations of the establishment requires
- ◆ International jurisdiction – Art. 3 par. 3, 4
 - ◆ If insolvency proceedings open under par. 1, all proceedings opened subsequently under par 2 => secondary proceedings
 - ◆ Territorial proceedings (par. 2) may be opened prior to opening of the main proceedings **only if:**
 - 1) Par. 1 proceedings cannot be opened because of the law of the MS in which COMI is situated
 - 2) there is a request from creditor whose claims arises from / is in connection with operations of the establishment OR from public authority in MS where establishment is situated that has the right to request

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- ◆ Art. 4 Examination as to jurisdiction
- ◆ **The court** – of its own motion + shall specify the grounds on which the jurisdiction is based, especially Art. 3 par. 1 or par. 2
- ◆ Where national law does not require a court decision, MS may entrust **the IP** appointed to examine if MS has jurisdiction according to Art. 3, IP's decision shall specify the grounds as above.

- ◆ Art. 5 Judicial review of **decision to open main proceedings**
- ◆ Debtor and creditors may **challenge decision before a court on grounds of int'l jurisdiction**
- ◆ Other parties may challenge on other grounds if national law so provides.

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- ◆ No provisions
- ◆ ECJ jurisprudence: (relationship between Reg. 1346/2000 and Reg. 44/2001)
- ◆ 1) C-339/07 Deko Marty
‘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’
- ◆ Art. 6 par. 1 Jurisdiction for actions which derive directly from the insolvency proceedings and are closely linked with them
- ◆ Rule: The courts of the MS where insolvency proceedings have been opened under Art. 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and are closely linked with them, **such as avoidance actions**

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- ◆ 2) C-328/12 Ralph Schmid

The courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to hear and determine an action to set a transaction aside by virtue of insolvency that is brought against a person whose place of residence is not within the territory of a Member State.

- ◆ Art.6 par. 2

If an action under par. 1 is related to another action (civil or commercial) against the same defendant, the IP may bring both actions in the courts of the MS within the territory of which the defendant is domiciled, provided that these courts have jurisdiction pursuant to the rules of Regulation (EU) No 1215/2012.

The same shall apply to the debtor in possession, if he is able under national law to bring actions on behalf of the insolvency estate.

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- ◆ 3)C-111/08 SCI Industri
- ◆ An action to invalidate a transfer of shares effected in the context of insolvency proceedings on the ground that the liquidator who made the transfer lacked the power to dispose of assets situated in that Member State, falls under the exception in Article 1(2)(b) of Regulation 44/2001 (ECJ held that Regulation 1346/2000 was inapplicable *ratione temporis*)
- ◆ For the purpose of par. 2, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

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- ◆ YET, in C-213/10 F-Tex SIA, ECJ held 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 Art. 1 par. 1 of Reg. 44/2001 and does not fall within the scope of Reg. 1346/2000.

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- ◆ Similarly, in C-292/08 German Graphics, ECJ held that an action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of title is situated in the MS of the opening of those proceedings at the time of opening of those proceedings against that purchaser is not covered by the The exception provided for in Art. 1 par. 2 let. b) of Reg. 44/2001, read in conjunction with Art. 7 par. 1 of Reg. 1346/2000

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- ◆ Art. 4 Law applicable (both procedural and substantive)

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, hereafter referred to as the ‘State of the opening of proceedings’.

The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure.

Art. 4 par. 2 a-m is a non exhaustive list

- ◆ Art. 7 Law applicable (both procedural and substantive)

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, hereafter referred to as the ‘State of the opening of proceedings’.

The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure.

Art. 7 par. 2 a-m is a non exhaustive list

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- ◆ Exceptions (carve-outs) – Art. 5-15:
 - third parties' rights *in rem*
 - set-off
 - reservation of title
 - contracts relating to immovable property
 - payment systems and financial markets
 - contracts of employment
 - effects on rights subject to registration
 - community patents and trade marks
 - detrimental acts
 - protection of third-party purchasers
 - effects on insolvency proceedings on pending lawsuits
- ◆ Exceptions (carve-outs) – Art. 8-18:
 - third parties' rights *in rem*
 - set-off
 - reservation of title
 - contracts relating to immovable property
 - payment systems and financial markets
 - contracts of employment
 - effects on rights subject to registration
 - community patents and trade marks
 - detrimental acts
 - protection of third-party purchasers
 - effects on insolvency proceedings on pending lawsuits

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- ◆ NEW PROVISIONS:
- ◆ Art. 8 par. 2 Contracts relating to immovable property

The court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where (a) the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings and (b) no insolvency proceedings have been opened in that Member State.

