Moving House: Which Court Can Open Insolvency Proceedings?

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1. European Insolvency law in motion

In some five years in Europe cross-border insolvency questions are being solved according to a fully different legal framework than at the end of the 90s of the last century. A cornerstone is the Council regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, which came into effect May 31, 2002.[2] It has introduced a legal system for dealing with cross-border insolvency proceedings, containing provisions on jurisdiction, recognition and applicable law. A Regulation is a Community law measure, which is binding and directly applicable in Member States. The goals of the Regulation, with 47 articles, are to enable cross-border insolvency proceedings to operate efficiently and effectively, to provide for co-ordination of the measures to be taken with regard to the debtor's assets and to avoid forum shopping. The Insolvency Regulation, therefore, provides rules for the international jurisdiction of a court in a Member State for the opening of insolvency proceedings, the (automatic) recognition of these proceedings in other Member States and the powers of the 'liquidator' in the other Member States. The Regulation also deals with important choice of law (or: private international law) provisions. The Regulation is directly applicable in the Member States for all insolvency proceedings opened after 31 May 2002.[3]
Art. 1(1) EU Insolvency Regulation (InsReg) excludes from its scope insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings, holding funds or securities for third parties, and collective investment undertakings. 'Insurance undertakings' are defined according to the description, set out in Directive 2001/17 of the European Parliament and the Council of March 19, 2001, on the reorganization and winding-up of insurance undertaking[4], and 'credit institutions' will be covered by the definition of Directive 2001/24 of the European Parliament and the Council of April 4, 2001, on the reorganization and winding-up of credit institutions.[5] These institutions are excluded from the Insolvency Regulation since they are subject to special arrangements and, to some degree, the national supervisory authorities have extremely wide-ranging powers of intervention. Unlike a Regulation, a Directive will go through a legislative implementation process in each individual EC Member State. The implementation dates are April 20, 2003 (insurance) and May 5, 2004 (credit institutions) respectively. The Winding-Up Directive Banks is to be regarded as to plug a gap left by the Insolvency Regulation.[6] It should be noticed that the Insolvency Regulation itself aims to fill a gap that deliberately was left, over thirty years ago, in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil

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[2] Official Journal (O.J.) L 160 of 29 May 2000
[3] In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not participating in the adoption of the Insolvency Regulation and is therefore not bound by it nor subject to its application.
[4] O.J. L 110 of 20 April 2001.
[5] O.J. L 125 of 5 May 2001.
[6] See Moss, Fletcher and Isaacs (eds.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide, Oxfort University Press (2002), nr. 8.11. Also: Hüpkes, The Legal Aspects of Bank Insolvency. A Comparative Analysis of Western Europe, the United States and Canada, Studies in Comparative Corporate and Financial law, Volume 10, The Hague/London/Boston: Kluwer Law International (2000), p. 7 ff, and Paulus, *Banken und Insolvenz – eine internationale Betrachtung* (Banks and Insolvency – An International Reflection), in: ZBB (Zeitschrift für Bankrecht und Bankwirtschaftrecht), 15. December 2002, p. 457 ff.

and Commercial Matters. Art. 1(1) of this Convention excluded from its scope insolvency proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings. The EU Insolvency Regulation has now filled this gap, while the Brussels Convention has been transformed into a Regulation as of 1 March 2002.[7] Art. 1(2) Brussels Regulation 2002 contains the same exclusion. Art. 25 Insolvency Regulation aligns the recognition and enforceability of insolvency related judgments (concerning the course and the closure of insolvency proceedings and court approved compositions) with the Brussels Regulation 2002. Systematically judgments, not covered by the Winding-Up Directives, fall within the scope of the Brussels Regulation 2002.

2. Opening insolvency proceedings against insolvent debtors

In Europe, in the first year after its entry into force, the Insolvency Regulation produced some twenty courtdecisions. It seems that especially in the UK, the Netherlands and in Germany the Regulation has caused interesting decisions.[8] More than half of these cases are concerned with a courts competence to initiate insolvency proceedings. Art. 3(1) InsReg provides that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. If the debtor is a company or legal person[9] art. 3(1), first sentence InsReg, contains a presumption: the place of the registered office shall be presumed to be the centre of its main interests, in the absence of proof to the contrary. In cases of natural persons, the 'centre of main interest' is the sole criterion to decide whether a court can exercise its international jurisdiction.
When a court has opened insolvency proceedings based on the debtor's center of main interest (COMI) the proceedings opened are the main proceedings, which in principle have universal scope and encompass all of the debtor's assets wherever located within the EU (with the exception of Denmark). By giving an interpretation to term in the Insolvency Regulation regard is to be had at the 33 recitals preceding the Regulation, which serve as a preamble or statement of reasons, see art. 253 EC Treaty. With regard to these recitals the High Court of Justice (Ch D) (Justice Lloyd) 7 February 2003 (*Re BRAC Rent-A-Car International Inc)*[10] holds:

