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Judicial Comity and Chauvinism: The Need to Go Forum Shopping in Insolvency Matters[1]

Paul Kuipers and Mees Roelofs, Simmons & Simmons, Rotterdam, The Netherlands

1. Introduction

It was the late Lord Denning who once said that just like a moth is drawn to a light, a litigant is drawn to the United States.[2] For the past century, claimants from all over the world have sought jurisdiction in the United States because of its apparent 'claimant-friendly' climate: high compensation, the possibility to litigate on a contingency fee basis, absence of costs deterrent, trial by jury, pre-trial discoveries etc.

It is the choice of forum that will decide upon numerous issues of law and therefore possibly upon the very outcome of a case. After all, the harmony of decisions (*Entscheidungseinklang*), as envisaged by Von Savigny and other 19th-century private international law scholars, has never been reached: neither world-wide, nor on European soil.

The choice of forum is so decisive that after dismissal of a claim for a lack of jurisdiction, claimants will often stop litigating. An American study shows that after the dismissal of a claim on *forum non conveniens* grounds, the vast majority of claimants chooses not to litigate in the natural forum.[3] We have no reason to believe that the situation would be different in Europe, when the courts of one member state decline jurisdiction for a certain case.

Such differences between courts has created the notion of forum shopping. Forum shopping can be defined as taking full advantage of one's right to bring a case into the competent court of one's choice, thereby, however, taking the case away from its natural forum (or at least into a court with little nexus to the case).

In insolvency law, at least in Europe, forum shopping is relatively new. Even though there have been cases about debtors trying to establish jurisdiction in states with little nexus to the debtor before,[4] forum shopping has only really come to the forefront since the European Insolvency Regulation (EIR) came into force on 31 May 2002.

At first sight, the EIR leaves no room for forum shopping. Rationale 4 to the EIR mentions limiting forum shopping as an objective of the EIR. Under the EIR, a debtor can only have one centre of main interests (COMI), so the courts of only one EIR state should have jurisdiction. With no multitude of competent EIR fora being available, forum shopping should be impossible.

Nonetheless, numerous debtors have successfully sought jurisdiction under the EIR for insolvency proceedings in jurisdictions to which their nexus was debatable in the view of many observers. In other words, forum shopping under the EIR has proven to be possible after all, despite its rationale and the single competent court, as stipulated in article 3(1) EIR. This appears to be mainly the result of many debtors having strong ties with more than one EIR state. In such cases, the COMI, as a broad notion, can be construed to be situated in more than one member state. It appears that courts are willing to do this.[5]

In this article, we will focus on forum shopping in insolvency cases, more specifically under the EIR. Firstly, we will name a number of aspects which are specific to forum shopping in insolvency cases. Then we will argue that most choices of forum in insolvency cases, which are being labelled forum shopping, fall outside our definition of forum shopping, since most

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1 This article is an amended and updated version of a speech by Paul Kuipers at the IBA Conference, presented by the Insolvency and Creditors' Rights Committee of the IBA Section on Business Law, held in Seville, Spain on 18-20 April 2004.

2 *Smith Kline & French Laboratories Ltd. v Bloch* [1983] WLR 730 at 733 (C.A.).

3 D.W. Robertson, 'Forum Non Conveniens in America and England' (1987) 103 LQR 399.

4 For instance: Bundesgerichtshof 18 September 2001, NZI 2001, page 646.

5 Famously, Eurofood IFSC Ltd. has been adjudicated to have COMIs in both Ireland and Italy. The courts of Dublin and Parma both assumed jurisdiction over this debtor and as a result two main proceedings are pending. The case has been referred to the ECJ by the Irish Supreme Court on 27 July 2004 (unreported). See ZIP 2004, page 1220 (Tribunale Civile Parma) and page 1223 (Kelly J.).

insolvency proceedings are already being brought in a proper forum. Furthermore, we will argue that the effects of forum shopping in insolvency cases will usually be positive for all parties involved and will at least not be detrimental to the vast majority of creditors' rights. Then again, there are drawbacks to forum shopping; we will deal with these as well.

2. Forum shopping in insolvency cases

We see two major differences between forum shopping in insolvency cases and forum shopping in non-insolvency cases.

Firstly, there is the issue that forum shopping in insolvency cases must often be seen in a group structure context. The choice of a certain forum is in a large number of cases the result of group structures. When a parent company collapses, it often takes the foreign subsidiary with it. Often, a reorganization cannot be completed without someone reorganizing the foreign subsidiaries as well. This creates an indirect nexus between the debtor and the state, where insolvency proceedings are being sought. The nexus between the debtor and the jurisdiction where insolvency proceedings are being sought goes through its parent company.