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- ◆ NEW PROVISIONS:

- ◆ Art. 11 par. 2 Contracts of employment

The courts of the Member State in which secondary proceedings could be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State.

The same shall apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article.

- ◆ Art. 18 The effects of insolvency proceedings on lawsuits have been extended to arbitral proceedings

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- ◆ Recognition of insolvency proceedings
 - ◆ Principle: Any judgment opening insolvency proceedings handed down by a court of a MS which has jurisdiction pursuant to Article 3 shall be recognised in all the other MS from the time that it becomes effective in the State of the opening of proceedings.
- ◆ Recognition of insolvency proceedings
 - ◆ Principle: Any judgment opening insolvency proceedings handed down by a court of a MS which has jurisdiction pursuant to Article 3 shall be recognised in all the other MS from the time that it becomes effective in the State of the opening of proceedings.

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- ◆ Effects of recognition:
 - ◆ 1) The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings
 - ◆ 2) The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States
- ◆ Effects of recognition:
 - ◆ 1) The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings
 - ◆ 2) The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States

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- ◆ ECJ jurisprudence
- ◆ 1) C-444/07 MG Probud Gdynia sp. zoo
Reg. 1346/2000, in particular Art. 3, 4, 16, 17 and 25, must be interpreted as meaning that... after the main insolvency proceedings have been opened in a MS, the competent authorities of another MS, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Art. 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings

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- ◆ 1) C-444/07 MG Probud Gdynia sp. Zoo (continuation)
...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.

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- ◆ Recognition and enforceability of other judgments – Art. 25
- ◆ Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2) of the Brussels Convention (1968).

- ◆ Recognition and enforceability of other judgments – Art. 32

Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 19 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 39 to 57, with the exception of Articles 45 and 46 of Regulation (EU) No 1215/2012.

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- ◆ The first subparagraph shall also apply to:
 - judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court
 - judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.
- ◆ The first subparagraph shall also apply to:
 - judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court
 - judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

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- ◆ The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1 provided that the Convention is applicable.
- ◆ The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Regulation referred to in paragraph 1 provided that the Regulation is applicable.

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- ◆ The liquidator (powers, proof of appointment)
- ◆ The appointment – evidenced by a certified copy of the original decision appointing him OR any other certificate issued by the court which has jurisdiction
- ◆ The liquidator may exercise all powers conferred to him by the law of the MS of the opening of the proceedings in another MS... he may, in particular, remove the debtor's assets from the territory of the MS in which they are situated
- ◆ The IP (powers, proof of appointment)
- ◆ The appointment – evidenced by a certified copy of the original decision appointing him OR any other certificate issued by the court which has jurisdiction
- ◆ The IP may exercise all powers conferred to him by the law of the MS of the opening of the proceedings in another MS...
- ◆ Those powers may not include coercive measures, unless ordered by a court of the MS within the territory of which he intends to take action, or the right to rule on legal proceedings or disputes.

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- ◆ Art. 24 -Establishment of insolvency registers
 - MS shall establish and maintain in their territory one or several registers in which information concerning insolvency proceedings is published. The information shall be published as soon as possible after the opening of such proceedings.
 - Mandated information (par. 2)
 - MS not obliged to include information concerning individuals not exercising an independent business or professional activity, nor to make such information publicly available, through the system of interconnection, provided that foreign known creditors are informed.
 - Art. 25 – Interconnection of insolvency registers.
 - The system: insolvency registers + European e-Justice Portal (central public electronic access point)

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- ◆ Secondary insolvency proceedings
- ◆ Opening (art. 27)
- ◆ The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction proceedings. pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State.

- ◆ Secondary insolvency proceedings
- ◆ Opening (art. 34)
- ◆ Where main proceedings have been opened by a court of a Member State and recognised in another Member State, a court of another Member State which has jurisdiction pursuant to Article 3(2) may open secondary insolvency proceedings.

