

*Centre for Business Law and Practice*  
*School of Law*  
*University of Leeds*

**ANNUAL REPORT**  
**2012 – 2013**

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## **1. ABOUT THE CENTRE, THE UNIVERSITY AND THE CITY**

### **1.1 THE CENTRE**

The Centre for Business Law and Practice (the 'Centre') is located in the School of Law (part of the Faculty of Social Sciences, Education and Law) at the University of Leeds. The School of Law is situated next to the Business School, in the brand new purpose built Liberty building, which is equipped with two Postgraduate Common Rooms - one for taught postgraduate students and one for research degree students, a Moot Court Room, and modern well equipped seminar rooms.

The Centre is a leading research centre in corporate and financial law. It is large and well-established, with presently eighteen members, including six full professors. Our members have established international reputations in the broad field of business law, and in particular in corporate and financial law.

The Centre promotes all forms of research, including doctrinal, theoretical (including socio-legal) and empirical research. Its work is disseminated as widely as possible by publishing monographs, articles, reports, and through regular seminars and high profile conferences which engage with both the academic community, the legal profession, policy-makers and regulators.

Members' research is regularly cited by the courts and referenced by policy makers. Staff members have acted as consultants to law firms, accounting bodies, national law reform bodies and government departments in various countries, and international organisations such as the International Monetary Fund, the World Bank and Transparency International.

The Centre has strong international connections which include the Centre for Economic Law Vrije Universiteit of Brussels; the Centre for Markets, Law and Regulation, University of New South Wales; the Centre for Corporate and Commercial Law, National University of Jodhpur, and East China University of Political Science and Law, Shanghai.

It has links with the Leeds University Business School (LUBS) and with the local and national business community and profession. It is a member of the Leeds Professional Services Hub, based in LUBS.

## **1.2 TAUGHT POSTGRADUATE PROGRAMMES**

These include:

**LLM International Banking and Finance Law**

**LLM International Business Law**

**LLM International Corporate Law**

**LLM International Trade Law**

**LLM Intellectual Property Law**

**MSc Law and Finance**

All postgraduate programmes are available on a full-time and part-time basis.

Postgraduate Diplomas are also available. These do not require the completion of a dissertation.

In all the programmes, the modules are taught by seminars, and there are two 11 week semesters in each academic year. Assessments are by written work.

We have a large postgraduate student cohort with a high proportion coming from outside the United Kingdom. One of the strengths of our programmes is that students come to study at Leeds from a wide range of countries and bring a broad range of experience and diverse perspectives.

The LL.M. programmes involve the completion of taught modules totalling 120 credits that are taken in Semesters 1 and 2. Some modules are compulsory (this varies between programmes) and the others are optional modules chosen from a long list of available subjects. The final stage of the programme is a dissertation (worth 60 credits) being completed in the Summer, following Semester 2. The programme consists of 180 credits in total.

The compulsory modules consist of modules which are believed to form a critical base for the study of business law, nationally and internationally. Students have a

broad choice when it comes to the optional modules, and this reflects the breadth of expertise in the Centre.

The dissertation, constituting 60 credits, is compulsory and forms a major part of the programmes, and reflects one of the aims of the programme, namely to foster research capabilities. The dissertation requirement permits students to engage in some detailed research of a particular issue that warrants investigation. Research for, and the writing of, the dissertation is undertaken in conjunction with a supervisor, who is a member of the Law School staff. The members of the Law School staff have a wide range of research interests and are able to supervise a broad spectrum of topics in different areas of the law.

The overall objective of this programme is to provide students with a firm grounding in many of the basic principles and rules regulating business activity in the UK, Europe and around the world. The programme also aims to enable students to develop the following: analytical legal skills, ability to work independently, writing skills, and ability to undertake research.

### **1.3 UNDERGRADUATE TEACHING**

While the Centre does not directly run any undergraduate programmes, it makes a very important contribution to teaching of the Bachelor of Laws (LLB) degree, in particular. The Centre has developed modules that are taught to both law and non-law undergraduates. These modules have been very popular with students, and have attracted good enrolments. The modules that are taught in the Bachelor of Laws programme (although students from other programmes with the necessary prerequisites can enrol for them) are Commercial Law, Company Law, Banking and Financial Services Law, Intellectual Property Law, Corporate Finance and Insolvency. Members of the Centre also either act as leaders, or contribute to the teaching, of the following modules: Law of Contract, International Law, Equity and Trusts, Constitutional Law, and Medical Law. Offerings to non-law students include Introduction to Company Law and Introduction to Obligations.

## **1.4 RESEARCH POSTGRADUATES**

The Centre for Business Law and Practice has a diverse range of students enrolled for research degrees in a number of areas, including corporate law, banking and finance, insolvency and international trade law. Each postgraduate student receives high quality supervision from two academics who are trained and experienced supervisors as well as being experts in the particular field of research. In addition, students are provided with formal research methods training.

The Centre for Business Law and Practice welcomes applications from students wishing to pursue research into any aspect of business and commercial law. The Centre has particular expertise in the following areas: contract law; corporate law – especially corporate governance, the role and duties of company directors, corporate insolvency law, corporate rescue, corporate finance; all aspects of insolvency law; insider dealing; banking and financial services law; economic crime including anti money-laundering and terrorist financing; Islamic banking law; credit; law relating to security; intellectual property; international economic law; consumer law including consumer credit; the role and duties of corporate lawyers and environmental law.

All relevant proposals within the broad remit of business law will be considered and even if the proposed research topic is not listed above it may be worth contacting the Director to discuss whether research supervision would be available.

The degree schemes on offer by research and thesis only are as follows:

- Master of Laws (LLM) – one year full-time or two years part-time
- Master of Philosophy (MPhil) – two years full-time or four years part-time
- Doctor of Philosophy (PhD) – three years full-time or five years part-time
- Integrated PhD – four years full-time (not available part-time). This new degree combines taught classes and the traditional research thesis, with an exit award of LLM Legal Research after the students complete the first two years.

The entrance requirements for all schemes are that applicants must normally possess an upper second class honours degree or equivalent. Applicants with professional qualifications or substantial professional experience are also encouraged to apply. In addition, MPhil and PhD applicants are usually required to hold a Masters level qualification.

Informal enquiries from applicants are welcome. Please contact Karin Houkes, Postgraduate Admissions Tutor, [lawpgadm@leeds.ac.uk](mailto:lawpgadm@leeds.ac.uk) or Tel: 0113 3435009.

The following is a list of Research Students in the Centre for Business Law and Practice (as at October 2013)

<u>Moosa AlAzri</u>	Foreign Investment in the Sultanate of Oman: Legal Challenges
<u>Abdulaziz Aleid</u>	The law of Finance Lease Contracts in Saudi Arabia
<u>Ayman Alharbi</u>	The Board of Directors and Corporate Governance in Saudi Arabia
<u>Bashayer Almajed</u>	Contract Law in Kuwait: A Comparative Analysis
<u>Muath Almajed</u>	Islamic Project Finance in Saudi Arabia
<u>Yousef Almutairi</u>	Regulating Electronic Transactions in the State of Kuwait
<u>Abdullah Al-Oraini</u>	Disclosure and Corporate Governance in Saudi Arabia

<u>Rakan Alrdaan</u>	Supervening Impossibility and Saudi Arabian Law of Contract
<u>Abdullah Alshebli</u>	Securities law in Kuwait
<u>Sulaiman Alsuhaibani</u>	The Development of Anti Suit Injunctions with particular reference to Saudi Arabia
<u>Maryam Alsuwaidi</u>	Capital Markets Law in UAE and KSA
<u>Hussam Ibrahim Fallatah</u>	Consumer Protection in Saudi Arabia: A Comparative Study
<u>Jeremy Harmer</u>	Internet Privacy
<u>Marina Himoni</u>	European Consumer Law: A Law for the Consumer or the Internal Market? The Case of the Consumer Rights Directive and its application to the UK and Cypriot Regimes
<u>Jae Young Lee</u>	Fair and Equitable Treatment Standard in GATT
<u>Zhihui Li</u>	Executive Remuneration in Companies
<u>Chin-Lan Lo</u>	National Regulatory Autonomy and the WTO
<u>Lerong Lu</u>	A Comprehensive Financial Regulatory System in China: From Private Lending to Banking
<u>Harald Martinsen</u>	Corporate Governance and Sovereign Wealth Funds

<u>Adekemi Omotubora</u>	E-Commerce Crimes - What is at Stake for Developing Economies? Nigeria as a Case Study
<u>Marjan Parkinson</u>	Corporate Governance and Insolvent Companies
<u>Julie Pole</u>	The impact of the Legal Services Act 2007 on barristers
<u>Michael Randall</u>	A Financial Transactions Tax and Theories of European Integration
<u>Josiah Gershon De-Graft Quansah</u>	Basel Compliance in Banks in Ghana and Kenya
<u>Sarah Zaghloul</u>	Arbitration and Investor Protection in Saudi Arabian Corporate Governance

## **1.5 THE UNIVERSITY**

The University of Leeds is among the United Kingdom's top universities, located close to the centre of one of the most progressive, cosmopolitan and student-friendly cities in the United Kingdom. One of the largest single site universities, Leeds is a hugely popular choice for students. With over 30,000 students living in the city, it regularly tops the national polls as a favourite destination for students.

Established in 1904, the University is a member of the Russell Group, which was formed by nineteen of the country's most prestigious universities. With a world class reputation for quality in research and teaching, a degree from the University of Leeds, both undergraduate and postgraduate, is highly regarded by employers and universities worldwide.

The University has over many years invested heavily in its infrastructure to provide students with first-class learning, development, support and leisure facilities, including modern well-equipped lecture theatres and seminar rooms, an internationally acclaimed University library, an enterprising careers service, a wide range of sporting amenities and one of the biggest and most active Students' Unions in the country.

The University is one of the main centres for postgraduate teaching in the country, with around 5,000 postgraduate students drawn from all over the UK and another 100 countries world-wide. The new Law School Building (opened January 2011) is a state of the art building situated next to the University of Leeds Business School. It has dedicated postgraduate facilities and, as a University of Leeds postgraduate research student, one will have access to the full range of university services including our major academic research library and excellent computing facilities.

## **1.6 THE CITY OF LEEDS**

Only a short walk from the bustling shops, boutiques, art galleries, cinemas, bars, restaurants and cafes of the city centre, the University campus is a vibrant place in which to live and study. Leeds is one of the fastest growing cities in the United Kingdom. As a law, finance, business and media centre, the city offers great employment potential. This is complemented by an exciting mix of culture, commerce and style, making Leeds the primary social hub of the North of England. Rich in history with a growing economy and cosmopolitan atmosphere, Leeds remains an affordable student-friendly city and the centre of a region of great cultural diversity. It is very well connected transport-wise to the rest of the UK being 2 ½ hours from London (train) and around an hour from Manchester.

Leeds is a '24 hour city' that is famous for the diversity and popularity of its nightlife. The city prides itself on the vitality of its 'independent' bar scene, whilst its nightclubs offer a sophisticated and relaxed clubbing experience with a wide range of music and ambiances to suit all tastes. It is home to a wide variety of theatre, music, film and music venues including the legendary University Refectory. The annual Leeds Film Festival is also one of the leading cinema events in the country.

## 2. OVERVIEW

This report covers the activities of the the Centre during the period from 1<sup>st</sup> October 2012 to 30<sup>th</sup> September 2013. Yet again this has been a very productive year for the Centre in terms of activity of staff, research, research outcomes and growth of its postgraduate student community. Dr Sarah Brown and Dr Michael Galanis provided support throughout the year to the Centre's activities in their role as deputy Directors of the Centre. At the end of the period Professor Joan Loughrey stepped down as Director of the Centre to become Deputy Head of the School of Law. She was replaced as Director of the Centre by Gerard McCormack. Special thanks are due to Joan Loughrey for her wonderful efforts over the past few years.

This year we were delighted to welcome a new member of the Centre, Dr Qi (George) Zhou, whose research interests are in commercial law with particular reference to contract law and the influence of behavioural law and economics on ways of thinking about contract law. George replaced David Campbell who has moved on to pastures new but continues his research collaboration with some members of the Centre.

The Centre also welcomes three existing colleagues from the School of Law – Graham Dutfield, Subhajt Basu and Cesar Ramirez-Montes. These colleagues will be associated with the Centre along with their existing affiliation to the Centre for International Governance.

The Centre continues to expand the scope of its activities, and this has been very much in evidence during the past year. In particular the Centre has continued to develop its research profile particularly in those areas where it already has considerable expertise:

- Corporate law - with special emphasis on corporate governance, corporate finance and corporate insolvency law.
- International financial law – banking and financial services and anti-money laundering.
- Credit and security law
- Contract law

- Consumer law
- Private International Law
- The regulation of corporate lawyers and law firms
- Intellectual Property Law

## **2.2 Advisory Board**

A major feature of the year has been the establishment of an Advisory Board consisting of practitioners in local, national and international practice. The Advisory Board consists of the following persons:

Dominic Adams (Proskauer, London)

Richard Calnan (Norton Rose, London)

Russell Kelsall (Squire Sanders, Leeds)

Lisa Linklater (Exchange Chambers, Leeds)

Jennifer Marshall (Allen & Overy, London)

We thank the members of the Advisory Board for being associated with us in this way.