> 'The context of the Regulation is described in its 33 recitals. These …. help to cast light on some of the substantive provisions'.[11]

Another source is formed by the Report Virgós/Schmit (1996)[12]. To the Report Virgós/Schmit Lloyd J in the *Brac Inc*.-case considers:

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[7] Council Regulation No. 44/2001 of 22 December 2000, O.J. 2001 L 12/1.
[8] See Fletcher, The Challenges of Change: First Experiences of Life under the EC Regulation in the UK, International Insolvency Review (forthcoming) and Wessels, Anticipation and Application of the EU Insolvency Regulation in the Netherlands, in: Insolvency Law & Practice (forthcoming).
[9] Not being a financial institution as meant in art. 1(2) InsReg.
[10] [2003] EWHC (Ch) 128, [2003] 2 All E.R. 201; [2003] BCC, Lloyd J. See for comments among others: Wessels, *Rechtspersonen met zetel buiten de EU kunnen onderworpen zijn aan een insolventieprocedure in de EU* (Legal persons outside the EU can be subjected to an insolvency proceeding in the EU), WPNR 6534 (2003), the 'Comment' in; The Company Lawyer 2003, p. 97 and the '*Kurzcommentar'* (Short Commentary) of Sabel and Schlegel in (German) EWiR 2003/8, p. 367.
[11] See para. 10, adding in para 26 that in cases of inconsistence the text of articles prevails over that of recitals in Community legislation.
[12] This report has been issued by Professor Miguel Virgós and Mr Etienne Schmit, to serve as an interpretative guide to the Insolvency Convention of 1995, which five years later has been altered to the Insolvency Regulation, with nearly the same content as the Convention. Although the Report Virgós/Schmit never has been finalized or approved by the EC Ministers of Justice, both in literature as in court decisions it is seen as an unofficial guide te interpretation. The Recitals, preceeding the Regulation, contain an unsystematical selection of several parts of the Report Virgós/Schmit, in several cases (quite) literary, which seems to affirm the interpretative value of the Report. It should be mentioned that in the Netherlands already in 1996 a court made references to the report, see Court of Haarlem 17 September 1996, Netherlands International Private law (NIPR) 1996, 438.

> 'I am not altogether clear as to the status of the Report ….. However it seemed to me that I ought to take some account of its contents'.

We will see that the Netherlands Supreme Court too supports its most recent decision of 9 January 2004 with references to the recitals and the Report Virgós/Schmit (see par. 6).

3. 'Centre of main interests' as a standard on the go

Report Virgós/Schmit (1996), nr. 75, provides that the concept of 'centre of main interests' must be interpreted '….. as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'. This description carries a 'law and economics' dimension, in that the reporters argue that '….. insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which ..… entails the application of the insolvency laws of that ….. State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.'[13] In the recitals, preceding the Insolvency Regulation, too the point of view of third parties is prevailing. Recital 13 says: 'The 'centre of main interests' 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.' These words mirror the words, just quoted from the Report Virgós/Schmit.
Although it seems that the accent lies on interests of an economic nature, conducted out of a place ('centre') which is ascertainable by third parties (especially potential creditors), it is important to stress that the use of the term 'interests' is intended to express a wide spread of activities. Report Virgós/Schmit (1996), nr. 75, says: 'By using the term 'interests', the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers).' The concept of a debtor's centre of main interests therefore applies equally to private individuals who do not engage in an economic or commercial activity as it does to corporate entities engaged in trade. The Report Virgós/Schmit (1996), nr. 75, ends its elaboration with: 'In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence'.
The determination of a debtor's COMI is based on the interpretation of the facts in any given case. The outcome is not only of importance with regard to the question which country's court is competent. When the centre of main interest of a debtor cannot be located in the territory of a Member State, the Insolvency Regulation does not provide a base for international jurisdiction of courts in a Member State to open main insolvency proceedings. Art. 3(1) InsReg presupposes that this centre is within the EC Community. Recital 13, too, is clear: 'This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community.' In a case like this, it is up to the national law (including its private international law) to determine the international jurisdiction of its own domestic courts. The legal consequences of an opening judgment therefore are not determinated by the Insolvency Regulation, but by the contents of each Member State's domestic laws. In the Netherlands for instance a company or legal person with registered office outside the Member States is subjected to an insolvency opening in this country when in the Netherlands there is a commercial activity or it keeps offices. This is the outcome of a proceeding, on appeal, called *Geveran Trading Co. Ltd v. Kjell Tore Skjevesland*[14] regarding