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- ◆ These latter proceedings must be among the proceedings Article 25 listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.
- ◆ Where the main proceedings required that the debtor is insolvent, the debtor's insolvency shall not be re-examined in the MS where secondary proceedings may be opened.
- ◆ The effects of secondary proceedings shall be restricted to the assets of the debtor situated within the territory of the MS where those proceedings have been opened.

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Art. 28 - Applicable law

The law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Art. 29 – Right to request the opening of proceedings

- the liquidator in the main proceedings
- any other person or authority empowered to request the opening of insolvency proceedings under the law of the MS where it is requested.

Art. 35 - Applicable law

The law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Art. 37 – Right to request the opening of proceedings

- the IP in the main proceedings
- any any other person or authority empowered to request the opening of insolvency proceedings under the law of the MS within the territory of which the opening of secondary proceedings is requested.

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- ◆ ECJ jurisprudence
- ◆ 1) C-116/11 Bank Handlowy
Article 27 of Reg.
1346/2000 must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the MS in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

- ◆ NEW PROVISIONS:
- ◆ Art. 36 – Right to give an undertaking in order to avoid secondary proceedings

The IP in the main proceedings may give a unilateral undertaking in respect of the assets located in the MS in which secondary proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, he will comply with the distribution and priority rights under national law that creditors would have if secondary proceedings were opened in that MS.

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- ◆ 1) C-116/11 Bank Handlowy (continuation)
- ◆ Art. 27 of Reg. 1346/2000 must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.
- ◆ The undertaking shall specify the factual assumptions on which it is based, in particular with respect to the value of the assets located in the MS concerned and the options available to realise such assets.
- ◆ The law applicable to the distribution of proceeds from the realisation of assets referred to in paragraph 1, the ranking of creditors' claims and the rights of creditors in relation to the assets referred to in paragraph 1 shall be the law of the Member State in which secondary proceedings could have been opened.

REG. 1346/2000 / RECAST VERSION

- ◆ 2) C-112/10 Zaza Retail BV
- ◆ The expression ‘conditions laid down’ in Art. 3(4)(a) of Reg. 1346/2000, which refers to conditions, which, under the law of the Member State where the debtor has the centre of its main interests, prevent the opening of main insolvency proceedings in that State, must be interpreted as not referring to conditions excluding particular persons from the category of persons empowered to request the opening of such proceedings.
- ◆ The relevant point in time for determining the assets referred to in paragraph 1 shall be the moment when the undertaking is given.
- ◆ The undertaking
 - shall be made in the official language or one of the official languages of the Member State where secondary proceedings could have been opened
 - shall be made in writing. It shall be subject to other form requirements, if any, and approval requirements as to distributions, if any, of the State of the opening of the main proceedings.

REG. 1346/2000 / RECAST VERSION

- ◆ 2) C-112/10 Zaza Retail BV (continuation)

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 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.

- ◆ The undertaking shall be approved by the known local creditors. The rules on qualified majority and voting that apply for the adoption of restructuring plans under the law of the Member State where secondary proceedings could have been opened shall also apply for the approval of the undertaking. ...

- ◆ The insolvency practitioner shall inform the known local creditors of the undertaking, the rules and modalities for its approval and of the approval or rejection of the undertaking.

REG. 1346/2000 / RECAST VERSION

- ◆ The undertaking given and approved in accordance with this Article shall be binding on the estate.
- ◆ If secondary proceedings are opened in accordance with Art. 37 and 38, the insolvency practitioner in the main proceedings shall transfer any assets which he removed from the territory of that Member State after the undertaking has been given or, in case these assets have already been realised, their proceeds, to the insolvency practitioner in the secondary proceedings.

REG. 1346/2000 / RECAST VERSION

Where the insolvency practitioner has given an undertaking, he shall inform local creditors about the intended distributions prior to distributing the assets and proceeds referred to in par. 1.

If the information does not comply with the terms of the undertaking or the applicable law, any local creditor may challenge such distribution before the courts of the Member State in which main proceedings have been opened in order to obtain a distribution in accordance with the terms of the undertaking and the applicable law. In such case, no distribution shall take place until the court has taken a decision on the challenge.