Full details of the Centre's activities can be found at <http://www.law.leeds.ac.uk/research/business-law-practice/>

**Gerard McCormack**

**Director of the Centre for Business Law and Practice**

### **3. PUBLIC SEMINAR PROGRAMME, MASTER CLASS AND ‘BROWN BAG’ SESSIONS**

The Centre’s seminar series continued its successful record this year with distinguished academic speakers covering topical issues in the area of business regulation. The series was very well attended with audiences consisting of staff from within and outside the Centre, practitioners and large numbers of students.

This year, the focus was on post-crisis corporate and financial markets law, with Professor David Kershaw joining us from the London School of Economics, to discuss the role of culture in financial regulation, and Professor Erik Vermeulen of Tilburg University delivering a seminar on potential conflicts between corporate board regulation and the goal of promoting entrepreneurship and innovation.

The Centre also organised for a second time a Master Class, run by Ian McIntosh, ex-corporate partner from Addleshaws and Adrian Slater, Head of the University’s Legal Service. The Master Class was a realistic (mental and physical) challenge involving intense negotiations between two teams of advisers on a corporate acquisition. Attendance was by invitation only as the student participants were selected on the basis of achievement in company law. Student participants’ feedback was very positive and encouraging for further similar sessions.

Finally, the Centre ran for the first time ‘brown bag’ sessions for research students and academic staff, as an informal forum for researchers to present work in progress, research ideas and methods or any other matter related to their research. Sarah Zaghloul led a discussion on the enforcement of corporate governance practices in Saudi Arabia, and Jae Lee led a session on a state's right to regulate in the context of expropriation under international Law.

A special thank you is owed to the speakers, School colleagues and students who participated in the organisation and delivery of all those events.

**Michael Galanis**

#### **4. CONFERENCE ACTIVITIES**

As well as the annual Centre postgraduate researcher conference, the Centre hosted two major conferences during the period as well as a workshop on Payday Lending. Further details are below.

##### **4.1 Conference - My Word is My Bond: Regulating for Integrity in the City**

15 January 2013 - Conference held at the premises of Allen and Overy LLP, London

The global financial crisis has posed a series of profound questions for practitioners, policymakers and the academia alike. In order to prevent or ameliorate future crises, we need to understand what mechanisms worked, what mechanisms failed and why. Many point out that much of what occurred was legal but irresponsible and unethical and this presents fundamental challenges for policy-makers.

Given that acting with integrity cannot be reduced to legal obligation, - though as St Paul's Institute points out, having the right regulation is imperative - the crisis raises questions regarding how to influence corporations to develop higher standards of accountability and responsibility than the minimum standards set by law, and what role regulation might have in this project.

Against this background and against a background of continuing political and economic change and uncertainty, the trajectory of reforms at the national and international levels needs to be assessed.

This conference sought to address the following questions:

- Does the on-going reform agenda address the root cause of the problems identified by the crisis?
- Is it possible for regulation to embed higher standards of market integrity at the level of the firm or the market in which it is nested? If so, what measures are most likely to be most effective?

- What modes of enforcement have been and could be adopted to deter misconduct and promote greater market integrity?
- How can the risk calculus be calibrated to encourage growth in the financial services sector and encourage innovation without causing or exacerbating externalities?
- How do we develop pre-emptive dynamic systems of internal and external oversight and can these be harmonized to prevent regulatory arbitrage?

This unique one day conference addressed these issues, taking into account national and international developments. Participants included national and international policy-makers, industry experts, practitioners and leading academics.

The following were speakers at the conference:

- Professor Lynn Stout (Cornell University)
- Professor Justin O'Brien (University of New South Wales)
- Professor David Campbell (University of Leeds)
- Professor Joan Loughrey (University of Leeds)
- Dr Hans Christoph-Hirt (Hermes Equity Ownership Services Ltd)
- Professor Andrew Keay (University of Leeds)
- Professor Emiliós Avgouleas (University of Edinburgh)
- Professor Andrew Campbell (University of Leeds)
- Mrs Judith Dahlgreen (University of Leeds)

Discussants:

- Professor Jeffrey Golden (LSE)
- Professor Philip Wood (Allen & Overy)
- Mr Michael Blair (3 Verulam Buildings)
- Ms Lauren Anderson (Bank of England)
- Dr David Bholat (Bank of England)
- Professor Blanaid Clarke (Trinity College, Dublin)
- Mr David Clark (Ex-senior advisor to UKFSA, NED at Tullet)
- Mr Paul Chisnall (British Bankers Association)
- Professor Joanna Gray (Newcastle University)

## **4.2 Conference - Reforming the European Insolvency Regulation - a legal and policy perspective**

The Centre together with the Centre for Business and Insolvency Law at Nottingham Law School, hosted a joint conference on the reform of the European Insolvency Regulation (EIR) on Wednesday 12 June 2013.

The European Insolvency Regulation was designed to improve the co-ordination of insolvency proceedings within the EU, ensure the equitable treatment of creditors, and minimise ‘forum shopping’ –(the movement of assets from one country to another so as to take advantage of a more favourable legal position).

The Regulation is presently under review by the European Commission, which published reform proposals in December 2012. The European Commission has allowed for an extensive period of consultation and discussion with a view to refining and improving the proposals. This conference provided an ideal opportunity to influence the debate and shape the final content of the reform proposals.

The conference was run with the active support and input of key stakeholders such as private sector practitioners and the UK Insolvency Service. The conference included speakers from the European Commission, the Insolvency Service and leading international law firms as well as from academia in the UK and elsewhere.

The morning session was introduced by Professors Joan Loughrey ( University of Leeds) and David Burdette (Nottingham Law School, Nottingham Trent University) and chaired by His Honour Judge Behrens.

Professor Michael Veder from Radboud University in Nijmegen opened the proceedings. Professor Veder was followed by Dean Beale, Head of International Policy and Insolvency Practitioner Regulation at the UK Insolvency Service.

Peter Cranston, a Partner at Eversheds, looked at two specific issues identified by the EU in relation to the EIR. Nora Wouters, a Partner at McKenna Long & Aldridge LLP based in Brussels, provided a non-UK perspective on these two issues.

The afternoon session was chaired by Richard Sheldon QC (South Square Chambers ) and began with a presentation from Professor Paul Omar from Nottingham Law School.

He was followed by Joe Bannister, a Partner at Hogan Lovells LLP, who presented the practitioner perspective on the difficulties arising with the inclusion of schemes of arrangement within the Insolvency Regulation. Dr Irit Mevorach, Associate Professor at the University of Nottingham School of Law, looked at the reforms relating to the insolvency of groups.

Jennifer Marshall, a Partner at Allen & Overy LLP, considered that the EIR reforms had missed a trick. Professor Gerard McCormack considered the approach to ‘insolvency related actions’ and the relationship between the EIR and the Brussels I on jurisdiction and the enforcement of judgments.

The last presentation of the day was delivered by Caroline Gerkens from the General Secretariat of the Council of the EU. She presented the EU policy perspective on the proposed reforms reiterating the importance of efficient and effective insolvency proceedings in ensuring the smooth functioning of the internal market and its resilience in economic crises.

### **4.3 Pay Day Lending and Its impact in Leeds and West Yorkshire**

On 12<sup>th</sup> July 2013 the Centre for Business Law and Practice hosted a Workshop on Pay Day Lending to which a number of discussants were invited, both from the local community, academia, credit unions, and Leeds City Council.

The purpose of the Workshop was to explore current issues in relation to pay day lending, with particular reference to how they affect the West Yorkshire area, and how current regulation can help or hinder the development of protection for the vulnerable consumer.

The morning session covered the realities of the pay day market, legislation and regulatory theory.

The afternoon session concentrated on the perspectives of the Leeds City Council and Leeds City Credit Union.

The workshop was then concluded with open discussion from all participants, covering issues such as the typical profile of pay day borrowers, student experience, the evidenced impact of pay day lending on those who sought help from debt advice charities, prevalent problems including cost and interest rates, and the Credit Union's role in providing an alternative form of borrowing.

#### **4.4 Research Student Conference, October 2013**

The annual postgraduate conference was held on Monday 7<sup>th</sup> October 2013. The conference was opened by Professor Loughrey and the Postgraduate Research Tutor Stuart Lister. Presentations on research were given by the following students:

Michael Randall - A Financial Transaction Tax: Enhanced Co-Operation in the EU.

Marina Himoni- The Manipulation of European Consumer Law.

Adekemi Omotubora- Electronic Payment Systems and Cyber Crime.

Maryam Alsuwaidi- A Comparison of Financial Regulation in the UAE, KSA and the UK.

Jeremy Harmer- Internet Privacy in a Surveillance World

Josiah De Graft Quansah- Capital Adequacy Under Basel III: Implications for Large Commercial Banks in Ghana and Kenya.

Lively discussion followed each of the presentations and the event was attended by fourteen student members of the Centre and seven staff members of the Centre. The conference was open to other researchers in the Law School. Some discussion took place about a proposed research methods training event for students in the Centre in December or January. Professor McCormack closed the conference and strongly encouraged all students in the Centre to attend and support the Centre's programme of evening seminars.

## 5. GENERAL CENTRE ACTIVITY AND NEWS

There have been some notable achievements by members of the Centre in the past year, and not always reflected in a published piece, that are worthy of mention. What follows is a selection of some of the activities of the Centre and its members and it is not intended to be exhaustive.

**Subhajt Basu** (with Katherine Pearson as lead applicant and Joe Duffy) has received \$20,000 from *Borchard Foundation Center on Law & Aging*, 2012 Academic Research Grants for the project "Crossing Borders and Barriers: How Older Adults Access Legal Advice and Information for Effective Justice".

**Sarah Brown** has been acting as a consultant on a Project being undertaken by Risk & Policy Analysts Ltd, for the European Commission, being a study on various impacts and aspects of implementation of the Consumer Credit Directive in Member States.

**Andrew Campbell** continues to be a Consulting Counsel to the International Monetary Fund and a member of the Advisory Panel to the International Association of Deposit Insurers, Basel, Switzerland.

As a leading expert on central bank policies on 'lender of last resort' he has been interviewed by BBC Radio Scotland by the leading Scottish Sunday newspapers and Bloomberg for his views, inter alia, on the Scottish independence debate in relation to matters of finance.

He has also presented evidence to the House of Lords European Union Committee on *European Banking Union: Key Issues and Challenges* – 9<sup>th</sup> October 2012 (Report published 12 December 2012 (HL Paper 88)).

He has acted as a PhD external examiner in the UK and Denmark for the University of Cambridge, University of Copenhagen, University of Lancaster, Queen Mary University of London and the Institute of Advanced Legal Studies, University of London.

**Graham Dutfield** acted as external examiner for a PhD thesis at the University of Oxford. He continues to be a member of the Scientific Advisory Board of Synthetic Biosystems for the Production of High-Value Plant Metabolites Project (PhytoMetaSyn), a \$14 CAN synthetic biology project funded by Genome Canada and Genome Alberta. He recently joined the Project Advisory Committee for the International Institute for Environment and Development project: “Smallholder Innovation for Resilience: Strengthening Biocultural Innovation Systems for Food Security in the Face of Climate Change”.

**Roger Halson** in December 2012 was part of the Vice Chancellor’s delegation that visited East China University of Politics and Law where he gave a presentation to, and met 25 students who were due to commence LLM studies at the Centre in October 2013.

**Michael Galanis** and Professor Alan Dignam successfully bid competitively to be guest editors of a special edition of the Journal of Law and Society forthcoming 2013 which will feature articles based on contributions at the *Post-crisis Trajectories of European Corporate Governance: Dealing with the Present and Building the Future* workshop.

**Andrew Keay’s** work was cited in following cases: *Moulin Global Eyecare Holdings Ltd v Lee* [2012] HKCA 537 at [32] (Hong Kong Court of Appeal); *Deldar Tony Singh and another v Rajinder Singh and others* [2012] SGHC 268 at [19] (Singapore High Court); *Re United Investments Trust (in liq)* [2013] FCA 635 at [24] (Federal Court of Australia); *Re SCW Pty Ltd* [2013] NSWSC 578 at [12] (Supreme Court of New South Wales); *Jones v Hirst* [2013] NSWSC 163 (Supreme Court of New South Wales). He has continued to practise as a chancery barrister at Kings Chambers.

He has also been appointed as an international assessor of research grants by the Australian Research Council.

**Joan Loughrey** is a member of the Steering Committee of the HEIF Professional Services Hub which was tasked with driving forward the impact agenda of research

into the broad area of established, new and newly emerging professional services. She has also been quoted in the Yorkshire Post on a story on the legal profession on 3rd September 2013.

**Gerard McCormack's** research outputs have been cited, inter alia, by the Singapore Court of Appeal in *Alwie Handoyo v Tjong Very Sumito* [2013] SGCA 44 and by the Isle of Man courts in *Interdevelco Limited v Waste2Energy Group Holdings Plc* (Deemster Doyle, 10<sup>th</sup> October 2012) – judgment available at [www.judgments.im/](http://www.judgments.im/). He has also given expert evidence to an ICSID Arbitral Tribunal on the effect of non-registration on security rights under English law.

## 6. PUBLICATIONS

### 6.1 Books

**Dutfield:** *Knowledge Management and Intellectual Property: Concepts, Actors and Practices*, Edward Elgar, 2013 (303pp) (co-editor – Stathis Arapostathis)

**Keay:** *McPherson's Law of Company Liquidation* 3<sup>rd</sup> ed, Sweet and Maxwell, 2013.

**Loughrey:** (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2012)

**Zhou:** *Commercial Contract Law: A Transatlantic Perspective* (Cambridge University Press, 2013), (joint-ed with Larry Dimatteo, Keith Rowley, Severine Saintier)

### 6.2 Chapters in Books and Other Contributions to Books

**Basu:** 'Direct Taxation and E-Commerce: Possibility and Desirability' in E. Druicã (ed) *Digital Economy Innovations and Impacts on Society* (Hershey, PA: Information Science, 2012)

**Brown:** 'European Regulation of Consumer Credit: enhancing consumer confidence and protection from a UK perspective' in J. Devenney and M. Kenny (eds) *Consumer Credit Debt and Investment in Europe* (Cambridge University Press, 2012)

**Campbell A:** 'The Future Role and Power of the Bank of England' in Justin O'Brien & George Gilligan (eds) *Integrity, Risk and Accountability in Financial Markets* (Hart Publishing, Oxford, 2013) Chapter 8, 143 (with Judith Dahlgreen)

**Dutfield:** 'Collective invention and patent law individualism, 1877-2012; or, the curious persistence of inventor's moral right' in S. Arapostathis and G. Dutfield (eds) *Knowledge Management and Intellectual Property: Concepts, Actors and Practices* (Edward Elgar, 2013)

**Dutfield:** “The genetic code is 3.6 billion years old: It’s time for a rewrite”: Questioning the metaphors and analogies of synthetic biology and life science patenting’ in A. Lever (ed) *New Frontiers in the Philosophy of Intellectual Property* (Cambridge University Press, 2012)

**Dutfield:** ‘Global intellectual property law’ in G. Ziccardi Capaldo (ed) *The Global Community: Yearbook of International Law and Jurisprudence 2010* (Oxford University Press, 2012) (with Uma Suthersanen)

**Halson:** ‘The Irrelevance of the Performance Interest: A Comparative Analysis of ‘Keep Open’ Covenants in Scotland and England’ in L. Di Matteo, K. Rowley, S. Saintier, Q. Zhou (eds) *Commercial Contracts: A Transatlantic Perspective* (Cambridge University Press, 2013) (with D. Campbell)

**Keay:** ‘The Duty to Promote the Success of the Company: Is it Fit for Purpose in a Post-Financial Crisis World?’ in J. Loughrey (ed) *Directors’ Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2012)

**Keay:** ‘An Assessment of the Present State of Statutory Derivative Proceedings’ in J. Loughrey (ed) *Directors’ Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2012) (with J. Loughrey)

**Loughrey:** ‘The Director’s Duty of Care and Skill and the Financial Crisis: The Devil in the Detail’ in J. Loughrey (ed) *Directors’ Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar, 2012)

**McCormack:** ‘Reconciling European Conflicts and Insolvency Law’ in *2013 Gore-Browne on Companies Special release* (Jordans, Bristol, 2013).

**Zhou:** ‘Harmonisation of European Contract Law, Mandatory Rules and Default Rules’ in L. Di Matteo, K. Rowley, S. Saintier, Q. Zhou (eds) *Commercial Contract Law: A Transatlantic Perspective* (Cambridge University Press, 2013)

### 6.3 Journal Articles

**Basu:** ‘Information Revolution: “Choice of Control” to “Choice and Control”’ (2013) 27 (1-2) *International Review of Law Computers and Technology* 124 (with C Munns)

**Basu:** ‘Stalking the Stranger in Web 2.0: A Contemporary Regulatory Analysis’ (2013) 3 (2) *European Journal of Law and Technology* 1

**Basu:** ‘Privacy Protection: A Tale of Two Cultures’ *Masaryk University Journal of Law and Technology*, (2012) Vol. 6, Issue 1; 1-34

**Basu:** ‘Older people and legal advice – the need for joined up and creative approaches’ (2012) 34 (1) *Journal of Social Welfare and Family Law* 31 (with J Duffy and K Pearson)

**Brown:** ‘Protection of the small business as a credit consumer: paying lip service to protection of the vulnerable or providing a real service to the struggling entrepreneur?’ (2012) 41(1) *CLWR* 59

**Campbell A:** ‘The Future of United Kingdom Monetary Union and Scottish Independence’ (2013) 7 *Law and Financial Markets Law Review* 239

**Campbell A:** ‘Protecting Interbank Payments in the United Kingdom: An Examination of the Legal Framework’ (2013) 7 *Law and Financial Markets Review* 22 (with Paula Moffatt)

**Dutfield:** ‘Who invented glivec? Does it matter anyway?’ (2013) 48(32) *Economic and Political Weekly (India)* 41

**McCormack:** ‘Conflicts, avoidance and international insolvency 20 years on: a triple cocktail’ [2013] *Journal of Business Law* 141

**Loughrey:** ‘Large Law Firms, Sophisticated Clients and the Regulation of Conflicts of Interest in England and Wales’ Invited paper in Special Edition of *Legal Ethics* on ‘Conflicts of Interest in the Legal Profession’ (2012) *Legal Ethics* 215

**Tang:** ‘Air Carriers’ Obligation in “Extraordinary Circumstances” [2013] (2) *European Journal of Risk Regulation* 275

**Tang:** ‘Conflicts of Jurisdiction and Party Autonomy in Europe’ (2012) 59 *Netherlands International Law Review* 321

**Tang:** ‘International Treaties in Chinese Private International Law’ (2012) 42 *Hong Kong Law Journal* 597

**Tang:** ‘Parallel Proceedings and Anti-Arbitration Injunctions’ [2012] *Journal of Business Law* 589

**Wragg:** ‘Mill’s Dead Dogma: the Value of Truth to Free Speech Jurisprudence’ [2013] (Apr) *Public Law* 363

**Wragg:** ‘The Benefits of Privacy-Invasive Expression’ (2013) 64(2) *Northern Ireland Legal Quarterly* 187

**Wragg:** ‘Time to End the Tyranny: Leveson and the Failure of the Fourth Estate’ (2013) 18(1) *Communications Law* 18

#### **6.4 Reports/Other**

**Basu:** ‘International Justice for Older Adults - Crossing Barriers as well as Borders’ submitted to Borchard Foundation Center on Law and Aging (2013) (with K Pearson and J Duffy)

**Basu:** ‘WikiLeaks’ *Interview for Ecuador Public Radio*, Sep. 2012

**Loughrey:** ‘Standard Chartered Bank and the Ethics of Corporate Lawyers’ *Lawyers and the Legal Profession* Blogpost, August 2012

**Loughrey:** ‘The Oxford Project: A Corporate Law Ethicist Responds’, the Centre for Law Markets and Regulation Web Portal May 2012

**Wragg:** ‘Leveson Reforms, Editorial Freedom and Press Discussion of Ordinary Members of the Public’, FLJS Policy Brief, Foundation for Law, Justice and Society: Oxford. Available at [www.fljs.org/content/leveson-reforms-editorial-freedom-and-press-discussion-ordinary-members-public](http://www.fljs.org/content/leveson-reforms-editorial-freedom-and-press-discussion-ordinary-members-public)

**Wragg:** Two entries on the Inform blog, which is edited by Hugh Tomlinson QC, Matrix Chambers - <http://inform.wordpress.com/2013/09/02/david-camerons-very-own-moment-of-press-intrusion-or-why-it-pays-to-listen-to-advice-about-dangerous-dogs-paul-wragg/> and <http://inform.wordpress.com/2013/04/19/levesons-regulator-and-the-goal-of-protecting-real-harm-caused-to-real-people-a-likely-story-paul-wragg/>

## **6.5 CONFERENCE PRESENTATIONS AND PUBLIC LECTURES**

**Basu:** ‘Post NHS Information Revolution: Reverse Engineering the Missing Logic from ‘Privacy’ to ‘Control’” BILETA (University of Liverpool 11 April 2013) (with C Munns)

**Basu:** ‘India’s Dilemma: Political Sensitivity and Freedom of Expression’ BILETA (University of Liverpool 12 April 2013) (with Nair)

**Basu:** ‘Right to Free Speech, Social Networking Sites and Indian Constitution’ Law Mission (Eastern India, 18-22 February 2013)

**Basu:** ‘What Prospective Clients Don’t Know about Elder Law’ Elder Law Section of the state-wide Pennsylvania Bar Association (16 November 2012) (with Pearson and Duffy)

**Basu:** ‘Crossing Borders and Barriers: How Older Adults Access Legal Advice and Information for Effective Justice’ Mid-Atlantic Law and Society Association (Drexel University, Earle Mack School of Law, Philadelphia, PA, October 2012) (with Pearson and Duffy)

**Basu:** ‘From Vision to Conviction for an Ethically Connected World’ Internet Society Nepal and CAN Info-Tech (2012) Keynote Lecture (January 2012)

**Brown:** ‘Protection of the Small Business as a Credit Consumer’ presented at the Durham University workshop of April 12, 2013 on ‘Conceptualising consumers of Financial Services: A new approach’

**Brown:** ‘Credit in relation to EU consumer protection, and the current reforms proposed in Europe and the UK’ presented at the Exeter University conference of December 17, 2012 on ‘Re-orientating Consumer Law: Simplification, Conceptualisation & Subsidiarity’

**Campbell A:** ‘Consumer Expectations and Awareness’ at the Annual Conference of the International Association of Deposit Insurers, (London, October 2012)

**Campbell A:** ‘The Global Financial Crisis and the Protection of Bank Depositors’ in a lecture at the Faculty of Law, Thammasat University, Bangkok, Thailand (November 2012)

**Campbell A:** ‘A Pan-European Deposit Guarantee Scheme and European Resolution Fund’ at the ‘Safety Net for Cross-Border Banks’ (European Academy of Law Brussels, December 2012)

**Campbell A:** ‘The Future Role and Power of the Bank of England’ at a Conference ‘My Word is My Bond – Regulating for Integrity in the City of London’ (London, January 2013) (with Judith Dahlgreen)

**Campbell A:** ‘Raising Awareness’ at the Second Research Conference of the International Association of Deposit Insurers, Basel, Switzerland (April 2013)

**Campbell A:** ‘The Future of UK Monetary Union and Scottish Independence’ at a conference entitled ‘Evolution in Monetary Law & Policy’ (University of Glasgow, June 2013)

**Campbell A:** ‘Protecting Bank Depositors After Cyprus’ at the International Insolvency Conference (Nottingham Law School, September 2013) (with Paula Moffatt)

**Dutfield:** ‘Patenting Life: Genes and Generations’ Conference of the International Society for the History, Philosophy and Social Studies of Biology (Montpellier, 2013)

**Dutfield:** ‘Intellectual property rights and sustainable growth: A tale of four countries’ Keynote presentation for Society for International Development Netherlands Chapter (SID NL) (Free University of Amsterdam, 2013)

**Dutfield:** ‘Universities, the private sector and open innovation: An academic’s reflections on open innovation.’ Marcus Evans 3rd Annual Alliance Management for Open Innovation in Pharma (Munich, 2013)

**Dutfield:** ‘Trade marks and geographical indications: Useful for indigenous peoples, or not?’ at a Conference ‘Biodiversity, Biocultural Heritage and Traditional Knowledge: How can they be protected?’ organised by IDDRI and the Fondation d’entreprise Hermès (Paris, 2013)

**Dutfield:** ‘Recognising the role of traditional knowledge in pharmaceutical discovery: What should a legal protection regime look like?’ at a Conference ‘Boundaries of Intellectual Property in the Life Sciences’ (University of Basel, 2013)

**Dutfield:** ‘Did Kary Mullis really invent PCR?’ Inaugural lecture: Queen Mary, University of London’s Herchel Smith Fellows and Graduates Seminars Programme (chaired by Lord Hoffmann) 2012

**Halson:** paper and interim report at the University of Buenos Aires in March 2013 for a British Academy funded comparative law project examining the limits upon the

recovery of damages for breach of contract with particular reference to provisions in the proposed new Civil Code for Argentina.

**Halson:** paper at the British Institute for International and Comparative Law on the topic of good faith in English contract law (March 2013)

**Keay:** ‘The Public Enforcement of Directors’ Duties’ presented at ‘Current Challenges in Corporate Governance: Between Regulatory Compliance and Shareholder Activism a (University of Bedfordshire, 20 June 2013) (invited speaker)

**Keay:** ‘The Public Enforcement of Directors’ Duties’ at the Department of Accounting and Finance (Loughborough University, 19 April 2013) (invited speaker).

**Keay:** ‘The Public Enforcement of Directors’ Duties’ presented at ‘My Word is My Bond: Regulating for Integrity in the City at Allen & Overy (London; 15 January 2013) (the conference was organised by the Centre for Business Law and Practice at the University of Leeds in conjunction with the Centre for Law, Markets and Regulation at the University of New South Wales, Australia and the law firm of Allen and Overy LLP, London).

**Loughrey:** ‘Rules and Principles in the Regulation of Self-interest in Financial Markets’ at ‘My Word is My Bond: Regulating for Integrity in the City at Allen & Overy (London, 15 January 2013) (the conference was organised by the Centre for Business Law and Practice at the University of Leeds in conjunction with the Centre for Law, Markets and Regulation at the University of New South Wales, Australia and the law firm of Allen and Overy LLP, London) (invited speaker; co-presenter).

**Loughrey:** ‘Lehmans and the Lawyers’ UCL, London (January 2013) (discussant at public lecture)

**Loughrey:** ‘Market Norms, Enforcement and the Failure of Accountability’ Berle V conference, hosted by The Centre for Law Markets and Regulation (University of New South Wales and Berle Centre, Seattle) (May, 2013)

**Loughrey:** ‘Market Norms, Enforcement and the Failure of Accountability’  
Corporate Law Research group (Monash University, May 2013)

**Loughrey:** ‘The Ethics of Corporate Lawyers’ (UNSW, May 2013)

**McCormack:** presented papers on international aspects of Insolvency Law at conferences and workshops in Brussels, Dublin, The Hague, Nottingham and Paris.