Forum shopping in non-insolvency cases, on the other hand, is much more stand-alone. Such cases are rarely embedded in pan-European or global group structures. In any event, non-insolvency cases (particularly in the United States) have seen 'excesses' of neither the claimant, nor the defendant, nor the facts having anything to do with the state where jurisdiction is being sought. Often, not even an indirect nexus can be found. At the very least, forum shopping in insolvency cases has not reached this stage. The alleged forum shopping under the EIR has so far always seen some kind of nexus between the debtor and the state where jurisdiction is sought.

The other major difference is in the field of applicable law. Article 4(1) EIR points to the law of the state of the insolvency proceedings (*lex fori concursus*) for the bulk of insolvency related matters. In non-EIR insolvency proceedings too (throughout the world), *lex fori concursus* usually is the choice-of-law rule. This application of *lex fori concursus* makes the differences in the outcome of proceedings between various jurisdictions potentially large. After all, once one crosses the border, rights and possibilities may be completely different.

In insolvency law, potential differences between jurisdictions in the outcome of proceedings are large indeed. Substantive law for insolvency proceedings has hardly been harmonized. Regimes may (to various degrees) be either debtor-friendly or creditor-friendly. Secured creditors in Germany, for instance, may not exercise their rights themselves, but have to leave this to the receiver (§ 50 Insolvenzordnung). In other jurisdictions, such as The Netherlands, there is little obstruction to the secured creditor foreclosing himself (section 57 Faillissementswet). For a debtor seeking reorganization, a German *Insolvenz* could therefore be preferable over other jurisdictions. After all, this choice could prevent creditors from foreclosing on all secured assets straight away, hence making an effective reorganization virtually impossible. Logically, the creditor would seek an insolvency proceedings outside Germany.

Non-insolvency proceedings rarely see such a difference in substantive outcome between various jurisdictions. This has to do with the fact that, even though there is no complete harmonization of choice-of-law rules, the courts in different jurisdictions will in most cases in some way or another point to the same substantive law.

In all, the *lex fori concursus* rule, as it is in place in insolvency proceedings, brings material differences in substantive law between the individual jurisdictions. This makes it (compared to non-insolvency cases) more attractive to go forum shopping.

3. Forum shopping is a debtor's right

Rationale (4) to the EIR – the one supposedly preventing forum shopping – goes back on a passage in Virgós and Schmidt's explanatory report to the European Insolvency Convention (which never came into force and was eventually replaced by the EIR):

'There was a conflict of laws at both the internal level, with divergent national substantive rules, and the international level, with different private international law solutions. (...) Institutional cooperation is needed to provide a certain legal order to avoid incentives for the parties to transfer disputes or goods from one state to another, seeking to obtain a more favourable legal position ('forum shopping')'[6]

As to goods, this objective has been reached with a mechanism of automatic recognition of the universal effect of EIR proceedings and of rights *in rem*. As a result, the effect of a main insolvency proceeding upon the debtor's goods is the same, regardless of the location of those goods (as long as they are located in an EIR jurisdiction).

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6 M. Virgós and E. Schmit, 'Report on the Convention on Insolvency Proceedings', para. 7.

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As to the proceedings, there has been no substantive harmonization (the 'internal conflict'). The only action taken by the EU legislature has been to adopt the choice-of-law rules of articles 5 to 15 EIR (the 'international conflict').[7] The result of these rules is that courts throughout the EIR states will apply the same substantive law to certain insolvency-related issues, regardless of the state of the debtor and the state of the insolvency proceedings. These choice-of-law rules do prevent forum shopping.

As discussed above, the *lex fori concursus* rule (article 4 EIR) does not prevent forum shopping, particularly when seen against the background of somewhat vague rules governing jurisdiction. It is therefore fair to say that Rationale (4) to the EIR merely explains why the provisions regarding mutual recognition and choice-of law have been adopted. There is nothing in Rationale (4) to the EIR that would prevent the debtor from seeking an insolvency forum that fits him best.

This matches with the traditional notion on the European continent that forum shopping is a litigant's right. Courts should not punish a claimant (or in the case of insolvency, a debtor) for choosing the forum that suits him best. As a result, the doctrine of *forum non conveniens* has always been declined under EU and EU-related statutes, at least under the Brussels Convention and the Jurisdiction and Enforcement Regulation.[8] If a court has jurisdiction, it has no discretion to decline it, because there is not enough nexus between the court and the present case or because another court would be in a better position to decide upon the present case.[9] As the Brussels Convention, the Jurisdiction and Enforcement Regulation and the EIR are all European law, we see no reason to believe that this standing view on the Brussels Convention would not apply to the EIR.[10]

Even the various rules of *forum non conveniens*, as they are in force throughout the world, will usually not allow courts to decline jurisdiction on their own motion or on public policy grounds.[11] It is not up to the courts to punish litigants for forum shopping, as long as the litigants themselves do not oppose.

The standing European view on forum shopping is that the legislative branch decides on jurisdiction being granted. This may be the legislative branch of the European Union (i.e. Council and Parliament) or the legislative branch of individual jurisdictions. In any event, as soon as the legislative branch decides that jurisdiction may be assumed, the parties involved may use the competent fora without further justification.

Overall, one cannot blame a debtor for trying to reorganize in the most effective way. Claimants in non-insolvency proceedings choose a certain forum for its expertise or its speed. Even the alleged excesses thereof have continuously been held admissible under the Brussels Convention, with no hint of a change for the Jurisdiction and Enforcement Regulation.[12] We see no reason why a debtor would not have a right to seek a forum which suits his aim of reorganization best. Moreover, such a choice is not an abuse, but a move which optimizes the rights of most parties involved.

This means that a debtor has every right to rebut the presumption that its COMI is in its incorporation state. The courts have no right to refuse jurisdiction as soon as the debtor has proven that he has his COMI in the member state of that court. Other member states can do nothing but accept the forum, as chosen by the debtor. The only exceptions to this rule are (i) if a main proceedings has been opened in an EIR jurisdiction before the forum chosen by the debtor has; or (ii) if the public order of a member state is being transgressed.

As a result, the only way to prevent debtors from seeking insolvency proceedings in the forum of their choice would be a change of article 3(1) EIR. The EU legislature or the European Court of Justice (ECJ) would then have to decide upon a stricter regime for jurisdiction. The presumption that a debtor's COMI is in the member state of incorporation could be made almost impossible to rebut or the factors to be taken into account when adjudicating the COMI could be restricted. Neither the ECJ nor the EU legislature have done so yet. Debtors are therefore still free to seek competent courts for their insolvency proceedings,

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7 Articles 5–7 EIR are strictly not choice-of-law rules, but merely state that some rights will not be affected, if certain criteria are being met.

8 P. Schlosser, 'Report on the Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice', OJ 1979, C 59, para. 77–78 (also known as the 'Schlosser Report').

9 P. Schlosser, op. cit., para. 76.

10 Strictly spoken, the Brussels Convention is not EU law, but a separate convention. Nonetheless, it is standing ECJ case law that the Brussels Convention must be seen as 'quasi-European law' with the same principles applying to it.

11 For the UK jurisdictions: *Lubbe et al. v. Cape plc (UK)* [2000] 1 WLR 1545 (H.L.).

12 These excesses would be to choose a forum for its lack of speed by 'natural defendants', which allows these natural defendants to continue their unlawful practices (the 'Italian torpedo'). See *Gubisch Machinenfabrik KG v Giulio Palumbo*, ECJ case 144/86 [1987] ECR 4861; *Erich Gasser GmbH v MISAT Srl*, ECJ case C-116/02, not yet reported.

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even if such fora may not be seen as the proper forum in view of Rationale (13) to the EIR.

4. Forum shopping often brings the procedure into a proper forum

Then again, it is our opinion that the broad interpretation of article 3(1) EIR usually brings debtors into a proper insolvency forum.

We do not share the view behind the presumption of article 3(1) EIR that the COMI of a corporation is logically in the member state of its incorporation. The rationale behind this provision is probably that a company by definition has its *siège réel* in the jurisdiction of its incorporation.[13] This is, in modern day Europe, all too often not the case anymore.

The presumption fails to take into account all kinds of structures, in which companies have various degrees of dependency on a parent company and also various degrees of ties to the member state of incorporation. After ECJ decisions such as *Centros*, *Überseering* and *Inspire Art*,[14] it is now well established that one may choose any European incorporation statute and then conduct business in every other member state without the risk of not being recognized as a corporation. A *siège réel* in the state of incorporation is not required anymore.

In tax law, a similar concept has already been in place for a longer period. There is an ever growing network of treaties in order to avoid double taxation. It is now well accepted that companies use this network, for instance by running loans through an entity in a state, to which neither the entity nor the parent company has much of a nexus. The involvement of the state of incorporation is virtually non-existent.

Locating the COMI of companies outside the incorporation state is nothing more than the logical result of the freedom to incorporate corporations without a real nexus to the member state of incorporation. Moreover, the member state of incorporation has little interest in really dealing with the bankruptcy of such entities, thus spending public funds on them. All too often, creditors, management and employees are located anywhere but in the member state of incorporation.

If the decision of a company to file for insolvency in the state where it has its *siège réel* is considered forum shopping, there is in our view nothing negative to it. Such companies are not taken 'off' their own proper or natural forum (as is the bottom line of the outcry after decisions such as *Enron Directo*, *Daisytek* and *Parmalat*[15]), but rather to a proper forum. This proper forum is not necessarily the state of incorporation of the debtor. The member state of the parent company or another member state with different ties to the debtor may just as well be a proper forum.

In general, it has been held that the question as to which court is the natural forum simply cannot be decided upon in court.[16] Given that many debtors have different kinds of ties all over Europe (if not the world), there is not one natural forum for a debtor, let alone one that could be objectively decided upon.

Even though the natural forum cannot be determined, it is very much necessary that the debtor will be brought into a proper forum. This need is confirmed by Ehrenzweig's *lex fori in foro proprio* theory. In short: Ehrenzweig favoured the application of *lex fori* in all cases. Nonetheless, under this theory, the fora cases could be brought in were limited to fora that could be considered proper fora. In order to test this, the facts of each individual case had to be reviewed. There could be no hard and fast rules, yet this was (according to Ehrenzweig) the logical consequence of the fact that *lex fori* would be applied as to the substance.[17]

The parallel between Ehrenzweig's theory and the EIR is obvious. Given that under the EIR *lex fori concursus* will be applied to most aspects of all insolvency proceedings, it must be secured that the proceedings are brought in a proper forum. A proper forum would be a member state to which a company has a very close nexus. Companies may have a close nexus to a number of states, which is ascertainable by third parties. This would make each of these states a proper forum. If one of these proper fora is eventually chosen, the choice therefore must be respected instead of being objected by insolvency practitioners of the self-proclaimed home state of the debtor.

The result is that the presumption article 3(1) EIR cannot be interpreted strictly, as if it were a hard and fast rule. A debtor must be given a real opportunity to

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13 As was, at the moment of writing the report in 1995, required in most EU member states, in order to be recognized as a corporation (theory of the *siège réel*).

14 *Centros Ltd v Ervhervs- og Selsabstyrelsen*, ECJ case C-212/97 [1999] ECR I-1459; *Überseering BV v Nordic Construction Company Baumanagement GmbH*, ECJ case C-208/00 [2002] ECR I-9919; *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd*, ECJ case C-167/01, not yet reported.

15 *Re Enron Directo SA*, unreported (Lightman J.); *Re Daisytek-ISA Ltd. et al.* [2003] BCC 562 (McGonigal J.); Tribunale Civile Parma 19 February 2004, ZIP 2004, page 1220 (Eurofood IFSC Ltd, 'Parmalat I'); Tribunale Civile Parma 5 February 2004, unreported (Parmalat Finance Corporation B.V. et al.).

16 R. Geimer, *Internationales Zivilprozessrecht* (4th ed. 2001), page 357. 'Diese Frage ist schlechthin nicht justiziabel'.

17 A.A. Ehrenzweig, 'The Lex Fori – Basic Rule in the Conflict of Laws' [1959] 58 *Michigan Law Review* 644.

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rebut it. Individual courts must be given space to decide where to locate a debtor's COMI on a case-by-case basis.

5. Forum shopping will not prejudice the estate, since it allows for effective reorganization

A further aspect of forum shopping in non-insolvency cases is that the choice of a frivolous forum usually goes to the detriment of the defendant. In an insolvency situation, it is particularly the estate of the debtor that could be prejudiced by a frivolous choice of forum.

In practice, however, this is not the case. On the contrary, a debtor in an insolvency case usually chooses to go forum shopping in order to reorganize effectively. This choice may be made by stand-alone companies, as well as by group companies seeking consolidation of insolvency proceedings.

Such consolidation allows for a quick reorganization, which in turn will bring the estate into a better state. A choice of a certain forum may be detrimental for one or two creditors (they could for instance 'lose out' in a vote for a composition), but the collective of creditors will most probably be better off.

If a European group of companies collapses, there are roughly two possibilities. In the first (pre-EIR) scenario, officeholders would be appointed throughout Europe for each individual group company in every member state. It is hardly surprising that all these officeholders have their own restrictive agendas. After all, a local officeholder will (and should) concentrate on the interest of the estate he is running.

Nonetheless, the interest of one estate is not necessarily the interest of the estate of the group of companies. Annulling certain intra-company transactions (for reasons such as financial assistance) may be beneficial to one estate, but in the larger picture of the group of companies, there may be everything against annulling such transactions. It is not surprising that insolvency proceedings against companies belonging to one group are usually being consolidated to a certain degree on a national level,[18] yet on an international level, consolidation has traditionally been rare. Without consolidation, however, it is hard to imagine an effective group reorganization. An insolvency of a group of companies 'scattered' over different jurisdictions with different bankruptcy laws applying appears to do anything but to promote reorganization.

A fine example of such a traditional pan-European group insolvency is that of KPNQwest. The list of names and addresses of the receivers in the collapse of this group of companies is five pages long. The current state of affairs in this insolvency is roughly as follows: the ultimate parent company filed for insolvency in May 2002. The group of companies collapsed in the month thereafter. Effective restructuring of the group of companies has never been a real possibility and the creditors have to deal with many receivers and many applicable laws. It will probably take years before the bankruptcy proceedings can be finished, with a result that probably is not going to be satisfactory for anyone.

Then compare this to a consolidated bankruptcy, as would be possible under the EIR. When the debtor decides to go forum shopping, he could bring the insolvency proceedings against all the individual group companies in Europe into one member state. To the extent possible under the laws of the state where the insolvency proceedings are opened, the proceedings will be consolidated. One receiver could be appointed. This receiver has the interest of all group creditors and of all group companies in mind. The fact that there is one officeholder instead of a number of officeholders throughout Europe will logically reduce the costs of the estate.

All these circumstances will bring the possibility of a quick and cheap reorganization, which will eventually benefit the entire estate and therefore the bulk of the creditors. For creditors of multiple group companies, it is only positive to have to deal with one officeholder and one set of applicable bankruptcy rules. Some types of contracts are hard to deal with if the receiver has no power over all of the group companies. This is above all the case with loan facilities and note issues, where it is the rule rather than the exception that other (if not all) group companies issue guarantees for the entire debt. In all, the costs will be lower, the insolvency proceedings will be run in a more effective way and the chances of a successful reorganization will increase.

The big picture in Parmalat, an insolvency case where a group of companies apparently chose its insolvency forum carefully, is as follows: the collapse took place in December 2003. In the weeks thereafter the *amministrazione straordinaria* proceedings against a number of individual group companies in EIR states were opened.[19] The outlines of a restructuring for those companies were posted in April 2004. The Extraordinary Manager aims to have a restructured group of companies up and running again as early as

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18 This degree may vary from the appointment of one receiver for more debtors within one group of companies to a complete consolidation of all estates of one group of companies.

19 See note 5 above for the status of Eurofood IFSC Ltd.

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January 2005. All parties involved in the Italian group proceedings are dealing with one receiver and one applicable bankruptcy law.

The comparison between KPNQwest and Parmalat alone proves that judicial comity (allowing a debtor to seek insolvency proceedings in a different member state) has more positive effects on the estate and to most parties involved than judicial chauvinism (keeping proceedings in one state at all costs).

Now we are fully aware that the European legislature has not drafted a special provision on group insolvencies in the EIR.[20] Debtors, creditors and officeholders will therefore have to do with article 3(1) EIR as it stands now. This means that every debtor within the group of companies must be adjudicated to have its COMI inside the member state, where jurisdiction for insolvency proceedings is being sought. The COMI must be ascertainable to third parties. These requirements may not be met if a group company (despite its obvious ties with the shareholders) largely operates independently. If the day-to-day management of a group is being performed centrally, however, we see nothing against the standing practice of locating the COMI in the jurisdiction of the central day-to-day management.

In general, however, the concept of the COMI has already created the possibility to bring an insolvency into a proper forum, thereby also creating the possibility to consolidate insolvency proceedings against groups of companies. Amendment to the EIR is not needed in order to generate the positive effects described above.[21]

This is confirmed by the principle of full effectiveness (*effet utile*, article 10 EC Treaty). Under this principle, each Community instrument must be interpreted in a way that ensures the realization of the instrument's objectives. The EIR has been drafted in order to increase efficiency in cross-border insolvencies.[22] Broad interpretation of the COMI, in order to facilitate the restructuring of companies and groups of companies, will no doubt help achieve this objective.

It is therefore our opinion that courts should continue to hold the presumption of article 3(1) EIR rebutted as frequently as they do now. The presumption is there to be rebutted. Contrary to (for instance) the strict interpretation of article 4 (5) Rome Convention, which leaves little manoeuvring room for rebuttal,[23] we would prefer that courts are given the necessary space to rebut the said presumption. The reality of European group companies and the need for effective reorganizations requires this.

6. Forum shopping will hardly prejudice individual creditors

Under the EIR, individual creditors are granted a number of rights in order to protect their rights against the debtor. As far as agreements between creditors and the debtor are concerned, *lex causae* will continue to play a major role, regardless of the jurisdiction, where insolvency proceedings are pending. Most notably, rights *in rem* will be recognized throughout the European Union under article 5 EIR.

If rights enforceable under local law (local rights) cannot be enforced in the main proceedings, creditors have the opportunity to seek the opening of a secondary (territorial) proceeding under article 27 EIR. The one requirement thereto is an establishment in the member state where secondary proceedings are being sought.

Once secondary proceedings have been opened there will be full recognition of the vast majority of such local rights. This means that creditors have an instrument to prevent the debtor's choice of forum being detrimental for them. Consequently, there is enough of a guarantee that the choice for any possible EIR forum for main insolvency proceedings will not be detrimental to most individual creditors.[24]

We are, however, aware that not all local rights would be guaranteed in any other EIR proceedings. Secondary proceedings cannot guarantee all these rights either. On the other hand, individual creditors (including those who appear to lose a certain right) may also gain rights as a result of the move of insolvency proceedings to a particular jurisdiction. In some way or another, moving insolvency proceedings from one state into another will always be more or less neutral as far as individual rights gained and lost are concerned.

Nonetheless, it is a fact that (next to the gains) individual rights will be lost after all. In the end, Willcock's remark that parties worried about fraud-

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20 M. Virgós and E. Schmit, op. cit., para. 76.

21 Likewise: R.J. van Galen, 'The European Insolvency Regulation and Groups of Companies', TvI 2004, page 61.

22 P. Oberhammer, 'Europäisches Insolvenzrecht in praxi: Was bisher geschah', ZInsO 2004, page 761.

23 *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 1 WLR 1745 (Morison J.); *Caledonia Subsea Ltd v Micoperi Srl* (2001) SC 716 (Outer House); Hoge Raad 25 September 1992, NJ 1992/750 (Balenpers); Bundesgerichtshof 25 February 1999, NJW 1999, page 2442.

24 A drawback of secondary proceedings is that they may be detrimental to reorganization plans, as article 3(3) EIR requires such proceedings to be winding-up proceedings. As to this problem, see U. Ehricke, 'Zur Einflussnahme des Hauptinsolvenzverwalters auf die Verwertungshandlungen des Sekundärinsolvenzverwalters nach der EuInsVO', ZInsO 2004, page 633.

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ulent preference should go to Greece, parties trying to avoid preferential creditors should go to Germany and those seeking to protect jobs should try France is all too true.[25]

It is therefore necessary that there will always be some real and ascertainable nexus between the court addressed and the debtor. Courts should continue to decline jurisdiction over debtors without any nexus to the jurisdiction of that court. This real and ascertainable nexus appears to be required under Rationale (13) to the EIR as well. The general rule should be: there is no right for any person involved that the debtor will enter insolvency proceedings in one particular member state only.[26] The right to go forum shopping should be upheld by not interpreting the presumption of article 3(1) EIR too strictly, but neither should the provision be interpreted all that broadly so that a debtor's COMI could be located anywhere.

As a result, it must be accepted that some of the parties involved will eventually lose out against others involved as a result of the choice of forum, whilst other parties will benefit by obtaining rights. This is not a problem in our view, as long as it is ensured that there is a real and ascertainable nexus between court and debtor. An indirect nexus through the parent company may (depending on the circumstances) suffice.

7. Solvent companies in group insolvencies

The most serious drawback of forum shopping in insolvency matters is in a different area – maybe even in the area of corporate law rather than insolvency law. In most (if not all) domestic bankruptcy laws of the EIR jurisdictions, only the shareholders may take the decision that a corporation will file for bankruptcy. In a group structure, this means that the parent company will decide on the bankruptcy of the subsidiary, thus creating a group insolvency.