REG. 1346/2000 / RECAST VERSION

Local creditors may apply to the courts of the **MS in which main proceedings have been opened** in order to require the insolvency practitioner in the main proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the Member State of the opening of main proceedings.

Local creditors may also apply to the courts of the Member State in which secondary proceedings would have been opened in order to require the court to take provisional or protective, measures to ensure compliance by the insolvency practitioner with the terms of the undertaking.

The insolvency practitioner shall be liable for any damage caused to local creditors as a consequence of his non-compliance with the obligations and requirements set out in Art. 36

REG. 1346/2000 / RECAST VERSION

Art. 38 Decision to open secondary proceedings

The court seized of a request to open secondary proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession in the main proceedings and give him an opportunity **to be heard on the request.**

Where the insolvency practitioner in the main proceedings has given an undertaking in accordance with Art. 36, the court referred to in paragraph 1 shall, at the request of the insolvency practitioner, not open secondary proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

REG. 1346/2000 / RECAST VERSION

Where a temporary stay of individual enforcement proceedings has been granted in order to allow for negotiations between the debtor and his creditors, the court, at the request of the insolvency practitioner or the debtor in possession, may stay the opening of secondary proceedings for a period not longer than three months, provided that suitable measures are in place to protect the interests of local creditors.

The court may order protective measures to protect the interest of local creditors by requiring the insolvency practitioner or the debtor in possession not to remove or dispose of any assets which are located in the MS where his establishment is located unless this is done in the ordinary course of business. The court may also order other measures to protect the interest of local creditors during a stay unless this is incompatible with the national rules on civil procedure.

REG. 1346/2000 / RECAST VERSION

The stay of the opening of secondary proceedings shall be revoked by the court of its own motion or at the request of any creditor if during the stay an agreement in the negotiations referred to in the first subparagraph has been concluded.

The stay may be revoked by the court of its own motion or at the request of any creditor if the continuation of the stay is detrimental to the creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded or if the insolvency practitioner or the debtor in possession infringed the prohibition to dispose of his assets or to remove them from the territory of the Member State where the establishment is located.

REG. 1346/2000 / RECAST VERSION

At the request of the insolvency practitioner in the main proceedings, the court referred to in paragraph 1 may open a type of insolvency proceedings referred to in Annex A other than the one initially requested provided that the conditions for opening this other type of procedure under national law are fulfilled and that this procedure is the most appropriate taking account of the interests of the local creditors and of coherence between the main and secondary insolvency proceedings.

Where the main proceedings required that the debtor is insolvent, the debtor's insolvency shall not be re-examined in the MS where secondary proceedings may be opened.

REG. 1346/2000 / RECAST VERSION

Art. 39 - Judicial review of the decision to open secondary proceedings

The insolvency practitioner in the main proceedings may challenge the decision to open secondary proceedings before the courts of the MS where secondary proceedings have been opened, on the ground that the court did not comply with the conditions and requirements of Art. 38.

REG. 1346/2000 / RECAST VERSION

Art. 31

Co & Co

Duty to cooperate and exchange information

- liquidator in the main proceedings
- liquidators in the secondary proceedings

The insolvency practitioner in the main proceedings and the insolvency practitioner or practitioners in secondary proceedings concerning the same debtor shall **cooperate** with each other **to the extent such cooperation is not incompatible with the rules applicable to the respective proceedings**. Such cooperation may take any form, including the conclusion of agreements or protocols.

This rule shall apply *mutatis mutandis* to situations where, in the main or in the secondary insolvency proceedings or in one of the territorial insolvency proceedings concerning the same debtor and opened at the same point in time, the debtor remains in possession of his assets.

REG. 1346/2000 / RECAST VERSION

Co & Co

In order to facilitate the coordination of main and territorial or secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending or which has opened such proceedings shall cooperate with any other court before which insolvency proceedings are pending or which has opened such proceedings to the extent such cooperation is not incompatible with the rules applicable to each of the proceedings. For this purpose, the courts may, where appropriate, appoint an independent person or body acting on its instructions, provided that this is not incompatible with the rules applicable to them.

REG. 1346/2000 / RECAST VERSION

Co & Co

In order to facilitate the coordination of main, territorial and secondary insolvency proceedings opened with respect to the same debtor,

(a) an IP in main proceedings shall cooperate and communicate with any court before which a request to open secondary proceedings is pending or which has opened such proceedings;

(b) an IP in territorial or secondary insolvency proceedings shall cooperate and communicate with the court before which a request to open main proceedings / other territorial or secondary proceedings is pending or which has opened such proceedings

to the extent that cooperation and communication are not incompatible with the rules applicable to each of the proceedings and do not entail any conflict of interests.

REG. 1346/2000 / RECAST VERSION

- ◆ Art. 32 Exercise of creditors' rights
- ◆ Art. 33 Stay of liquidation
- ◆ Art. 34 Measures ending secondary insolvency proceedings
- ◆ Art. 35 Assets remaining in the secondary proceedings
- ◆ Art. 36 Subsequent opening of the main proceedings
- ◆ Art. 37 Conversion of earlier proceedings
- ◆ Art. 38 Preservation measures
- ◆ Art. 45 Exercise of creditors' rights
- ◆ Art. 46 Stay of the process of realisation of assets
- ◆ Art. 47 Power of the IP to propose restructuring plans
- ◆ Art. 48 Impact of closure of insolvency proceedings
- ◆ Art. 49 Assets remaining in the secondary proceedings
- ◆ Art. 50 Subsequent opening of the main proceedings
- ◆ Art. 51 Conversion of secondary proceedings
- ◆ Art. 52 Preservation measures

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- ◆ Art. 39 Right to lodge claims
- ◆ Art. 40 Duty to inform creditors
- ◆ Art. 41 Content of a lodgement of a claim
- ◆ Art. 42 Languages
- ◆ Art. 53 Right to lodge claims
- ◆ Art. 40 Duty to inform creditors
 - standard form for lodging the claim
 - standard notice form, published in the European e-Justice
- ◆ Art. 55 Procedure for lodging claims

REG. 1346/2000 / RECAST VERSION

Insolvency proceedings of members of a group of companies

- ◆ Art. 56 to 58 Co & Co: IPs to IPs, courts to courts, IPs to courts
- Powers of the IPs in proceedings concerning members of a group of companies:
 - to be heard in any proceedings with respect to any other member of the same group
 - request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to any other member of the same group if a restructuring plan for all / some members of the group has been proposed + other conditions are met
 - apply for the opening of group coordination

REG. 1346/2000 / RECAST VERSION

Insolvency proceedings of members of a group of companies

- Coordination -

- may be requested **at any court having jurisdiction** over the insolvency proceedings of a member of a group by an IP appointed in insolvency proceedings opened in relation to a member of the group; a coordinator is proposed and an outline of the proposed group coordination
- priority rule: when coordination proceedings is requested at courts of different MS, any court than the court first seised shall decline jurisdiction in favour of that court (exception Art. 66)
- court gives notice to all IPs appointed in relation to the members of the group
- Any IP may object to the inclusion of his proceedings in the group coordination proceedings or to the person proposed as coordinator => his proceedings are not included in the group coordination proceedings

REG. 1346/2000 / RECAST VERSION

Insolvency proceedings of members of a group of companies

- Coordination -

- ◆ If the court decides to open group coordination proceedings :
 - appoints a coordinator
 - decides on the outline of the coordination
 - decides on the estimation of costs and the share to be paid by the group members
- ◆ Any IP may opt-in for the inclusion of his proceedings in the group coordination proceedings; the decision on the opt-in rests with the coordinator. The coordinator's decision may be challenged under the law of the MS where group coordination proceedings have been opened.
- ◆ Coordinator issues recommendations to the IPs; The IPs may not follow them if providing adequate reasons to the person / body IP reports to under his national law
- ◆ The court, of its own motion or at the request of any IP of a participating group member may revoke the coordinator if the coordinator acts to the detriment of the creditors of a participating group member or the coordinator fails to comply with his obligations.

REG. 1346/2000 / RECAST VERSION

- ◆ Chapter VI – Data protection
- ◆ Chapter VII Transitional and final provisions
 - Art. 84 – The provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into application. Acts done by a debtor before the entry into application of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done.
 - Notwithstanding Article 90 [that repeals Reg. 1346/2000], Regulation 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened before [the date of entry into application of the recast regulation]

THANK YOU AND GOOD BYE !

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