**Tang:** ‘Corruption in International Commercial Arbitration—Special Private International Law issues’ Conference of the Journal of Private International Law (Madrid, 12-13 September 2013)

**Tang:** ‘Collective Action in Private International Law’ - Jean Monet Workshop (University of Aberdeen, 16 August 2013)

**Tang:** ‘Corruption in Arbitration’ Leicester Conflict of Laws Forum (6 March 2013)

**Tang:** ‘Current Jurisdiction Problems in Consumer Collective Redress’ ERA, Annual Conference on Consumer Law 2012 (Trier, Germany, 25-26 Oct 2012) (invited Keynote Speaker)

**Tang:** Panellist for Transparency International UK ‘Doing Business in China’ seminars held in Addleshaw Goddard (2 May 2013) and Norton Rose Fulbright (16 September 2013)

**Wragg:** ‘The Sanctity of Press Partisanship’ at ‘Media Law after Leveson’ hosted by the Foundation of Law, Justice and Society and Wolfson College, University of Oxford (April 2013) (invited speaker)

**Wragg:** ‘Legal Anatomy of the Opinionated Employee: Liberty, Speech and Contractual Subjugation’ at the Law and Society Association Annual Meeting (Boston, Mass., USA May 2013)

**Wragg:** ‘The Constitution of the Public Sphere: the Post-Leveson Landscape’ WG Hart Legal Workshop (IALS, London, June 2013)

**Wragg:** ‘The Legitimacy of Press Regulation’ at the Society of Legal Scholars Annual Conference Media Law section (September 2013, Edinburgh)

**Zhou:** ‘Pragmatism and English Sales Law’ at 2<sup>nd</sup> Conference on Transatlantic Perspective on Commercial Contract Law (University of Edinburgh, 30- 31 August 2013)

**Zhou:** ‘Key Topics in English Contract Law’ (University of Republic, Montevideo, Uruguay 20- 22 August 2013) (three invited lectures)

**Zhou:** ‘Behavioural Law and Economics: The use of Nudge in Mediation’ (Chinese University of Politics and Law Bei Jing, 17 May 2013)

**Zhou:** ‘Judicial Mediation: A Behavioural Law and Economics Perspective’ China and International Commercial Dispute Resolution International Workshop and Roundtable (Xi An Jiao Tong University, China 14 May 2013)

**Zhou:** ‘The value of law and economics: An example of contract law’ (Shang Hai Finance and Economic University, 7 May 2013)

**Zhou:** ‘Limits of Mandatory Rules in Contract Law’, Research Seminar (School of Law, Erasmus University of Rotterdam, 16 November 2012)

**Zhou:** ‘The Limits of Private Law: A case of European Common Sales Law’ Research Roundtable (University of Leicester, 19<sup>th</sup> October 2012)

**Zhou:** ‘Regulating illegal transactions’ Research Seminar (Newcastle Law School, 21 March 2012)

## 7. EDITORIAL WORK

**Campbell A:** Member of the Editorial Boards of the *Journal of Banking Regulation*, the *Journal of Financial Regulation and Compliance*, the *Journal of Money Laundering Control* and the *Journal of Financial Crime*.

**Dutfield:** Joint General Editor, *Queen Mary Studies in Intellectual Property* (Edward Elgar)

**Dutfield:** Member of the Editorial Board, *Pharmaceutical Patent Analyst*

**Dutfield:** Member of the Advisory Committee, *Law and Justice Review* (Turkey)

**Keay:** Commonwealth Editor for *Gore-Browne on Companies* and a member of the editorial board.

**Keay:** Member of the Editorial Board for the *Insolvency Law Journal*

**Keay:** Member of the Editorial Board for *International Insolvency Review*.

**Keay:** Member of the Advisory Board for *Insolvency Intelligence*

**Keay:** Member of the Advisory Board for the *QUT Law and Justice Journal*.

**Loughrey:** Member of the International Advisory Board for the International Journal of the Legal Profession

**McCormack:** Member of the Editorial Board, Europa Law Publishing

**McCormack:** Member of the Editorial Board, Asian Business Lawyer

**McCormack:** Reviewer of book proposals for Edward Elgar Publishing

**Tang:** Reviewer for book proposals for Private International Law Series, Hart Publishing.

**Tang:** Reviewer for book proposals on Chinese law for Edward Elgar Publishing

**Wragg:** Article reviewer for Public Law and Communications Law

**Wragg:** Reviewer for book proposals for Routledge

## **8. WORKING PAPER: PLEASE DO NOT CITE WITHOUT PERMISSION**

### **Reforming the European Insolvency Regulation – a Legal and Policy Perspective**

G McCormack – Centre for Business Law and Practice, University of Leeds

This paper will critically evaluate the proposals for reform of the European Insolvency Regulation - regulation 1346/2000 - advanced by the European Commission. <sup>1</sup> While criticised by some commentators as unsatisfactory, the Regulation – is widely understood to work in practice.<sup>2</sup> The Commission proposals have been described as ‘modest’<sup>3</sup> and it is fair to say that they amount to a ‘service’ rather than a complete overhaul of the Regulation.<sup>4</sup> The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors.

A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.<sup>5</sup>

#### **1 General philosophy**

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<sup>1</sup> See Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM (2012)743 and Proposal for a new Regulation COM (2012) 744 final. See also the Hess/Oberhammer/Pfeiffer external evaluation of the Regulation. - JUST/2011/JCIV/PR/0049/A4. On the same day as its proposals for reform of the Insolvency Regulation the Commission also released a Communication “ A new European approach to business failure and insolvency” COM (2012) 742 and a Commission Staff Working Document - SWD (2012) 416 final.

<sup>2</sup> See the statement in the Commission report that “Regulation is generally regarded as a successful instrument for the coordination of cross-border insolvency proceedings in the Union” - COM (2012) 743 final at p 4.

<sup>3</sup> See H Eidenmuller “A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond” (2013) 20 Maastricht Journal 133 at 150.

<sup>4</sup> See M Arnold QC “The Insolvency Regulation: a Service or an Overhaul” South Square Digest (May 2013) at p 28.

<sup>5</sup> For instance, in the private law field the proposal for a Common European Sales Law – see SEC(2011) 1165 final and SEC(2011) 1166 final and for a critical evaluation see S Whittaker ‘Identifying the Legal Costs of Operation of the Common European Sales Law’ (2013) 50 Common Market Law Review 85.

The professed objective of the Insolvency Regulation is achieve greater efficiencies and effectiveness in the administration of cross-border insolvency cases.<sup>6</sup> The preamble to the regulation also mentions the prevention of forum shopping i.e. the movement of assets or judicial proceedings from one Member State to another so as to try to take advantage of a more favourable legal position.<sup>7</sup>

The Regulation puts in place a detailed framework for the management of cross-border insolvency cases within Europe and attempts a partial harmonization of conflicts-of-law rules but it does not say much about substantive insolvency law.<sup>8</sup> The State where the debtor has its centre of main interests or ‘COMI’ is given centre stage when it comes to collection and administration of the debtor’s assets. The COMI State is given the exclusive authority to open main insolvency proceedings in respect of the debtor<sup>9</sup> and the decision to open such proceedings must be given immediate, full and unqualified recognition throughout the EU.<sup>10</sup> While secondary insolvency proceedings may be opened in States where the debtor has an ‘establishment’<sup>11</sup> the effect of these proceedings is however limited to assets within the particular State. According to Article 4, the law of the State where insolvency proceedings are opened, governs the conduct and effect of the proceedings and the article 4 sets out a number of matters that are specifically subject to the law governing the opening of the proceedings. These matters include the assets which form part of the estate; the powers of the liquidator; rules governing the lodging, verification and admission of claims; and the priority ranking of creditors. Articles 5-15 however, set out a whole host of exceptions to the Article 4 general rule.

Looking at the European Insolvency Regulation from the perspective of international insolvency principle, its general approach appears to be ‘universalism’, albeit tempered or modified by pragmatic considerations. The universalist philosophy suggests that there should be a single insolvency proceeding in respect of a debtor which covers all the debtor’s assets wherever situated and that applies in respect of all the debtor’s legal relationships.<sup>12</sup> Article 4 of the Regulation reflects a universalist

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<sup>6</sup>Recitals 2 and 3. See generally on the Regulation and the Convention, G Moss, I Fletcher and S Isaacs, The EC Regulation on Insolvency Proceedings 2nd edn (OUP, 2009); I Fletcher, Insolvency in Private International Law (OUP, 2nd ed 2005).

<sup>7</sup> Recital 4. For an implicit distinction between ‘good’ and ‘bad’ forum shopping see the opinion of Advocate General Colomber in Staubitz-Schreiber - Case -1/04 [2006] ECR I-701 at paras 71,72.

<sup>8</sup> The Virgos-Schmit Report is on the draft EU Convention on Insolvency Proceedings, which preceded and foreshadowed the Regulation. While the Virgos-Schmit Report has no official status and was not agreed to by all the EU Member States, nevertheless it is of persuasive authority. The report is to be found in an appendix to Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings (OUP, 2nd ed, 2009) and also in an appendix to I F Fletcher, Insolvency in Private International Law (Oxford University Press, 2nd ed, 2005).

<sup>9</sup> Article 3(1).

<sup>10</sup> Articles 16 and 25.

<sup>11</sup> Article 3(2).

<sup>12</sup> For a discussion of universalism versus territorialism see G McCormack “Universalism in Insolvency Proceedings and the Common Law” (2012) 32 OJLS 325. See also JL Westbrook “Theory and

approach but the exceptions contained in Articles 5-15 cast a different light. Another modification to the universalist philosophy in the Regulation comes from the fact that secondary insolvency proceedings may be opened in respect of a debtor and these proceedings do not serve simply as mechanisms for the more convenient collection of assets and their remission to the liquidator in the principal proceedings. The secondary proceedings are subject to the law of the State that opens the secondary proceedings which will apply, inter alia, to the distribution of the assets subject to the secondary proceedings.<sup>13</sup> The role of secondary proceedings in the context of Regulation acknowledges implicitly the alternative to ‘universalism’; namely ‘territorialism’ which suggests that separate insolvency proceedings may be opened in any State where a debtor has assets and that ‘local’ assets should be in principle be set aside for the benefit of ‘local’ creditors.<sup>14</sup>

Apart however, from a rather bald statement that the proper functioning of the internal market requires a cross-border insolvency initiative there is nothing much in the preamble about higher level objectives. The Commission has painted the background to the proposed amendments with a far broader and bolder brush. The amendments are stated to be with a view to ensuring a smooth functioning of the internal market; its resilience in economic crises and the survival of businesses. Reference is made to the Europe 2020 strategy and the EU's current political priorities to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment.<sup>15</sup> Language in the proposed new preamble refers to the extension of the regulation to proceedings which “promote the rescue of an economically viable debtor in order to help sound companies to survive and give a second chance to entrepreneurs. It should notably extend to proceedings which provide for the restructuring of a debtor at a pre-insolvency stage or which leave the existing management in place.”<sup>16</sup> Underlying the Commission agenda is the assumption that in a business there is a surplus of going concern value over liquidation value and that this going concern surplus is best captured if the business is, in some way, restructured rather than the assets of the business being sold off to the highest bidder.<sup>17</sup> This assumption is questionable in that the best outcome may be the sale of the economically viable part of a company’s business with the ‘bad bits’ being left behind and liquidated.

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Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 *American Bankruptcy LJ* 457; L LoPucki “Cooperation in International Bankruptcy: A Post-Universalist Approach” (1999) 84 *Cornell L Rev* 696; S Franken, “Three Principles of Transnational Corporate Bankruptcy Law: A Review” (2005) 11 *ELJ* 232.

<sup>13</sup> This was made clear in *Re Alitalia Ltd* [2011] EWHC 15 (Ch), [2011] BPIR 308.

<sup>14</sup> For a defence of provisions ring-fencing assets for the benefit of ‘local’ creditors see the paper by the Singapore Chief Justice Chan Sek Keong “Cross-Border Insolvency issues affecting Singapore” (2011) 23 *Singapore Academy of Law Journal* 413 at 419.

<sup>15</sup> See explanatory memorandum attached to the Commission proposals at para 1.2.

<sup>16</sup> New recital 3.

<sup>17</sup> On different conceptions of corporate rescue see V Finch “Corporate Rescue: A game of three halves” (2012) 32 *Legal Studies* 302; “Corporate rescue in a world of debt” [2008] *Journal of Business Law* 756.