[13] See too Virgós, The 1995 European Community Convention on Insolvency Proceedings: an Insider's View, in: Forum Internationale, no. 25, March 1998, p. 13, referring to '….. the place where the debtor conducts the effective administration of his interests on a regular basis'.
[14] First instance: [2002] EWHC 2898 (Ch), [2003] BCC 209 (Registrar Jacques); on appeal High Court 11 November 2002 [2003] BCC 391 (Judge Howard).

a debtor (referring to himself as a Swiss banker), who is a Norwegian citizen, domiciled in England during a period of three years prior to his petitioning, and domiciled too in Spain and in Switzerland. The debtor tried to defend himself against a creditor that petitioned for his insolvency in the UK. The debtor tried to proof that all his relevant connections were with Switzerland or Spain, but not the UK. The High Court did not locate his COMI in Spain (what would have resulted in applying the Regulation, but only through the international jurisdiction of a Spanish court), but in Switzerland. Therefore the Insolvency Regulation does not apply (Switzerland is not an EU Member State) and, by consequence, the English court could apply its domestic jurisdiction rule (section 265 Insolvency Act 1986), leading to its jurisdictional authority based on the debtor's previous residence in England for a period within the preceding three years.
In cases of personal insolvency to which the Regulation applies I mentioned earlier that the Regulation does not contain a presumption with regard to (fixing) a centre to a certain place, (which presumption might or might not be rebutted). For a private individual a court solely can give interpretation to relevant facts that would or would not lead to COMI. In theory a court may have to decide e.g. where a natural person has his COMI when he lives in Amsterdam and works for 2, sometimes 3, and once in a while 4 days a week in London. Some authors prefer a choice for the place of residence,[15] where I – with others[16] – would try to apply the norm provided in recital (13) ('….. as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'), leading to the place of living or professional/business domicile ('woonplaats') to be the aforementioned centre of main interest.

4. A Norwegian-born Swiss banker in London

In the UK case I mentioned earlier, with regard to the Norwegian-born 'Swiss banker' living in England, Spain and Switzerland (*Geveran Trading Co. Ltd v. Kjell Tore Skjevesland*), the High Court considered that in a case of a non-professional usually his COMI is where the debtor habitually resides, but in the case of a professional the decisive factor would be the place of his 'professional domicile', as this location constitutes '…..somewhere were he can be located, the centre which is ascertainable by third parties'. The court, although implicitly, denies the possibility of having, under the application of the Insolvency Regulation, two or more 'centres' of main interests, which I hold as correct.
The reference date for a 'centre' to be 'centre' enough for a court to base its international jurisdiction is not the date of presenting the petitioning, according to the judgment in appeal in the aformentioned case of *Geveran Trading Co. Ltd v. Kjell Tore Skjevesland.*[17] The 'centre' should be there at the moment the court decides to open (or not) the main proceedings. In case the court has determined its international jurisdiction (by opening main proceedings), then the legal effect of this decision (universal effect within the Community; application of the lex concursus elsewhere; universal power of the liquidator) can not be influenced by – taken it would be legally possible – a decision of the debtor to close down all activities, to 'transfer' the centre to another Member State or a country outside of the EU

[15] Taupitz, *Das (zukünftige) Europäische Internationale Insolvenzrecht – insbesondere aus international-privatrechtlicher Sicht* (The (future) European International Insolvency Law – especially within the private international law context), in: ZZP 1998, p. 315; Berends (1999), p. 117.
[16] See for instance Balz, *Das neue Europäische Insolvenzübereinkommen* (The New European Insolvency Convention), in: Zeitschrift für Wirtschaftsrecht (ZIP) 1996, p. 949; Lücke (1998), p. 287, und Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfielt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung?* (Models of Cooperation in International Insolvency Law. Is A New Orientation Recommanded?) Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking (2001), p. 286.
[17] First instance: [2002] EWHC 2898 (Ch), [2003] BCC 209 (Registrar Jacques); on appeal High Court 11 November 2002 [2003] BCC 391 (Judge Howard). In this regard too: Fletcher, The Law of Insolvency (2002), p. 839; Dicey and Morris on Conflicts of Law (Third Cumulative Supplement to the thirteenth edition, 2003), nr. 31-090.