This may lead to unsatisfactory results if a group of companies seeks restructuring (stand-alone debtors are not affected by this problem). Imagine a (hypothetical) profitable corporation, DutchCo, incorporated under the laws of The Netherlands. DutchCo is part of a European group of companies. DutchCo and its subsidiaries are largely independent of the parent. The parent becomes insolvent and wants to reorganize the entire group of companies, including DutchCo and its subsidiaries. DutchCo wants to prevent that the group of companies is being reorganized at the expense of its own profits, yet the parent company arranges a shareholders meeting of DutchCo and adopts a resolution that DutchCo will file for bankruptcy in the parent company's jurisdiction.

DutchCo may have good grounds to argue that its COMI is not in the same jurisdiction as its parent company. However, its directors may not even be heard personally by the court.[27] Due to the absence of a hearing (or just because the judges are chauvinist) the foreign court could hold that the COMI of DutchCo is the same as the COMI of its parent. Main proceedings would be opened and the consequences for DutchCo are obviously enormous. The group of companies may effectively reorganize at the expense of DutchCo's profits.

We disagree to such an approach. Profitable subsidiaries should not pay for the ultimate parent's insolvency. Rightfully, the courts opening EIR group proceedings have (at least until now) always tested the COMI and the insolvency of each subsidiary. That test appears not to be enough, however. For instance, it is all too easy for a parent company to orchestrate the insolvency of one of its subsidiaries. Depending on the law of incorporation of the subsidiary, shareholders can use all kinds of lawful and unlawful 'tricks' in order to make sure that a company cannot meet its obligations any more and thus is insolvent. As soon as that is the case, main proceedings can be opened and the unwilling subsidiary has been brought under a group proceedings after all.

It is obvious to require that opening insolvency proceedings may not take place in a manner vexatious and oppressive to the debtor (or, in case of a group insolvency: each of the debtors). To a certain extent – with respect to employees – all EU member states already have to ensure that insolvency proceedings are not being misused.[28]

However, we are not sure that the court tests against misuse (both with respect to employees and to debtors in general) are serious in each member state. It is hardly being verified in any of the member states that the shareholders have not acted in a manner vexatious and oppressive to the debtor. The absence of genuine court tests is most obvious in member states allowing for out of court opening of

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25 J. Willcock, 'How Europe Became the Capital of Forum Shopping (and How London Hopes to Become the Delaware of Europe)', *INSOL World*, third quarter 2003, page 8.

26 Parties may of course agree that if a debtor is to file for insolvency, it will do so in a particular member state. For instance, in many loan agreements, the debtor represents that it has and will continue to have its COMI in a certain member state. Nonetheless, a subsequent insolvency proceedings in another member state is no more than an event of default, not a ground to assume or decline jurisdiction.

27 It is still unclear, whether the public order exception of article 26 EIR requires such a hearing. Holding so for the German public order: AG Düsseldorf 12 March 2004, 502 IN 126/03, ZIP 2004, page 623 ('Daisytek-ISA').

28 Article 5(4) Directive 2001/23/EC.

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insolvency proceedings. Under English law, for instance, a debtor may first resolve to go into administration (which triggers the effects of the EIR) and only then inform the court that he is insolvent and in administration. The court will not verify anything at all.[29]

This situation virtually invites groups of companies to bring a profitable subsidiary under a foreign insolvency regime, to reorganize at the expense of the subsidiary's profits and to get away with the vexatious and oppressive acts related thereto.[30]

It is debatable whether the opening of insolvency proceedings without any court test must be recognized under articles 16 and 2(d) EIR. The Virgós/Schmit report expressly states that article 2(d), giving a definition of 'court', has been drafted so as to facilitate certain UK proceedings with a rather restricted role of the courts.[31] Nonetheless, the provision was drafted in order to facilitate the UK procedure of voluntary arrangements in particular. There is no indication that out of court openings of insolvency proceedings were to be facilitated as well.[32]

We would therefore prefer that the opening of insolvency proceedings with only a ministerial role by the court would not be recognized under articles 16 and 2(d) EIR. The European system of recognition and enforcement of judgments (including bankruptcy orders) is based upon the expectation that the courts in the originating state have already done a fair and independent test, which under the principle of full faith and mutual trust must be enforceable in all member states.[33] The public order restriction of article 26 EIR seems to require such a test too. In EIR matters, this means a (substantial, not ministerial) court test of a debtor's COMI, its insolvency, as well as a test ensuring there is no misuse of insolvency law.

All this leaves the individual member states free of course to take measures in order to prevent main proceedings over (domestic and/or foreign) debtors being opened without any substantial court examination and/or in a manner vexatious or oppressive to the debtor.

8. Conclusion

The usual complaints lodged against EIR decisions seemingly promoting forum shopping under the EIR are, in our view, largely unfair. Whereas it is being argued that debtors are taken off their natural forum, it must be emphasized that there is no such thing as a natural insolvency forum and that a debtor may have multiple proper fora. The principle of *lex fori in foro proprio* makes it clear that, given the predominant applicability of *lex fori concursus* in insolvency proceedings, it is absolutely necessary to use a somewhat vague notion such as the COMI, and to create manoeuvring space for a rebuttal of the presumption of article 3(1) EIR. The standing European practice of incorporating entities in jurisdiction with little nexus to that entity's activities requires so even more.

Another argument against forum shopping decisions is that forum shopping in insolvency cases would be to the detriment of the lawful rights of the creditors and other parties involved. This is, in our view, generally not true. Choosing a certain forum for insolvency proceedings may very well reduce costs, increase effectiveness, and enlarge the chances of a successful reorganization. This is the case for individual debtors as well as for groups of companies seeking insolvency jurisdiction in a certain member state.

It is, nonetheless, unavoidable that the choice for a different forum will be to the detriment of some creditors. Not even secondary proceedings can avoid this. These detrimental consequences must be taken for granted, as long as a forum with a real and ascertainable nexus to the debtor is chosen. In a group context, each debtor must have such a nexus, which can be assumed if day-to-day management of the group of companies takes place more or less centrally. In general, it must be avoided that a debtor without any ties to a certain jurisdiction has the right to choose this jurisdiction, only because this jurisdiction has a favourable law in the field of a particular issue of insolvency law.

A larger risk of forum shopping in insolvency cases is misuse of insolvency proceedings by parents or ultimate parents in group structures. As the shareholders usually decide upon a company going bankrupt, there is a risk that parent companies will decide that solvent and profitable companies will go bankrupt for the benefit of a group but to the detriment of their own interest, in order to enable reorganization of groups of companies.

A possible solution to this problem is to add a test by the court before proceedings under the EIR can be

Notes

29 Schedule B1 sections 22 et seq. Insolvency Act 1986 (as amended by the Enterprise Act 2002).

30 Such vexatious or oppressive acts may qualify as a criminal offence, depending on the laws of the individual member states. The status of the insolvency proceedings thus opened as an EIR main proceedings will, however, not change if the abuse is (if at all) discovered.

31 M. Virgós and E. Schmit, op. cit., para. 66.

32 W. Trower and L. Tamlyn, 'Cross-Border Aspects of the New Administration Regime', (2004) ICR 5–6.

33 As Denmark is not bound by the EIR (Rationale (33)), insolvency-related orders for EIR jurisdictions cannot be enforced under EU statutes in Denmark.

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opened. It should be tested whether opening insolvency proceedings will not be (or, if the court decides after the opening of the proceedings have not been) vexatious or oppressive to the debtor and its employees. Alternatively, this test should only take place upon the opening of group insolvencies and/or when long arm jurisdiction is being exercised.

The possibility of no court tests taking place upon the opening of EIR proceedings over foreign entities, as stipulated inter alia by English law, must in our view not be upheld. An obvious solution in this respect lies in excluding out of court opening of insolvency proceedings (even if followed by registration by a court) from the scope of article 2(d) EIR.

Finally, a word about the title of this article. It may appear odd to use words so closely related to the doctrine of *forum non conveniens*.[34] This doctrine is, after all, considered a measure against forum shopping, whereas this article promotes it. But then again, the doctrine of *forum non conveniens* forces us to look at the facts of a matter rather than to strictly apply a hard and fast rule – exactly our view as expressed in this article. Furthermore, Lord Diplock's words in *The Abidin Daver* emphasized part of the rationale behind *forum non conveniens*: courts should look beyond the confines of their own jurisdiction for a greater good. To that extent, this article is not different: in our view, insolvency practitioners too should look beyond their own jurisdiction for the greater good of all parties involved in an insolvency.

9. Post scriptum

When this article was being finalized, the Irish Supreme Court referred the *Eurofood* case to the ECJ. The preliminary questions deal, inter alia, with factors to be taken into account, when locating a corporation's COMI. The forthcoming ECJ judgment will therefore probably clarify whether EIR forum shopping, as promoted in this article, is here to stay.

Notes

34 *The Abidin Daver* [1984] 1 All ER 470 at 476: 'The essential change in the attitude of the English courts (...) is that judicial chauvinism has been replaced by judicial comity to an extent which (...) is indistinguishable from the Scottish legal doctrine of forum non conveniens.'

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