Chapter 11 of the US Bankruptcy Code is often cited as the model to which European restructuring laws should aspire.<sup>18</sup> Chapter 11 has as a goal the preparation and confirmation of a restructuring plan.<sup>19</sup> Prominent US commentators suggest<sup>20</sup> that in "the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world, Chapter 11 ... deserves a prominent place. Based on the idea that a failing business can be reshaped into a successful operation, Chapter 11 was perhaps a predictable creation from a people whose majority religion embraces the idea of life from death." Restructuring mechanisms, including Chapter 11, are designed to keep a business alive so as to preserve this additional going concern value. There is however, another view that if a company encounters economic difficulties the most effective solution may be to shut it down.<sup>21</sup> For instance, if a company is producing goods and services for which there is no ready market then there may be no point in leaving it in existence. There seems little merit in saving a dog food company if the company is producing food that the animals do not like.<sup>22</sup> Putting ailing companies on a life support machine may in fact harm the sector of the economy in which they operate. It makes competitors suffer by forcing them to compete in crowded markets with rivals that are restructured and have their debts reduced but which are ultimately inefficient. There is a move therefore, to a new 'Chapter 11' with a greater emphasis on sales of the debtor's business as a going concern rather than on restructurings in the traditional sense.<sup>23</sup>

There is a bit of a gap however, between the rhetoric of the European Commission and the reality. Despite the rhetoric, the Commission proposals are essentially modest and procedural. Essentially, they extend Europe-wide recognition under the

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<sup>18</sup> See M Brouwer "Reorganization in US and European Bankruptcy Law" (2006) 22 *European Journal of Law and Economics* 5; A Tilley "European Restructuring: Clarifying Trans-Atlantic Misconceptions" [2005] *Journal of Private Equity* 99; C Pochet "Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules" (2002) 6 *Journal of Management and Governance* 343.

<sup>19</sup> Bank of America v 203 North LaSalle Street Partnership (1999) 526 US 434. See also HR Rep No 595, 95<sup>th</sup> Congress, 1st Session 220 (1977) and US v Whiting Pools Inc (1983) 462 US 198 at 203: "In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future ... By permitting reorganisation, Congress anticipated that the business would continue to provide jobs, to satisfy creditors' claims, and to produce a return for its owners... Congress presumed that the assets of the debtor would be more valuable if used in a rehabilitated business than if 'sold for scrap'".

<sup>20</sup> See E Warren & JL Westbrook "The Success of Chapter 11: A Challenge to the Critics" (2009) 107 *Michigan Law Review* 603 at 604. The American Bankruptcy Institute has established a commission to review Chapter 11 with a view to advancing proposals for legislative reform – see [www.commission.abi.org](http://www.commission.abi.org)

<sup>21</sup> See C Adams "An Economic Justification for Corporate Reorganizations" (1991) 20 *Hofstra L Rev* 117 at 133 "[M]ost assets are probably not firm-specific, and so, most insolvent corporations will not have substantially greater going concern than liquidation values and, consequently, will not be good candidates for an effective reorganization."

<sup>22</sup> See generally M White "Does Chapter 11 Save Economically Inefficient Firms" (1994) 72 *Wash U LQ* 1319; "The Corporate Bankruptcy Decision" (1989) 3 *J Econ Persp* 129.

<sup>23</sup> See e.g. K Ayotte and DA Skeel "Bankruptcy or Bailouts" (2010) 35 *Journal of Corporate Law* 469 at 477 "roughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan."

Regulation to a greater range of restructuring proceedings. This extension will now be considered.

## **2 Extension of the Regulation to cover ‘pre-insolvency’ procedures**

Currently, Article 1(1) provides that the Regulation applies to collective insolvency proceedings involving the partial or total divestment of the debtor and the appointment of a liquidator (Art 1). Article 2 goes on to state that for the purposes of the Regulation ‘insolvency proceedings’ shall mean the collective proceedings referred to in Art 1(1), which proceedings are listed in Annex A. The European court said in Bank Handlowy and Adamiak<sup>24</sup> that once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. ‘Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation.’ Moreover, in Ulf Kazimierz Radziejewski<sup>25</sup> the European court suggested that the Regulation only applied only to the proceedings listed in the annex.<sup>26</sup> Therefore a form of Swedish debt relief procedure considered in the case did not fall within the Regulation as it was not included in the Annex.

The annex may be over-inclusive in that it covers procedures that, strictly speaking, are not collective insolvency proceedings entailing the partial or total divestment of a debtor and the appointment of a liquidator. It may also be under-inclusive in that certain procedures in some countries may satisfy the Art 1(1) definition but are not listed in the Annex. There is also a time lag in that a State may introduce a new insolvency procedure but some time elapses before it appears in the Annex.<sup>27</sup>

Under the proposed new regime the Regulation would apply to apply to ‘collective judicial or administrative proceedings, including interim proceedings, which are based on a law relating to insolvency or adjustment of debt and 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 a liquidator is appointed, or (b) the assets and affairs of the debtor are subject to control or supervision by a court.’<sup>28</sup>

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<sup>24</sup> Case C-116/11; judgment given 22 November 2012 at paras 33–35. See also para 49 of the opinion of Advocate General Kokott.

<sup>25</sup> Case C-461/11 – judgment 8<sup>th</sup> November 2012 . The court however also pointed out that the procedure did not entail the divestment of the debtor and therefore could not be classified as an insolvency procedure within the meaning of Article 1.

<sup>26</sup> Para 24.

<sup>27</sup> There is a procedure under Article 45 whereby the Council, acting by qualified majority, may amend the Annex.

<sup>28</sup> New Article 1(1).

This proposal would certainly allow a wider range of procedures to be listed in Annex A but there is no intention to alter the decisive effect attributed to inclusion in the list nor the procedure whereby a Member State notifies the Commission of what procedures it wants included in the list. There is however a proposal whereby the Commission would examine whether a particular procedure notified to it satisfies the definition, and should be included in the Annex.<sup>29</sup> The Commission would make the decision on inclusion rather than the Member States, acting through the Council, as under the present regime. This amounts to a transfer of power to the Commission at the expense of Member states and it is questionable whether it will lead to more efficient or accurate outcomes unless there is a corresponding increase in the resources available to the Commission.

As far as the UK is concerned, the main point of contention in respect of the expanded definition of ‘insolvency proceedings’ in the proposed new Regulation is in relation to schemes of arrangements. Schemes of arrangement under the UK Companies Act have proved a popular restructuring tool for large corporate debt and for large companies<sup>30</sup>, including foreign-registered companies.<sup>31</sup> They serve in effect as a form of ‘debtor-in-possession’ restructuring. The scheme procedure enables a company to enter into a compromise or arrangement with any class of creditors, or members. In this way, the capital structure of a company in financial difficulties may be rearranged. The arrangement may have various elements, either alone or in combination, such as extending the maturity of loans; partial debt write off or converting debt into other instruments including equity in the company. The statute requires that a majority in number representing 75% in value of the class of creditors or members affected must accept the scheme. The court must also sanction a scheme as being fair to the creditors as a whole.<sup>32</sup> Once the statutory conditions are fulfilled, the scheme becomes binding even in respect of those creditors who did not give their consent.<sup>33</sup> The statutory provisions enable unanimous lender consent provisions in loan agreements and, more generally, objections to a restructuring by minority lenders to be overcome.

The fact however that schemes of arrangement are not listed under the Insolvency Regulation means that they are not entitled to the benefits of automatic EU wide recognition under Articles 16, 17 and 25 of the Regulation. On the other hand, the

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<sup>29</sup> New Article 45.

<sup>30</sup> See generally on schemes Geoff O’Dea, Julian Long and Alexandra Smyth Schemes of Arrangement Law and Practice (OUP, 2012).

<sup>31</sup> See Re Seat Pagine Gialle SpA [2012] EWHC 3686; Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746; Re Rodenstock GmbH [2011] EWHC 1104; [2011] WLR (D) 150 and see generally Look Chan Ho “Making and enforcing international schemes of arrangement” (2011) 26 JIBLR 434.

<sup>32</sup> On “fairness” see Re Telewest Communications [2004] BCC 342.

<sup>33</sup> For details see Part 26 of the UK Companies Act 2006. As well as being used for the restructuring of company debt, schemes are also used in takeover situations as a means for the compulsory acquisition of shares.

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. Under Part 26 of the Companies Act 2006 dealing with schemes, the court has jurisdiction to sanction a scheme if the company is liable to be wound up under the Insolvency Act. By virtue of s 221 of the Insolvency Act, a winding up order may be made in respect of a foreign registered company but established case law suggests that the jurisdiction to exercise winding up should only be exercised if the company is deemed to have a sufficient connection with the UK. In cases like Re Drax Holdings Ltd<sup>34</sup> the courts have applied the ‘sufficient connection’ test in respect of schemes. For instance, in Re Rodenstock GmbH<sup>35</sup> a sufficient connection with the UK was found to exist by virtue of the fact that the credit facilities extended to the company contained English choice of law clause and jurisdiction clauses and also by expert evidence to the effect that the German courts would recognise the English court order.

The reason that schemes of arrangement are not listed under the Insolvency Regulation is that they are not necessarily a collective procedure nor an insolvency procedure. Schemes, for instance, may be used as a takeover mechanism in respect of solvent companies and even in the restricting context they may only involve a few debtors rather than debtors or bondholders as a whole. The expanded definition of ‘insolvency proceedings’ provides an opportunity to revisit the issue of whether or not schemes should be listed under the Regulation. In accordance with the revised definition, one might argue that schemes of arrangement are based on a law relating to the adjustment of debts in which, for the purpose of adjustment of debt, the assets and affairs of the debtor are subject to control or supervision by a court. They are also judicial proceedings. While they are not invariably ‘collective’ proceedings, it is not clear what is meant by collective proceedings for the purpose of the Regulation and it should be possible to limit the application of the Regulation to certain types of schemes.

It is unlikely however, that listing of schemes under the Regulation would be welcomed by UK restructuring professionals. On the one hand, there would be automatic EU wide recognition of schemes instead of the present piecemeal recognition but it would limit the jurisdiction of the English courts to sanction schemes to cases where a company had its centre of main interests in the UK. No longer could the courts apply a more flexible ‘sufficient connection’ test. This would surely detract from the attractiveness of the UK as the restructuring venue of choice for large companies. It might limit the financial and other opportunities of UK-based professionals. More seriously it might make large corporate restructuring more

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<sup>34</sup> [2004] 1 WLR 1049.

<sup>35</sup> [2011] EWHC 1104; [2012] BCC 459. See also Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746 (Ch), [2013] BCC 201 and Re Seat Pagine Gialle SpA [2012] EWHC 3686.

difficult to accomplish since not all jurisdictions may have the same advantageous laws as the UK that enable ‘hold-outs’ among minority creditors to be overcome.<sup>36</sup>

### 3 Jurisdiction to open insolvency proceedings

The Regulation gives jurisdiction to open main insolvency proceedings to the State where the debtor has its centre of main interests (COMI). In the case of companies, there is a presumption that COMI is the same as the place of the registered office but this is only a presumption and it may be rebutted. The only other guidance on COMI in the Regulation comes in recital 13 of the preamble which states that the COMI “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”. There has been considerable criticism of the COMI concept and its place at the heart of the Regulation.<sup>37</sup> Certainly it is fact sensitive and capable of varying judicial interpretations particularly when, for example, the corporate headquarters, principal assets, place of main operations and place of incorporation are all in different countries.<sup>38</sup>

It would be possible to reduce uncertainty by replacing the COMI test for main insolvency proceedings with an incorporation, or seat of registration test, or, less radically, by making the COMI equals place of registered office presumption rebuttable only in wholly exceptional circumstances.<sup>39</sup> There are at least two drawbacks with this approach. Firstly, the COMI test is mirrored in other international instruments such as the UNCITRAL Model Law on Cross-Border Insolvency and a unilateral departure from the COMI yardstick by the EU would cause disharmony and friction in the process of international insolvency co-operation.<sup>40</sup> Secondly, while within the frontiers of the EU it may be somewhat pejorative to use the expression ‘letter box incorporation jurisdictions’, a company may have little or no economic connection with its place of incorporation or registration. The vast bulk of its activities may be carried out elsewhere. In these

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<sup>36</sup> See generally on these issues J Armour “Who Should Make Corporate Law? EC Legislation versus Regulatory Competition” (2005) 58 *Current Legal Problems* 369; H Eidenmüller “Free Choice in International Company Insolvency Law in Europe” (2005) 6 *European Business Organization Law Review* 423.

<sup>37</sup> See generally M Szydło “Prevention of Forum Shopping in European Insolvency Law” (2010) 11 *European Business Organization Law Review* 253; W-G Ringe “Forum Shopping under the EU Insolvency Regulation” (2008) 9 *European Business Organization Law Review* 579; G McCormack “Jurisdictional competition and forum shopping in insolvency proceedings” (2009) 68 *CLJ* 213.

<sup>38</sup> L LoPucki in “The Case for Cooperative Territoriality in International Bankruptcy” (2000) 98 *Michigan Law Review* 2216 at 2217 has gone so far as to say that the COMI concept is intentionally vague and practically meaningless.

<sup>39</sup> See generally J Armour “Who Should Make Corporate Law? EC Legislation versus Regulatory Competition” (2005) 58 *Current Legal Problems* 369; H Eidenmüller “Free Choice in International Company Insolvency Law in Europe” (2005) 6 *European Business Organization Law Review* 423.

<sup>40</sup> Article 16 and see Re Stanford International Bank Ltd [2011] Ch 33.

circumstances, it seems perverse to give the place of incorporation the jurisdiction to open main insolvency proceedings particularly when the courts of that State may be ill-equipped in terms of convenience and resources to carry out the task.

The Commission's proposals stick with the COMI concept but try to put some more flesh on the bones by introducing a statutory codification of the case law from the European Court particularly in the Interedil decision.<sup>41</sup> The proposals suggest a weakening, rather than a strengthening, of the COMI presumption. The new language states that the COMI/ registered office presumption may be rebutted where "a comprehensive assessment of all the relevant factors establishes, 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 another State.<sup>42</sup>

Under the Regulation, for a party that is advantaged by the opening of insolvency proceedings in a particular country rather than others, there is an incentive to file proceedings first and then to ask questions later, if at all. The Regulation creates a figurative race to the court house door though the notion of a 'court' under the Insolvency Regulation is something of a misnomer since it extends to administrative bodies and even insolvency practitioners (IPs) competent to open insolvency proceedings under the provisions of a particular national law.<sup>43</sup> In marginal cases where the COMI of a company is debatable, the competent authorities of a Member State first seised of an insolvency matter may well be inclined to assert jurisdiction.<sup>44</sup> Under the Commission proposals, a new Article 3b will impose a duty on courts and other bodies competent to open insolvency proceedings to examine ex officio whether or not they have jurisdiction in the particular case. It is questionable however whether this requirement adds anything new and whether it amounts to anything more than a box-ticking exercise.

The new article also gives any "creditor or interested party who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings" the right to challenge the decision opening main proceedings. The court opening the main proceedings is required to inform known creditors "of the decision in due time in order to enable them to challenge it." This provision opens up the possibility that foreign creditors might have greater rights than local creditors to appeal against decisions opening insolvency proceedings. This state of affairs appears to be anomalous.

### Insolvency-related actions

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<sup>41</sup> Case C-396/09; [2011] BPIR 1639.

<sup>42</sup> New recital 13a.

<sup>43</sup> See the definition in Article 2(d) and see also Re Salvage Association [2004] 1 WLR 174 at paras 20, 21.

<sup>44</sup> Hans Brochier Holdings Ltd v Exner [2007] BCC 127.

The Commission proposals also suggest measures of clarification in respect of insolvency-related actions acknowledging that the “delimitation between the Brussels I Regulation and the [Insolvency] Regulation is one of the most controversial issues relating to cross-border insolvencies.”<sup>45</sup> It proposes a codification of the decision in Seagon v Deko<sup>46</sup> so that in the revised Regulation there would be a clear statement that courts opening insolvency proceedings also have jurisdiction in respect of actions that derive directly from the insolvency proceedings and are closely linked with them.<sup>47</sup> This clarification is welcome but there is no guidance on what is a ‘directly and closely linked action’. Such guidance need not be exhaustive nor prejudice the generality of the term but it might follow the example of Article 4(2) which sets out conflict of law rules for determining the matters that are subject to the law of the State that opens the insolvency proceedings.

The Commission has also proposed that a liquidator should be allowed to bring insolvency related actions in the defendant’s country of domicile as well as in the insolvency forum.<sup>48</sup> This would allow a liquidator to couple an insolvency-related action with, for example, an action based on the duties of directors under company law.<sup>49</sup> There is much merit in this proposal for, at the moment, a liquidator is faced with the prospect and the costs of potentially having to bring proceedings against the same defendant in two different countries. Proceedings under insolvency law to set aside pre-insolvency transactions, on the basis that they are detrimental to the general body of creditors, are insolvency-related.<sup>50</sup> Therefore they should be brought in the State where the insolvency proceedings are opened whereas actions to recover company assets in a defendant’s possession should be brought in the State where the defendant is domiciled.<sup>51</sup> This seems costly and inconvenient. It would minimize

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<sup>45</sup> See Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings COM(2012) 743 final at p 10.

<sup>46</sup> Case C-339/07 [2009] ECR I-767. See on the decision L Carballo Pineiro ‘Vis attractiva concursus in the European Union: its development by the European Court of Justice’ InDret 3/2010 at pp 1-23 and more generally A Dutta “Jurisdiction for insolvency-related proceedings caught between European legislation” [2008] LMCLQ 88.

<sup>47</sup> On whether the Insolvency Regulation applies where the defendant in an insolvency-related action is resident outside the EU see the preliminary reference to the European court in Schmidt v Hertel - Case C-328/12. The Virgos-Schmit report at paras 11 and 44 suggests that the Regulation does not give jurisdiction in these cases.

<sup>48</sup> See Proposal for a Regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings COM(2012) 744 final at p 7.

<sup>49</sup> The proposal adds that insolvency related actions may only be brought in a court of the defendant’s domicile if that court has jurisdiction under the Brussels I Regulation. But it could be argued that that court has no jurisdiction by virtue of the bankruptcy and analogous proceedings exception under the Brussels I Regulation, in which case the proposal means little in practice. The Hess/Oberhammer/Pfeiffer external evaluation of the Regulation is much clearer on this point. It states that the liquidator should be entitled to file the insolvency-related action optionally before the courts of the EU state in which the defendant is domiciled, if and to the extent that, the latter courts have jurisdiction over the connected claim under the Brussels I Regulation. - JUST/2011/JCIV/PR/0049/A4 - at pp 22 and 219-220.

<sup>50</sup> Seagon v Deko Case C-339/07 [2009] ECR I-767.

<sup>51</sup> Bvers v Yacht Bull Corp [2010] EWHC 133; [2010] BCC 368.

transaction costs if the actions could be combined and heard together in the same State.

#### **4 Improving the coordination of main and secondary proceedings**

The Insolvency Regulation departs from Universalist ideals by permitting the opening of secondary insolvency proceedings applying to assets in a State where the debtor has an “establishment”. Local law applies to these secondary proceedings including local priority rules in respect of the distribution of assets.<sup>52</sup> Under a truly universal regime the primary job of a liquidator in secondary proceedings would be merely to collect assets and hand them over to the liquidator in the main proceeding who would then distribute them in accordance with the law governing the main proceedings. The opening of secondary proceedings protects the position of local preferential creditors whose claims would be regarded as non-preferential under the law of the main proceedings.

The Regulation contains a number of provisions to regulate the relationship between main and secondary proceedings. Firstly, any ‘surplus’ that remains after payment of all claims that have been lodged in the secondary proceedings must be passed to the IP in the main proceedings but, in practice, there may be nothing left after claims of local preferential creditors have been met. Secondly, there is a duty imposed on the IPs in the main and secondary proceedings to communicate promptly with one another.<sup>53</sup> Thirdly, secondary proceedings can be stayed for up to 3 months at the request of the IP in the main proceedings, although the court in the secondary proceedings granting the stay may require the IP in the main insolvency proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors.<sup>54</sup> A request by the liquidator for a stay may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. The stay may be extended for further three-month periods at a time but the stay may be lifted by the court where it no longer appears justified having regard to the interests of creditors. Fourthly, a composition in the secondary proceedings may not become final without the consent of the liquidator in the main proceeding. Such consent cannot be withheld however, if the financial interests of the creditors in the main proceeding are not affected by the composition.

The opening of secondary proceedings complicates the Insolvency Practitioner (IP)’s task in the main proceedings. Apart from having to deal with another independent office holder, creditors in other countries are now in a stronger bargaining position. For example, an IP who is trying to formulate and implement plans for the sale of the business as a whole could find the plans frustrated by creditors in a particular State

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<sup>52</sup> Articles 2(i) and 28.

<sup>53</sup> Article 31.

<sup>54</sup> Article 33.

who take the view that a secondary liquidation in that State would better serve their interests. The English courts have tried to minimize the potential disruption caused by the opening of secondary insolvency proceedings through two mechanisms. The first is the notion of ‘synthetic’ secondary proceedings. In Re Collins and Aikman<sup>55</sup> it was held that the UK Insolvency Act was sufficiently flexible so that UK IPs should observe promises made to creditors in other EU States that local priorities would be respected in return for not opening secondary proceedings in the other States. In effect, the creditors got the benefits of having secondary proceedings without the trouble of going to open them. The secondary proceedings were ‘synthetic’ rather than actual. Secondly, in Re Nortel Networks SA<sup>56</sup> a procedure was put in place to try to ensure that the IP in the main proceeding had a ‘voice’ on any decision to open secondary proceedings. The administrators of various companies in the Nortel group were granted an order requesting other EU courts to give notice of applications to open secondary insolvency proceedings in respect of Nortel companies and to allow them to make submissions on such applications. The administrators were of the view that the best option to maximise value for Nortel’s creditors was through a coordinated restructuring of the entire group. Accordingly, they wished to avoid secondary insolvency proceedings on the basis this was likely to impede a global restructuring and reduce the value ultimately realised for the benefit of the creditors.

While IPs and courts, particularly in the UK, have devised imaginative solutions to particular issues thrown up the Regulation,<sup>57</sup> one insuperable roadblock is presented by the fact that while main insolvency proceedings may be either liquidation or restructuring proceedings, secondary proceedings opened after commencement of main insolvency proceedings can only be liquidation proceedings.<sup>58</sup> One of the drafters of the Regulation has explained that limiting secondary proceedings to liquidations was part of the overall compromise which led to the instrument gaining general acceptance. “By opening a local liquidation proceeding, Member States can pull an emergency brake if they feel that unlimited recognition of foreign rehabilitation proceedings is unfair to their (or to their local creditors’) interests.”<sup>59</sup> Nevertheless, the limitation may make an overall business sale or restructuring more difficult to accomplish. <sup>60</sup>

The Commission’s proposals retain a role for secondary proceedings – there does not appear to have been serious consideration given to the idea of doing away with secondary proceedings and entrusting all power to the liquidator in the main proceedings. The proposals however, contain measures to improve the coordination of main and secondary proceedings and generalize and ‘Europeanise’ some of the

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<sup>55</sup> Re Collins and Aikman Europe SA [2006] BCC 861.

<sup>56</sup> [2009] EWHC 206; [2009] BCC 343.

<sup>57</sup> See Commission Report COM (2012) 743 final at p 14.

<sup>58</sup> Article 3(3).

<sup>59</sup> See M Balz “The European Union Convention on Insolvency Proceedings” (1996) *American Bankruptcy Law Journal* 485 at 520.

<sup>60</sup> For criticism see I Fletcher Insolvency in Private International Law (OUP, 2nd ed 2005) at 371.

practices developed by the English Courts in cases like Re Collins and Aikman and Re Nortel Networks. Firstly, the court seised of a request to open secondary proceedings may turn down the request if the IP in the main proceedings gives an undertaking that the distribution and priority rights enjoyed by local creditors if secondary proceedings had been opened will be respected in the main proceedings.<sup>61</sup> According to the Commission, such a practice is currently not possible under the law of many Member States and the proposal introduces a new rule of substantive law.<sup>62</sup> Secondly, the court seised with a request to open secondary proceedings is required to hear the liquidator of the main proceedings before making its decision.<sup>63</sup> Thirdly, the proposal abolishes the requirement that secondary proceedings have to be liquidation proceedings. Fourthly, the proposal extends the obligation to cooperate to the courts involved in the main and secondary proceedings.<sup>64</sup> “Consequently, courts will be obliged to cooperate and communicate with each other; moreover, liquidators will have to cooperate and communicate with the court in the other Member State involved in the proceedings.”<sup>65</sup> Under the current Regulation, there is no express duty of co-operation between courts opening main and secondary insolvency proceedings but there have been suggestions that such a duty should be implied.<sup>66</sup>

## 5 Groups of Companies

The Insolvency Regulation does not have any provisions on groups of companies, whether of a substantive or procedural kind.<sup>67</sup> In determining whether insolvency proceedings may be opened, the focus of the inquiry is on a particular individual company and the COMI of that company, and not on its status as a member of a group of companies. The Regulation ignores the wider group perspective though some of the case law from Member States have adopted an “integrated economic unit” approach. This approach looks at the affairs of the group of companies as a whole and may lead to the conclusion that related companies have their COMI in the same State even though the companies may have been incorporated in different States. According to a French Court<sup>68</sup> the “analysis of the case law of the various Member States shows that courts adopt a pragmatic approach tending to allow streamlining of strongly integrated groups of companies.” The European court judgment in the Eurofood

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<sup>61</sup> New Articles 18(1) and 29a(2).

<sup>62</sup> See explanatory memorandum attached to the Commission proposal at para 3.1.3.

<sup>63</sup> New Article 29(1).

<sup>64</sup> New Article 31a.

<sup>65</sup> Explanatory memorandum at para 3.1.3.

<sup>66</sup> See Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings (OUP, 2nd ed, 2009) at para 8.362.

<sup>67</sup> See generally I Mevorach “The ‘Home Country’ of a Multinational Enterprise Group Facing Insolvency” (2008) 57 ICLQ 427; “Centralising Insolvencies of Pan-European Corporate Groups: a Creditor’s Dream or Nightmare?” [2006] JBL 468.

<sup>68</sup> Re MPOTEC GmbH [2006] BCC 681 at 687.

case<sup>69</sup> however firmly focuses the inquiry on the individual company holding that “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.” In other words, the presumption that the COMI is the place of the registered office prevails.

More recently, in the Mediasucre case<sup>70</sup> the European court rejected the proposition that a single COMI could automatically be inferred from the fact that the property of two companies has been intermixed. The court said that such intermixing could be organised from two management and supervision centres in two different Member States.

In dealing with the insolvency of related companies four different approaches are possible. The most interventionist strategy is that of substantive consolidation and to pool the assets of related companies. As a general proposition this approach is unlikely to pass muster because it disregards the principle that a company is a legal entity separate and distinct from its controllers or constituent shareholders. This principle is at the heart of most European legal systems and was recently reaffirmed by the UK Supreme Court.<sup>71</sup> Some countries however, including Ireland, as an exception to the ‘separate corporate entity’ principle permit the pooling of assets of related companies in certain limited circumstances.<sup>72</sup> Even in the UK this principle is not unknown, for in a case arising out of the collapse of Bank of Credit and Commerce International in the early 1990s – Re BCCI (No 2)<sup>73</sup>– it was held that pursuant to s 167 of the Insolvency Act 1986 the court could approve a ‘pooling’ agreement where the assets of insolvent companies were so confused that it was impossible to define the assets of each company.

A second, milder, approach is that procedural consolidation, whether done on a de facto or de jure basis. In the UK, this result can be achieved by the appointment of the same IP to two or more members of the same corporate group. In cases like in Re Daisytek-ISA Ltd<sup>74</sup> this approach was effectively adopted in respect of cases under the Insolvency Regulation with the court holding all the members of a group of companies had their COMI in the UK despite incorporation in different countries. A variant of the procedural consolidation approach is employed in the US and this allows a bankruptcy filing in a district other than where a company has its centre of main interests. Under the US code<sup>75</sup> a bankruptcy case may be filed where a

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<sup>69</sup> Case C-341/04 Re Eurofood IFSC Ltd [2006] ECR I-03813.

<sup>70</sup> Case C-191/10; OJ 2012 C39/3.

<sup>71</sup> Prest v Petrodel Resources Ltd [2013] UKSC 34; VTB Capital plc v Nutritek International Corp [2013] UKSC 5.

<sup>72</sup> See s 141 of the Irish Companies Act 1990. On the US position see D Baird “Substantive Consolidation Today” (2005) 47 Boston College Law Review 5.

<sup>73</sup> [1992] BCC 715.

<sup>74</sup> [2003] BCC 562.

<sup>75</sup> 28 U.S.C. § 1408

company had its domicile, residence, or principal place of business in the US or where an affiliate company had already filed a bankruptcy case. This provision was used in the General Motors case to facilitate a bankruptcy filing by General Motors in New York even though the company had its headquarters and main operations in the US State of Michigan. General Motors could ‘piggyback’ on an earlier bankruptcy filing by a small associated company in New York.<sup>76</sup> Effectively the US venue rules allow for the insolvencies of a large group of associated companies to be administered from the same location.<sup>77</sup>

A third, even milder, approach is that of procedural cooperation with the insolvencies of different members of a corporate group administered in different States but with the separate IPs being subject to a duty to cooperate and given a role in the different proceedings. The final approach, and least interventionist strategy, would be simply to disregard the fact that the companies are related and to proceed with separate insolvency proceedings in respect of each company. This approach is likely to be value destructive because the economic affairs of group members may be so entangled that meaningful returns can only be achieved through a coordinated group restructuring and/or sale of assets.

In its proposals the European Commission acknowledges the virtues of the second, procedural consolidation, approach. It states that its proposals are not intended to preclude the “existing practice in relation to highly integrated groups of companies to determine that the centre of main interests of all members of the group is located in one and the same place and, consequently, to open proceedings only in a single jurisdiction.”<sup>78</sup>

The main thrust of the Commission proposals is to extend the principles of cooperation applicable in the context of main and secondary proceedings to insolvency proceedings involving different members of the same group of companies. Both IPs and courts are obliged to cooperate but this cooperation may take different forms depending on the circumstances of the case. IPs should exchange relevant information and cooperate in the elaboration of a rescue or restructuring plan where this is appropriate. Cooperation by way of protocols is explicitly mentioned and the Commission suggests that this reference both acknowledges the practical importance

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<sup>76</sup> See The Financial Times 2<sup>nd</sup> June 2009 at p 27. See generally on the big ‘car’ cases in the US D Baird “Lessons from the Automobile Reorganizations” (2012) 4 Journal of Legal Analysis 271; S Lubben “No Big Deal: The GM and Chrysler Cases in Context” (2009) 82 American Bankruptcy Law Journal 531; M Roe and D Skeel “Assessing the Chrysler Bankruptcy” (2010) 108 Michigan Law Review 727.

<sup>77</sup> For vociferous criticism of bankruptcy forum shopping in the US see L M LoPucki Courting Failure: How Competition For Big Cases is Corrupting the Bankruptcy Courts (Ann Arbor, University of Michigan Press, 2005) but for rebuttals of the LoPucki thesis see (2006) 54 Buffalo Law Review and also K Ayotte & D Skeel (2006) 73 University of Chicago Law Review 425. See now S Parikh “Modern Forum Shopping in Bankruptcy” [2013] Connecticut Law Review at p 28.

<sup>78</sup> See explanatory memorandum attached to the Commission proposals COM (2012) 744 final at para 3.1.5.

of these instruments and further promotes their use.<sup>79</sup> Courts can cooperate, in particular, by the exchange of information and by coordinating the administration and supervision of the assets and affairs of the group companies as well as coordinating the conduct of hearings and the approval of protocols.

Additionally, the proposal gives an IP standing in relation to insolvency proceedings affecting another member of the same group. In particular, the liquidator has a right to be heard in these other proceedings; to request a stay of the other proceedings and to propose a rescue or restructuring plan in accordance with the law applicable to those proceedings. The IP also has the right to attend and participate in a meeting of creditors.<sup>80</sup> The Commission suggests that these procedural tools will enable the IP with the biggest interest in a successful group restructuring to submit a coordinated restructuring plan even if this plan does not meet with the approval of the IPs of other group members.<sup>81</sup> The proposals however, also open up the possibility of procedural chaos with different restructuring plans being put forward by different IPs. Practical arrangements will have to be worked out to ensure that this potentially valuable procedural tool does not become an arena for personal wrangling and conflict and an instrument for increased transaction costs.

A final point concerns the definition of members of a corporate group. It is defined as a number of companies consisting of parent and subsidiary companies. A parent company is defined in terms of control of a majority of voting rights in another company or membership of the other company plus the power to appoint or remove a majority of members of the administrative, management or supervisory board or the ability to exercise a dominant influence.<sup>82</sup> It has been argued that this definition is too limited because it fails to capture and reflect the myriad forms in which corporate groups are now structured.<sup>83</sup>

## **6 Applicable law - Missed opportunities**

Under the Regulation the law that applies to insolvency proceedings is, in general, the law of the State that opens the insolvency proceeding but Articles 5-15 contain a lot of exceptions to this general principle. By and large, Articles 5 -15 have not been tested to the same extent in case law as the COMI principle and the jurisdiction to open insolvency proceedings. Nevertheless, the meaning of some of the Articles 5-15 provisions as well as the rules on “location” of assets in Art 2(g) seem shrouded in

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<sup>79</sup> See new Article 42a and para 3.1.5 of the explanatory memorandum.

<sup>80</sup> New Article 42d.

<sup>81</sup> Explanatory memorandum at para 3.1.5 p 9.

<sup>82</sup> New Article 2(j).

<sup>83</sup> See H Eidenmuller “A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond” (2013) 20 Maastricht Journal 133 at at p 149.

uncertainty and to detract from the security of transactions which these provisions are supposed to guarantee. Article 5, for example, states that the opening of insolvency proceedings shall not affect rights in rem of creditors over assets located in a State other than the State of the opening of proceedings.<sup>84</sup> The general view reflected in the Virgos Schmit Report<sup>85</sup> is that Article 5 embodies a ‘hard and fast’ rule<sup>86</sup> that the holder of the right in rem can exercise its rights without any exception or limitation stemming from collateral carve-outs for the benefit of unsecured creditors under the law of the COMI state. This interpretation implies that Article 5 constitutes an exception to Article 4(2)(i) which provides that the COMI State shall determine the rules “governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off”.<sup>87</sup> Arguably, Article 5 overprotects a secured creditor with foreign-located collateral because it gives a stronger level of protection against the debtor’s insolvency than that demanded by the national law of the situs.<sup>88</sup> There is an EU bonus – a bonus for secured creditors in European cross-border insolvencies that is not available in domestic insolvencies.<sup>89</sup> Unless secondary insolvency proceedings are opened in a particular State, a secured creditor is allowed to enforce against collateral in that State even though the country’s domestic law would not allow enforcement.

Article 5 however, does not define what is meant by a “right of rem”. This is a source of some uncertainty but in general terms it covers security rights i.e. rights over property to ensure the payment of money or the performance of some other obligation.

It is also not clear what is meant by “shall not affect” in Article 5 and whether in particular it prohibits temporary restrictions on the enforcement of security; the writing down of secured debt; and the realization of security by an IP against the wishes of a secured creditor.

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<sup>84</sup> See generally on this P Smart ‘Rights In Rem, Article 5 and the EC’ (2006) 15 International Insolvency Review 18; M Balz “The European Union Convention on Insolvency Proceedings” (1996) 70 American Bankruptcy Law Journal 485 at 509-510.

<sup>85</sup> See paras 97-104.

<sup>86</sup> For use of this expression see AJ Berends ‘The EU Insolvency Regulation: Some Capita Selecta’ [2010] Netherlands International Law Review 423 at 429 and for discussion of rival approaches see pp 430-434.

<sup>87</sup> The Financial Markets Law Committee Issue paper no 30 (September 2012) “European Insolvency Regulation” at p 11 suggests however that there is some uncertainty on the point. See also Article 4(2)(i) on the role of the COMI State in determining who is to bear the costs and expenses incurred in the insolvency proceedings.

<sup>88</sup> See para 5.7 of the proposals prepared by Insol Europe for “Revision of the European Insolvency Regulation” (2012) - drafting committee chaired by Robert van Galen. More generally on the need for reform of Article 5 see the papers by Jennifer Marshall and Michael Veder on the [www.eir-reform.eu](http://www.eir-reform.eu) website.

<sup>89</sup> See Miguel Virgos and Francisco Garcimartin The European Insolvency Regulation: Law and Practice (The Hague, Kluwer, 2004) at pp 103-104: “Article 5 functions more as a rule of substantive law than as a simple conflict rule and when, compared with the national laws concerned, it may afford a stronger level of protection against the insolvency of the debtor than that which these national laws demand”.

The Commission proposal's leave Article 5 unchanged but make certain technical adjustments to the old Article 2(g) including new rules on the location of banks accounts.<sup>90</sup> These changes introduce a welcome measure of clarification but certain difficulties remain; not least whether the location rules establish a hierarchy and how to treat tangible property that may be recorded in an ownership register. The position of intellectual property rights is also unclear.<sup>91</sup>

The Commission also proposes a new provision – article 6a on netting agreements stating that such agreements shall be governed solely by the law of the contract governing such agreements. This proposal may suggest that netting agreements are currently outside Article 6 of the Regulation which is worded so as to preserve certain set-off rights. Article 4(2)(d) states that the law of the insolvency forum shall govern the conditions under which set-offs may be invoked, but, under Art 6, set-off rights can still be claimed if they are permitted by the law applicable to the insolvent debtor's claim. The BCCI<sup>92</sup> litigation shows that set-off rights differ significantly between States and the provision safeguards the position of creditors who have entered into certain transactions on the basis that set-off rights would be available. On the other hand, the expression 'set-off' may be used in different States to refer to different legal processes. It is not clear whether the expression should be given an autonomous interpretation for the purpose of the Regulation and whether this interpretation includes contractual netting. In Eurofood<sup>93</sup> the European court said that the COMI concept had to be given an autonomous interpretation but in the Bank Handlowy case<sup>94</sup> they declined to give such an interpretation to the concept of closure of insolvency proceedings.

The Commission also missed the opportunity of clearing up another ambiguity in the interpretation of Article 6 and, in fact, in a proposed new Article 6 compounds the area of ambiguity. Article 6, in allowing set-off rights that are permitted by the law applicable to the insolvent debtor's claim does not say whether or not this has to be the law of an EU Member State. One might argue that this limitation is implicit in the Regulation but one could contrast the wording of Article 6, and the proposed new Article 6a, with Article 13. According to Article 4(2)(m), the law of the insolvency forum shall dictate the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors. Article 13 however, provides a defence where the person who benefited from an act detrimental to all the creditors provides proof that (i) the act is subject to the law of a different Member State and (ii) that law does not allow any means of challenging that act in the relevant case. This veto is designed

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<sup>90</sup> Under the Commission proposals, the 'location' rules would be contained in a new Article 2(f) and in the case of cash held in accounts with a credit institution, the asset would be deemed to be located in the State indicated in the account's IBAN.

<sup>91</sup> See Commission report - COM(2012)743 - at p 12.

<sup>92</sup> Re Bank of Credit and Commerce International SA (No 10) [1997] Ch 213.

<sup>93</sup> Case C-341/04 Re Eurofood IFSC Ltd [2006] ECR I-03813.

<sup>94</sup> Case C-116/11; judgment given 22 November 2012 at paras 49-51.

to uphold legitimate expectations based upon the circumstances that exist at the time of acting but the veto is specifically stated to apply only where the relevant law is the law of an EU Member State. In comparing the language of Articles 6 and 13 one could apply the maxim *expressio unius, exclusio alterius* or alternatively dismiss the difference in wording as simply due to imprecision and inconsistency on the part of the drafter.

Article 10a is another proposed new article from the Commission and it amends Articles 8 and 10 of the Regulation. Article 8 provides that the effects of insolvency proceedings on contracts conferring the right to acquire or make use of immovable property are governed solely by the law of the Member State within whose territory the immovable property is situated. Article 10 states that the effect of insolvency on employment contracts and relations shall be governed by the law applicable to the contract of employment. The preamble to the Regulation states that the purpose of this provision is to protect both employees and jobs.<sup>95</sup> The intention is that the law applicable to the employment contract would determine, for example, whether liquidation operates to terminate or to continue employment contracts. Other important employment law related matters are left to the law of the insolvency forum, including the preferential status of employee claims in liquidation.

The intended new Article 10a states that where the law of a Member State “governing the effects of insolvency proceedings on the contracts referred to in Articles 8 and 10 provides that a contract can only be terminated or modified with the approval of the court opening insolvency proceedings but no insolvency proceedings have been opened in that Member State, the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts.” It seems that behind the Commission proposal is the view that “different labour law standards may hinder an insolvency administrator to take the same actions with regard to employees located in several Member States and that this situation may complicate the restructuring of a company.”<sup>96</sup> On the other hand, the effect of the amendment would seem to deprive Article 10 of practically all force. Article 10 has made a policy choice and the new Article 10a makes a different policy choice. Certainly, the two do not sit neatly side by side.

The clarification to Article 15 proposed by the Commission is more defensible and more readily comprehensible. Article 15 provides that the effects of insolvency

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<sup>95</sup> Recital 28.

<sup>96</sup> See Commission report - COM (2012) 743 - at p 12. The report goes on to say that “this situation is inherent in the policy choice underlying Article 10 which the evaluation study does not call into question. A harmonization of certain aspects of labour law could mitigate this problem but would be difficult to achieve since labour law is deeply rooted in national traditions and, at any rate, go beyond the scope of the revision of the Regulation.”

proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending. The Commission proposes to make it clear that reference to ‘lawsuits pending’ includes arbitration proceedings.<sup>97</sup> This clarification makes explicit what was held to be implicit in Article 15 by the English courts in Syska v Vivendi Universal SA.<sup>98</sup> The court suggested that it would border on the irrational to protect the legitimate expectations of those who had commenced an action against the insolvent but not those who had initiated a reference to arbitration.

## **7 Publicity and improving the position of creditors**

The Insolvency Regulation contains some provisions for publicizing the existence of insolvency proceedings but these are essentially voluntary. Article 21 states that a liquidator may request that notice of the opening of insolvency proceedings and the decision appointing him should be published in other Member States in accordance with the publication procedures in those States. Article 22 states that a liquidator may request that the opening of insolvency proceedings should be registered in the land registers, the trade register and any other public registers kept in other Member states. The publication of the opening of the insolvency proceedings triggers a presumption that a person honouring an obligation for the benefit of a debtor is aware of the opening of insolvency proceedings in respect of the debtor.<sup>99</sup>

There may be a considerable time lag between the opening of insolvency proceedings and the proceedings being publicized in another State. It is not therefore surprising that there have been a number of cases where main insolvency proceedings have been opened in an EU State even though main insolvency proceedings have already been opened in a different State. This was the case in Re Eurodis Plc<sup>100</sup> where it was held that the courts of the State where the first proceedings had been opened were not entitled to disregard the second set of proceedings. The court held that while a winding up order by a Belgian court probably ought not to have been made, since the main insolvency proceedings were in the UK, it had to stand as a valid order of the Belgian court unless set aside in Belgium.

The Commission proposes an ambitious new regime to enhance the publicity of proceedings with Member States being required to publish relevant court decisions in insolvency cases in a ‘free’ and publicly accessible electronic register that is interconnected with the registers of other Member States.<sup>101</sup> The information to be

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<sup>97</sup> See Commission report - COM (2012)743 - at p 13.

<sup>98</sup> [2008] 2 Lloyd’s Rep 636 (HC); [2009] 2 All ER (Comm) 891 (CA).

<sup>99</sup> Article 24 provides a good discharge to a person honouring an obligation for the benefit of the debtor if that person is unaware that insolvency proceedings in respect of the debtor have been opened in another Member State.

<sup>100</sup> [2011] EWHC 1025; [2012] BCC 57.

<sup>101</sup> New Articles 20a, 20b, 20c and 20d and revised Articles 21 and 22.

published includes information concerning the court opening the insolvency proceedings, the date of opening and of closing proceedings, the type of proceedings, the debtor, the liquidator appointed, the decision opening proceedings as well as the decision appointing the liquidator, if different, and the deadline for lodging claims.

It is questionable whether the idea of a publicly accessible Community wide electronic register of insolvency proceedings is practically realisable. Moreover, given the considerable costs involved in the establishment and maintenance of such a system it is also questionable whether public funds should be committed to maintaining free access to the system.

#### Improving the position of creditors

One of the reasons why ‘local’ creditors may press for the opening of secondary proceedings is that the main proceedings are being transacted in a faraway country and in a language with which they may not be familiar. Foreign creditors may not be familiar with the procedures in the State where main proceedings have been opened including the proofs that have to be submitted and the time limits for lodging claims. The creditor may be required to provide a translation of the claim into one of the official language of the State where the proceedings have been opened. Submitting a claim may require the services of a foreign lawyer or other professional. All these transaction costs may make it uneconomical to submit a claim. The European Commission has estimated that the average cost for a foreign creditor of lodging a claim is € 2000 in a cross-border case. “Due to high costs, creditors may choose to forgo a debt, especially when it involves a small amount of money. This problem mainly affects small and medium-sized businesses as well as private individuals.” 102

Articles 40–42 set out practical steps to try to alleviate the disadvantage that foreign-based creditors may suffer in practice. According to a French Commercial Court in R Jung GmbH v SIFA SA,<sup>103</sup> under these provisions, creditors, whose head offices were in an EU State than the State where the proceedings had been opened, were entitled to receive a notice of information with the title ‘Invitation to lodge a claim. Time limits to be observed’. The court said that this title must appear on a form at the top, in all official languages of the EU institutions. If it did not do so, then the creditor was not subject to any time limits in respect of the bringing of a claim.

The provisions in the Regulation however do not establish a comprehensive procedural framework. They only set out minimum rules that enabling foreign creditors to lodge their claims and, under Article 42(2), the foreign creditor may be required to provide a translation of the claim into the language of the State that opens the proceedings. According to the Commission, “in some Member States requiring

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<sup>102</sup> See Commission report - COM(2012)743 - at pp 16-17.

<sup>103</sup> [2006] BCC 678.

the translation has become the rule rather than the exception, thereby entailing additional costs and delays.”<sup>104</sup>

Recognising these issues, the Commission has fashioned a set of proposals that tries to facilitate the lodging of claims by foreign creditors.<sup>105</sup> Firstly, it provides for the introduction of two standard forms. One is for the notice to be sent to creditors and the other is for the lodging of claims. These standard forms will be made available in all EU official languages thereby reducing translation costs. Secondly, each Member State is required to indicate at least one EU official language other than its own which it accepts for the purpose of the lodging of claims. Thirdly, foreign creditors are given at least 45 days following publication of the notice of opening of proceedings in the insolvency register to lodge their claims and this period applies regardless of any shorter periods under national law. Foreign creditors will also have to be informed if their claim is contested and afforded the opportunity of providing supplementary evidence to verify their claim. Finally, it is provided that representation by a lawyer or another legal professional shall not be mandatory for the lodging of claims.<sup>106</sup>

## 8 Conclusion

The general consensus reflected in the Commission proposals seems to be that the Regulation, on the whole, works well; that fundamental reform is not needed and could in fact be destabilising but that some reform would be beneficial to improve the practical operation of the Regulation.<sup>107</sup> Leading commentators, with varying degrees of enthusiasm, have described the proposals as a “very decent”<sup>108</sup> and as a “modest attempt ..... to improve the status quo”.<sup>109</sup> The proposal will probably not do any harm except perhaps in relation to groups of companies where the revised Regulation opens up the possibility of multiple different plans for a group restructuring being put forward by IPs in different countries. Given however, the time and expense in trying to formulate a restructuring plan this nightmarish vista is unlikely to be seen much in practice.

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<sup>104</sup> See Commission report - COM(2012)743 - at p 16.

<sup>105</sup> Revised Articles 39-41.

<sup>106</sup> Revised Article 39.

<sup>107</sup> It should be noted that the UK has “opted-in” to the proposal – see written ministerial statement of 15<sup>th</sup> April 2013 “Government consider that it is in the UK’s interest to opt in to the proposal because it will be of general benefit to creditors and businesses in the UK and EU.” The statement is available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130415/wmstext/130415m0001.htm>

<sup>108</sup> See G Moss QC [2013] *Insolvency Intelligence* 55.

<sup>109</sup> See H Eidenmuller “A New Framework for Business Restructuring in Europe: The EU Commission’s Proposals for a Reform of the European Insolvency Regulation and Beyond” (2013) 20 *Maastricht Journal* 133 at 150.

In their proposals for a revised Regulation the Commission has stuck very much within the framework of the existing Regulation. The proposals do not set off on a new path or try to disturb the essential balance of interests at the heart of the political compromises that make up the Insolvency Regulation.<sup>110</sup> Recital 11 of the preamble to Insolvency Regulation<sup>111</sup> acknowledged that as a result of widely differing substantive laws it was not practical to introduce insolvency proceedings with universal scope throughout the entire EU and this calculus has not changed very fundamentally. Opinions still differ on the extent to which a company should be allowed to ignore or set aside existing contractual commitments during the insolvency process. The priority afforded secured credit<sup>112</sup> and whether secured creditors are subject to a bankruptcy or restructuring moratorium and whether they can be subjected to a restructuring plan against their wishes are also areas where national differences remain pronounced.<sup>113</sup>

There are also differences on the extent to which there should be an investigation of the reasons that caused the company's financial difficulties and whether company management can be held personally responsible for these failings. There are different ideas about whether, and in what circumstances, pre-insolvency transactions may be set aside at the beckoning of an insolvency administrator and the importance ascribed to the security of transactions.<sup>114</sup> Another important area of difference concerns the treatment of employees in insolvency, whether in the context of continuation of employment or pensions.<sup>115</sup> National variation in the priority given to unpaid tax and environmental cleanup claims is also common.

Some countries may place a strong emphasis on liquidation whereas others put a greater emphasis on business restructuring. The last is however, is an area where the Commission have recognized, and tried to forge ahead with, a new consensus. In a Communication on a new European approach to business failure and insolvency they say:

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<sup>110</sup> See F Mucciarelli "Not Just Efficiency: Insolvency Law in the EU and its Political Dimension" (2013) 14 European Business Organization Law Review 175.

<sup>111</sup> Regulation 1346/2000.

<sup>112</sup> See JM Garrido "No Two Snowflakes are the Same: The Distributional Question in International Bankruptcies" (2011) 46 Texas International Law Journal 459 at 460-461 that "there are no two priority systems that are identical, and that harmonization or unification of the law in this area is extremely unlikely to happen. In fact, priority systems are but the expression of the hierarchy of values that permeate a given legal system. This means that graduation of creditors is primarily political, and that the influence of powerful groups of creditors, the inertia of legal tradition, or the conscious and deliberate choice to promote certain values, are the factors that explain the fundamental differences encountered in various jurisdictions around the world."

<sup>113</sup> See Jay L Westbrook, Charles D Booth, Christoph G Paulus and Harry Rajak, A Global View of Business Insolvency Systems (Washington DC, The World Bank 2010).

<sup>114</sup> See generally G McCormack 'Conflicts, avoidance and international insolvency 20 years on – a triple cocktail' [2013] JBL 141.

<sup>115</sup> See generally S Deakin and A Koukiadaki "Capability theory, employee voice, and corporate restructuring: evidence from UK case studies" (2012) 33 Comparative Labor Law and Policy Journal 427; J Armour and S Deakin 'Insolvency and employment protection: the mixed effects of the Acquired Rights Directive' (2003) 22 International Review of Law and Economics 443.

“As Europe is facing a severe economic and social crisis, the European Union is taking action to promote economic recovery, boost investment and safeguard employment. It is a high political priority to take measures to create sustainable growth and prosperity.”<sup>116</sup>

The Commission highlights the importance of insolvency rules in supporting economic activity and, as a first step towards achieving its ambitious goals, it puts forward “the modernisation of the EU Regulation on insolvency proceedings”.<sup>117</sup> The rhetoric seems overblown and far divorced from the quite modest changes proposed in the revised Insolvency Regulation. While the modern tendency may be to hype everything and to herald eagerly rafts of new initiatives, this approach sows the seed of disillusionment and disappointed expectations. More prosaically, the Commission missed out on the opportunity for desirable clarifications of the directive, for example, in the context of Article 5 and security rights over property. It suggests that the existing provisions “apply sufficiently smoothly within the EU and the respective fields of the *lex fori* and the *lex situ* strike the right balance.”<sup>118</sup> It is difficult to concur with this conclusion when the provisions are unclear. Moreover, the Commission does not propose amendments to the provisions of the Regulation concerning the recognition of, and coordination with, insolvency proceedings opened outside the EU. “[T]he main reason is that such provisions would be binding only in the territory of Member States and not in non-EU countries.”<sup>119</sup> Nevertheless, in the context of set-off rights and netting agreements in Article 6, it would have been desirable to specify whether the Regulation applies if the relevant transaction is governed by a law of a non-EU State.

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<sup>116</sup> Communication “A new European approach to business failure and insolvency” COM (2012) 742 at p 2 citing ‘President’ Barroso’s letter to EP President in the framework of the State of Union address on 12 September 2012.

<sup>117</sup> Communication “A new European approach to business failure and insolvency” COM (2012) 742 at p 8. In addition, the Commission suggested the adoption of a European Entrepreneurship Action Plan which would include action to promote efficient bankruptcy procedures and offering second chance. The plan “Entrepreneurship 2020 Action Plan: Reigniting the entrepreneurial spirit in Europe” COM (2012) 795 was released on 9<sup>th</sup> January 2013.

<sup>118</sup> See Commission report - COM (2012)743 - at p 18.

<sup>119</sup> According to the Commission report at p 18 a possible elaboration of a draft international convention would better achieve these objectives, and also ensure the Union’s interests in reciprocal negotiations with the third countries.