and/or to limit 'centre' activities to a level that would qualify as a place of operations ('establishment').[18] The Regulation should be interpreted so as to prevent any easy evasion of jurisdiction under the Regulation, see recital 4 (avoid 'forum shopping'). I agree with Moss, who submits: 'The courts should, in a case of undesirable forum shopping of that kind, ignore the steps taken purely to avoid the appropriate jurisdiction'.[19] This view can be supported by Community principles like (i) the principle of equal treatment or non-discrimination (between insolvent debtors), and (ii) the principle of legal certainty for creditors (the fixed or 'frozen' facts at a certain time – reference date – that includes the perspective of ascertainability by potential creditors).

5. On the move: from Germany to Spain and from The Netherlands to France

In a German case and a Dutch case the facts seem quite similar, but the courts hand down different judgments.
The Country Court of Wuppertal 14 August 2002[20] determines that the COMI of a German debtor-natural person is Spain:

> '….. because the debtor, according to her own statement, has moved to Spain on April 1, 2002, and considers herself that her Spanish domicile is her centre of main interest, because she want to live and work there'.[21]

The Court of Appeal Amsterdam 17 June 2003[22] had to decide in a similar case where the Dutch debtor obviously has finished her professional activities and moved to Longueville, France, a year prior to her insolvency. The sole fact of moving to another country, according to the court:

> '…. does not lead inevitably to the conclusion that main proceedings solely can be opened in France. It too does not lead to the conclusion that the debtor's COMI is not anymore in the Netherlands. By giving the answer to the question where the debtor's COMI is, the court holds as important that she has exercised her (professional) activities in the Netherlands, from which activities the claims derive. These claims are connected with a Dutch BV (in which the debtor owned shares) and with the husband of the debtor, and both the BV and the husband are subject to Dutch insolvency proceedings. Given these facts and in the absence of a decisive point of departure with France, the Amsterdam Court of Appeal decides that the debtor's COMI (still) is located in the Netherlands.'

I disagree with the Amsterdam Court of Appeal decision as the court denies putting weight on the circumstances at the time of its decision of (non-)opening of the proceedings. Moreover, the court seems to overlook the norm that the COMI is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, by merely looking at the origin and the nature of these debts. The Wuppertal court excites sympathy, the COMI-facts in a certain case however should be of an objective, rather

[18] In this way too with regard to the jurisdiction ex art. 3(2) InsReg Justice Lightman, in: Moss et al, p. 173.
[19] See Moss, in: Moss, Fletcher, Isaacs (eds.), The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide, 2002, p. 171.
[20] ZinsO-Rechtsprechungsreport 22/2002, p. 1099.
[21] It should be noted that the German Supreme Court (Bundesgerichtshof) with its decision of 27 November 2003 with a reference to this case has required to give a preliminary decision to the question whether a court in a Member State, where a petition to open main proceedings has been filed, remains to have international jurisdiction, when the debtor after having filed the petition, but prior to the opening of insolvency proceedings moves his centre of main interest to another Member State or whether the courts in the latter Member State shall have international jurisdiction. See ZIP 2/2004, p. 94 ff.
[22] Court of Appeal Amsterdam 17 June 2003, JOR 2003/186, commented by Spinath.

that of a subjective nature. Nevertheless the outcome of the Wuppertal judgment seems correct.

6. Moving about: a round-trip from the Netherlands, Dutch Antilles, British Virgin Islands, Belgium to the Nehterlands

The first Supreme Court case on COMI is from the: Netherlands Supreme Court 9 January 2004. The Supreme Court[23] has to decide in a case where a bank (Fortis) in March 2003 filed for opening of main insolvency proceedings at the Court of Alkmaar agains its debtor Evert-Jan Vennink, living in Deurle, Belgium. The Court opens the proceedings, and Vennink appeals.
The Court of Appeal Amsterdam 7 August 2003 (unreported) ex officio assessed its international jurisdiction and decided that according to art. 3(1) InsReg the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings, and follows:

> 'From the documents it can be derived satisfactorily that V's centre of main interest – among which substantial interests in a large number of companies, established in the Netherlands – is the Netherlands'.

From the considerations of the Supreme Court it can be taken that the fact that V argues that he does not administer any interest or trade activity in the Netherlands since 1994 can not be taken into account as these facts have not been presented in an earlier stage. The fact that V claims that he bank always has sent statements of account to his address in Belgium is considered incorrect as Fortis has stated – undisputed – that bank statements always have been sent to V's address in the Netherlands and that V always responded.
V disagrees and brings an appeal in cassation. The Supreme Court rejects V's complaints as far as these are aimed at the Amsterdam Court's judgment with regard to art. 3(1) InsReg:

> 3.4.1. According to art. 3 section 1 of this Regulation the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. With regard to companies and legal persons, according to this section, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Towards natural persons the Regulation does not contain similar presumption, subject to proof of the contrary. In the Recitals to the regulation under (13) it is mentioned that the 'centre of main interests' 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. The point of departure that with regard to a natural person his place of residence has to be regarded as his centre of main interest as meant in art. 3(1) EU Insolvency Regulation does not follow from the text, nor from the recitals. For this plea one finds unsufficient support in the passage in the explainary report of Virgós and Schmit accompanying the Bankruptcy Convention of 1995, which has not been enacted, and which report has served as a model for the rules of the EU Insolvency Regulation. The passage cited by the Attorney-General[24] does not imply that with regard to natural persons the

[23] HR 9 januari 2004, LJN-nummer: AN7896; Zaaknr. R03/091HR, available (in Dutch) at <<www.rechtspraak.nl>>.
[24] The Attorney-General quotes Report Virgós/Schmit, nr. 75: 'In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence', for which he uses the book of Moss et al (2000) (note xx above). The Attorney-General quotes the English version of the Virgós/Schmit report, adding that a Dutch version has not been published, which is incorrect, where a Dutch version exists and is easily available in an Ars Aequi legal texts edition and in the only available two-Volumes loose-leafe on the 'Faillissementswet' (Bankruptcy Act) in the Dutch market.

common place of residence has to apply as centre of main interests or that this is a rebuttable presumption.

In an additional note the Supreme Court further considers:

> 3.4.2. ….. did not ignore that in a case like this in which a debtor has left the Netherlands, the Kingdom in Europe, under circumstances no international jurisdiction ex art. 3 section 1 EU Insolvency Regulation will exist anymore, especially when the debtor not only has left his place of residence, but also has relocated his centre of main interest to another country. In the Court of Appeal's judgement however, this is not the case, as the Court apparently and not incomprehensible has adopted the view that V, with regard to the substantial interests in a large number of companies established in the Netherlands, has maintained to administer these commercial interest in the Netherlands and that V's position that he has left the Netherlands and went to the British Virgin Islands and subsequently to Belgium, in which country he lived until shortly prior to the Court of Appael's judgment, preceeding his recently terminated detention in Belgium, did not lead to another judgment.

7. Concluding remarks

The topic of 'centre of main interest' will be only one of the very many that will have to be solved in applying the huge mass of rules that the last five years have been spread of Europe in creating an efficient framework for the effectiveness of insolvency proceedings having cross-border effects. In the introduction I described some relevant sources. They contain many vague terms, standards and norms that will have to be decided on in the near future.
From the EU Insolvency Regulation I took a term that until now has been addressed by courts in the UK, the Netherlands and Germany.[25] With regard to COMI of natural persons the approach to distinct between a non-professional and a professional debtor has been suggested in the Report Virgós/Schmit (1996), nr. 75 and in literature.[26] As demonstrated, some courts seem to apply a division between a private person acting as a non-professional (COMI is habitual residence) or acting as professional (COMI is professional domicile), be it with different outcomes. Courts seem furthermore to give different weight to the (subjective) desire of a natural person to have its centre of main interest elsewhere, and act accordingly. Where some authors stress the meaning of subjective factors, like the debtors' declaration 'where his emotional ties are'[27], I would be much more reluctant, as one of the key aims of the Insolvency Regulation – avoiding forum shopping[28] – may be easily undermined.
For a fact intensive criterion as 'centre of main interest' the judgement of the Nehterlands Supreme Court demonstrates that all relevant facts should be addressed and explained, e.g:
- 'centre' versus a place one visits several times;
- 'main' versus other 'non-main' interests;
- 'interests', representing commercial or professional activities, but also general economic activities, including, living, eating, sporting and all other activities (maintaining a flat abroad, having bank accounts abroad) in live which are relevant to (making) creditors.

As often with an 'open standard', facts and rules are intertwined.

[25] It is a matter of great concern that the EC itself or (European) organisations of insolvency practitioners or of judges have not been able to organise a system in which court judgments are gathered and translated.
[26] See e.g. Moss et al (2002), nr. 8.41.
[27] See Dicey and Morris, Third Cum. Suppl. (2003), nr. 31-090.
[28] See recital 4: 'It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping).