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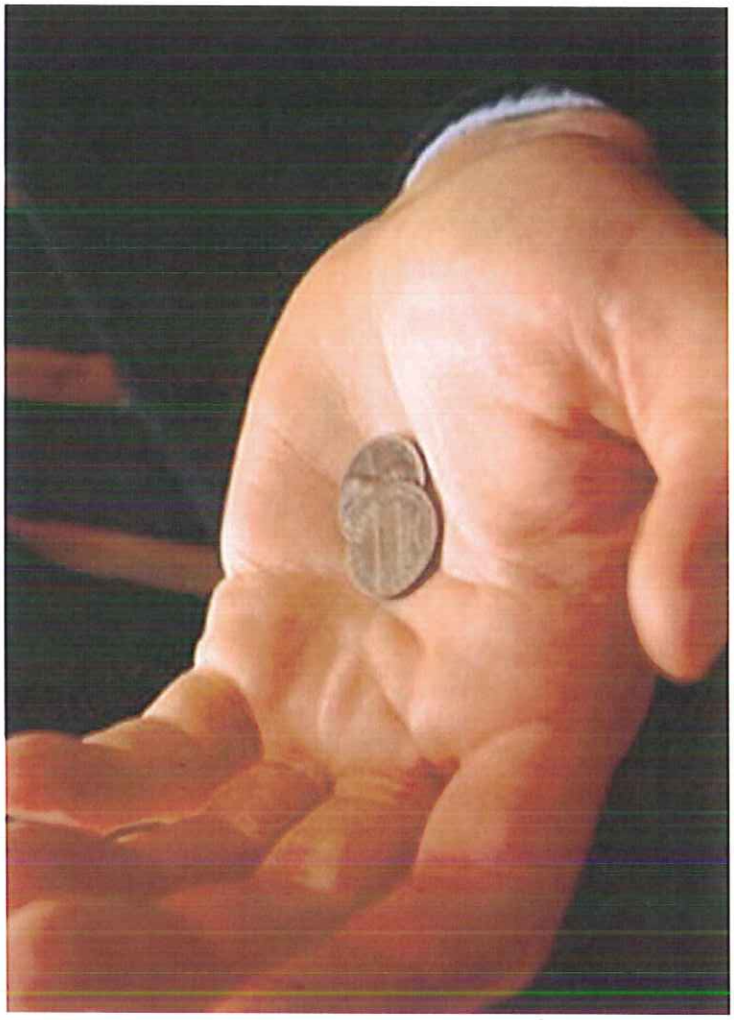

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PRELIMINARY WORDS

"*If the Gods wish to punish us, they usually begin by answering our prayers*"

Ancient Greek proverb

It is increasingly frequent for either companies and individuals to have business activities or economic interests in different member States of the European Union, as a natural consequence of the freedom of goods, services, capital and people. Therefore, insolvency may have direct implication on the proper function of the internal market.

Baring this concern in mind the Council adopted in May 2000 a regulation - fully binding for all the Member States except for Denmark - which lays out coordination measures regarding the liquidation of an insolvent debtor's assets in different Member States. Council Regulation (EC) Nº 1346/2000 of 29 May 2000[1]-[2]-[3] on insolvency proceedings, which entered into force on 31 May 2002, establishes common rules related to the court competent to open insolvency proceedings, the applicable law and the recognition of the court's decisions for cross-border cases where a debtor becomes insolvent.

Outside the scope of the Regulation fall cross-border insolvencies concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings (article 1, nº 2). The legal instrument used in these matters was the Directive: directives 2001/17 and 2001/24, on the reorganisation and winding up of insurance undertakings and of credit institutions.

Within the scope of the Regulation, no difference is made between the legal status of the debtor - in fact he can either be a natural or a legal person and a trader or an individual.

Cross-border cases include instances where the insolvent debtor has assets in more than one state[4] or where some of the creditors of the debtor are not from the state in which the insolvency

1 Published on O. J. L 160, 30.6.2000, p. 1.

2 Amended by the following Council Regulations (EC): Nº 603/2005 of 12 April 2005, L 100, 20.4.2005, p. 1, Nº 694/2006 of 27 April 2006, L 121, 6.5.2006, p. 1, Nº 1791/2006 of 20 November 2006, L 363, 20.12.2006, p. 1, Nº 681/2007 of 13 June 2007, L 159, 20.6.2007, p. 1, Nº 788/2008 of 24 July 2008, L 213, 8.8.2008, p. 1, and Implementing Regulation of the Council (EU) Nº 210/2010 of 25 February 2010, L 65, 13.3.2010, p. 1; Amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, L 236, 23.9.2003, p. 33; Corrected by Corrigendum, OJ L 49, 17.2.2007, p. 36 (603/2005).

3 Subsequently named «Regulation».

4 It will be further discussed if the Regulation is applicable to insolvencies relating only to one member state or if it shoud only aplly to cross-border insolvencies within the territory of the European Union.

proceedings are taking place. This international factor relates to the main objective of the Regulation, which is to dissuade the debtor from transferring his assets or the judicial proceedings from one country to another in order to improve his legal position *(forum shopping)*.

We will approach three aspects of the Regulation (EC) No 1346/2000 of 29 May 2000:

A - The centre of a debtor's main interests

In the Regulation, the jurisdiction of courts is based on the general principle that the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Thus, the notion of «centre of main interests» is a vital one. However, due to its vagueness and lack of more detailed ruling, many problems have arisen in courts, demanding clarification.

B - Protection of third-party purchaser

Regulation (EC) No 1346/2000 of 29 May 2000, calls to say it, not merely governs the issues of competence and adjectives aspects of the process of insolvency, but also substantive matters of indole, as notes, and clearly named, Articles 5 (right in rem of third parties), 6 (Compensation), 7 (retention of title), 8 (building contracts), 13 (detrimental acts) and 14 (protection of third party purchaser). We will approach one of those substantive matters: article 14, protection of third-party purchaser.

We also will approach it because it is one exception to the main principle in the European Insolvency Regulation, regarding the applicable law, is that applicable law is the law of the Member State where proceedings commenced: the l*ex fori concursus.*

C – Recognition of insolvency proceedings

In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

That is one of the proposes of Regulation (EC) No 1346/2000 of 29 May 2000, that Articles 16 et seq regulate the recognition of insolvency proceedings.

We will discuss the principal of mutual trust the meaning of recognition of insolvency proceedings, the Principal and the Exceptions and the Effects of Recognition.

"The centre of a debtor's main interests"

Legal criteria for determining international jurisdiction

Cross-border insolvencies can be approached from two points of departure: universality and territoriality.[5]

In the universality approach, insolvency proceedings are unique and involve all of the debtor's assets, not withstanding their location, which means that the entire estate will be administered or liquidated on the basis of the rules established in the law of the country where the debtor has his domicile or similar reference location, where the proceedings are opened - *lex forum concursus.* This is the law of the country where a court has opened insolvency proceedings. The main consequences of this approach relate to the scope of the forum law – which is applicable to all aspects of the proceedings (for example, current contracts, powers of administrators and system of dividends distribution) - and the powers of the liquidator - who is in charge of liquidating debtor's assets anywhere in the world.

According to the territoriality approach, the insolvency proceedings produce legal effects only within the jurisdiction of the state where they are opened, whose borders constitute the limit. Therefore, the liquidator or administrator has no powers over assets located abroad.

The Regulation doesn't adopt exclusively one of those approaches, opting instead for a hybrid system, in particular allowing in certain cases national proceedings covering only assets situated in the State of opening alongside main insolvency proceedings with universal scope (recital 11). As we will further see, the scheme of interconnection between main proceedings and secondary proceedings results in a combination of universality and territoriality.

The universal insolvency proceedings comenced are named «main proceedings» and the applicable law is precisely that "of the Member State within the territory of which such proceedings are opened[6]" (article 4 (1)) - *lex concursus.* From that moment on, the opened proceedings shall be recognised automatically in all other Member States (article 16). In addition, the court of another Member State than the State of opening of main proceedings shall have jurisdiction only if "the debtor possesses an establishment within the territory of that other Member State" (article 3 (2)). However, subsequent proceedings - «secondary proceedings» — are limited to the assets of the debtor situated in the corresponding territory of the other Member State (article 3 (2), *in fine*) and

5 WESSELS, Bob, - «The Changing Landscape of Cross-border Insolvency Law in Europe», Juridica International, XII, 2007, p. 2. Available in <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe> (consulted on 29 May 2011).

6 *i.e.*, where the petition is presented.

may only consist of liquidation proceedings. When a territorial proceeding is filed prior to the universal proceeding, following the conditions of article 3º (4), it risks conversion in a winding up proceeding (art. 37º)[7].

Apart from these general rules, the regulation establishes several exceptions to the application of the *lex concursus* (articles 5 – 15).

Centre of main interests

In the Regulation, the jurisdiction of courts is based on the general principle that "the courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings" (article 3 (1)). For a company or legal person, the presumption is that the centre of the debtor's main interests is the place of his registered office, although this presumption may be rebutted (article 3 (1) *in fine*).[8]

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 (recital 13)[9]. However, due to the vagueness of this definition, the determination of the centre of main interests is precisely the principle point of legal conflict in what concerns the application of the Regulation.

In courts, a vast number of circumstances have been considered relevant to the above mentioned definition[10]:

- the state where the day to day administration was conducted;
- the nationality of the directors;
- the state where the company has represented itself to its most substantial creditor as having its principle executive offices;
- the state from where the debtor (a natural person) administered his commercial interests;
- the state where some remaining contractual work conducted by an incorporated company

7 Although Portugal made a Declaration by which reserves the right to invoque public interest to avoid conversion. O. J. L 183, 30.6.2000, p. 1.

8 Precisely because there wasn't enough evidence that the centre of main interest of a company registered in Jersey is located elsewhere, in particular in Portugal, where it possesses an establishment, the portuguese court made use of the presumption and decided that the portuguese insolvency proceedings can only bear a territorial nature. Tribunal da Relação de Évora, 31.3.2009, case 1112/08.8TBOLH-C.E1, available in <www.dgsi.pt> (consulted on 29 May 2011).

9 Criticising the legislative technique of placing the criterion for determining the centre of main interests in the preamble of the Regulation, PINHEIRO, Lima Luís, *O Regulamento Comunitário Sobre Insolvência - Uma Introdução*, Almedina, Coimbra, 2007, p. 14.

10 WESSELS, Bob, - «The Changing Landscape of Cross-border Insolvency Law in Europe», Juridica International, XII, 2007, p. 4. Available in <http://www.juridicainternational.eu/the-changing-landscape-of-cross-border-insolvency-law-in-europe> (consulted on 29 May 2011).

was still in progress;

- the location of the the parent company;
- the existence of a limited partnership with a company in the forum state, notwithstanding the company being registered in another member state and having a postal address in another one;
- the member state where the source code of the computer programs of the debtor company was stored, differing from that of registration and from that of the postal address.

However different the facts may be, one element seems to be of the utmost importance to the Regulation: the ascertainability by the majority of the creditors of the place where the debtor conducts the administration of his interests. This explains why the Regulation chose the place of registration for companies or legal persons as a presumption for the centre of main interests.[11]

This means that even if the member state of administration is different from that of registration, it doesn't necessarily mean that the first one should be considered the centre of main interests, instead of the latter, as the European Court of Justice clarified in the Eurofood case[12] in the scope of a preliminary ruling:

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

Although the Eurofood constitutes a landmark in what concerns the definition of «centre of main interests», further clarification is needed through the amendment of the Regulation, for reading article 3 (1) in the light of recital 13 is not enough.

As to natural persons, VIRGÓS and SCHMIT argue that, in principle, the centre of main interests will in the case of professionals be the place of their professional domicile[13] and for natural

11 Considering that this presumption can only be rebutted when the majority of creditors know or have the obligation to know that the centre of the debtor's main interest is not in the member state of registration, for example, because he doesn't maintain there any kind of economic activity, contrary to what happens in another member state, where there is an well known special connection with the debtor , PINHEIRO, Lima Luís, *O Regulamento Comunitário Sobre Insolvência - Uma Introdução*, Almedina, Coimbra, 2007, p. 17

12 From 2 May 2006, case C-341/04, available in <http://curia.europa.eu>.

13 Or the main place of business, when there is more than one professional domicile.

persons in general, the place of their habitual residence.[14]

The risk of «bankruptcy tourism»

We already know that the courts of the Member State where the debtor has the centre of his main interests shall have the jurisdiction to open insolvency proceedings, but is it possible for the debtor to change or manipulate the centre of main interest? The question gains relevance with the conscience of the diversity of national insolvency regimes, which may be more or less favourable or convenient to debtors.

On 17 January 2006, the European Court of Justice issued an important preliminary ruling – the Staubitz-Schreiber case[15] - referred by the German Supreme Court relating to the case of Susanne Staubitz-Schreiber, a sole trader in Germany until 2001. In April 2002 she moved to Spain to live and work there. Right before leaving, she applied for a bankruptcy order in Germany but the *Amtsgericht* refused to open the proceedings on the ground that there were no assets and the *Landgericht* dismissed her appeal against that order. Finally, she appealed to the *Bundesgerichtshof*, which made a reference to the Grand Chamber of the European Court.

The question was the following: "Does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction?"

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

The Court of Justice considered that a transfer of jurisdiction is contrary to the objectives pursued by the regulation, as becomes clear before 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*)". On the other hand, it considered that a transfer of jurisdiction would also be

14 SORIANO, Miguel VIRGÓS and Etienne SCHMIT, 1996 – Report on the Convention of Insolvency Proceedings, DOC. 6500/96 DRS 8 (CFC), nº 75.

15 Case C-1/04 (Susanne Staubitz-Schreiber), available in <http://curia.europa.eu>.

contrary to the objective of efficient and effective cross-border proceedings. Therefore, retaining the jurisdiction of the first court seised ensures greater judicial certainty for creditors who have assessed the risks to be assumed in the event of the debtor's insolvency with regard to the place where the centre of his main interests was situated upon entry into a legal relationship with him.

According to Adam GALLAGUER[16], the german Bankruptcy Court of Cologne has recently used the «centre of main interests» concept under the Regulation to assist in the rescue of Germany's second largest mail service provider, the PIN Group – a Luxembourg holding company -, to implement a restructuring plan primarily based on the continuation of the nationwide mail service. This was only possible though the migration of the «centre of main interests» of the PIN Group from Luxembourg to Germany, assuming the german jurisdiction to open insolvency group subsidiaries registered across Germany. When economic and finantial difficulties began, by late 2007, the Group created a centralized executive committee — composed of the holding company's executive directors and the Group's regional managers — that held its meetings at the offices of the Group's corporate advisers in Cologne. The committee had authority for all material business decisions, concentrating the operations of the Group's business in Cologne. It was precisely this strategic planning which enabled the Bankruptcy Court of Cologne to find that it had international and local jurisdiction to open the universal insolvency proceedings in accordance with Article 3 of the Regulation.

The German court reasoned that creditors and third parties, such as other contracting parties or employees, could have ascertained that the material and important business decisions of the company were being made in Cologne, not at the place of the registered office in Luxembourg. Since late 2007, only marginal functions were left with the original offices in Luxembourg.

The bankruptcy court stressed in the PIN case that it is not of itself abusive for a company to move its COMI to a more suitable insolvency forum and that the freedom of establishment pursuant to Art. 43 and 48 of the EU Treaty gives companies a right to transfer their seat and take advantage of a more favorable legal environment. In the view of the court, this fundamental right provides a valid basis for a company moving its «centre of main interests» under the Regulation.

The bankruptcy court did highlight that a migration of the «centre of main interests» could still be classed as abusive and a sham if its primary purpose was to evade protection for creditors. Notwithstanding, it found that in the PIN group's case, the debtor migrated the COMI in the interests of the creditors, preservation of the group and with a view to restructuring the group. This constitutes, however, a doubtful judgment – shouldn't it be considered an abuse to change the

16 Adam Gallagher - «European Insolvency Regulation: German Court Blesses Change of COMI», in ABI Journal, September 2008, p. 30/48, available in <http://globalinsolvency.com/sites/globalinsolvency.com/files/canada4.pdf> (consulted on 29 May 2011).

«centre of main interests» after the crisis of the group emerged?

These two cases are probably enough to conclude that, once more, a legislative clarification would be important to avoid further dispute over the moment when international jurisdiction becomes unchangeable.

Are cross-border insolvencies confined to the limits of the European Union?

In consonance with recital 14, the Regulation only applies to proceedings where the centre of the debtor's main interests is located in the Community.
Consequently, if the debtor's centre of main interests is located outside the European Union – or in Denmark – only the international private law of the state where the insolvency proceedings is filed is applicable and not the Regulation. In Portugal, for example, it would be articles 65º (1), b) d) and 65º-A, b) of the Civil Procedural Code, combined with aricles 7º and 275º and following of the Insolvency Code.

But does it also mean that cross-border insolvency proceedings related to a member state – where the debtor's main interests are located – and to third states are not covered by the Regulation? And if the answer were to be affirmative, wouldn't it represent a threat to the efficient functioning of the internal market?

Although the Regulation doesn't expressly prohibits its application in these cases, it could be defensible that debtors whose centre of main interests resides in a member state but, apart from that, only has connections with a third state stay out of the range of the Regulation.[17] However, we adhere to the opposite thesis[18], according to which further limitations to the scope of the Regulations, besides those established, do not have valid ground and do not conflict with special Regulation rules[19] that purposedly limited their application to the territory of the European Union, excluding Denmark, naturally.

17 LEITÃO, Luís Manuel Teles de Menezes – *Direito da insolvência,* 3rd. ed., Coimbra, Almedina, 2011, p. 359, n. 423, accompaigning FLETCHER, Ian F., «Scope and Jurisdiction», in MOSS, Gabriel, FLETCHER, Ian F. and ISAACS, Stuart (org.) - *The EC Regulation on Insolvency Proceedings: a comentary and Annotated Guide, Oxford, University Press, 2002, p. 39.*

18 BRITO, Maria Helena Brito - «Falências internacionais. Algumas considerações a propósito do Código da Insolvência e da Recuperação de Empresas», Themis – Novo Direito da Insolvência, 2005, 183-220, p. 191/192; PINHEIRO, Lima Luís, *O Regulamento Comunitário Sobre Insolvência - Uma Introdução*, Almedina, Coimbra, 2007, p. 15.

19 For example, almost every rule between articles 5º and 15º.

Protection of third-party purchasers

Regulation (EC) No 1346/2000 of 29 May 2000, calls to say it, not merely governs the issues of competence and adjectives aspects of the process of insolvency, but also substantive matters of indole, as notes, and clearly named, Articles 5 (right in rem of third parties), 6 (Compensation), 7 (retention of title), 8 (building contracts), 13 (detrimental acts) and 14 (protection of third party purchaser).

Now, we are going to see this last article: article 14.

The main principle in the European Insolvency Regulation, regarding the applicable law, is that applicable law is the law of the Member State where proceedings commenced.

However that main principle of the l*ex fori concursus* has exceptions in the articles 5 to 15.

One of those exceptions is the rule regarding the protection of third party-purchasers: articule 14.

The article 14 contains an exception to the main principle - that the applicable law is the law of the Member State where proceedings commenced - so that one third party purchaser who benefits from certain acts of disposition of the debtor entered into after the opening of insolvency proceedings can be protected.

The acts that are included in the article 14 must be costly acts concluded after the opening of insolvency proceedings in which the debtor disposes, for consideration, of an immoveable asset, or a ship or an aircraft subject to registration in a public register, or securities whose existence presupposes registration in a register laid down by law.

This provision was initially based on the desire to protect the confidence of third parties in the content of property registers when the debtor, after the insolvency proceedings have been opened, disposes for consideration of an asset from the estate, and the opening of proceedings or the restrictions on the debtor have not yet been entered or referred to in the register in question. The final drafting of this Article goes further and covers all acts of disposal concerning immovable assets which take place after the opening of the insolvency proceedings[20].

The validity of this act shall be governed by the law of the State in whose territory such immovable property or under whose authority the register is kept.

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20 Virgos, Miguel and Schmit, Etienne. (1996) *Report on the Convention on Insolvency Proceedings.* [EU Council of the EU Document]

In principle, the acts committed after the debtor's willingness to open insolvency proceedings are ineffective or subject to challenge under the law of the opening, since one of the typical effects of the declaration of insolvency is the inhibition of powers provision of the debtor or its subjection to some kind of supervision or control.

The deviation introduced by art. 14 aims to ensure that reliance by third parties in good faith in the systems of publicity of "property rights" are protected based on the law of the State of registration even if insolvency proceedings are instituted in another State[21] - the article aims, as ultimate goal, to ensure the credibility of the State.

Following PINHEIRO, for this purpose, should be considered "acts of disposition"not only instruments of transfer of ownership but also the acts of creation or transfer of "property rights" on the smaller property in question.

The application of this article is, of course, conditional: the registration or the property must be situated in a Member State.

There is also no reason to exclude the hypotheses, from the scope of the provision, in cases where the asset is registered in a third country.

For acts of disposition made after the opening that are not subsumed in that category continues to apply the general rule: *the lex fori concursus*.

The most common is that these acts are directly ineffective under the *lex fori concursus*: one of the typical effects of insolvency is to deprive the debtor of the powers of disposition. These powers are transferred to the trustee.

As it is stated in article 1.1: proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

However, the enforceability of this inefficiency to others on the basis of a foreign insolvency law may contravene the traffic needs for care and protection of trust, particularly where this confidence comes from registrar advertising systems[22].

The meaning and purpose of that exception to the general scope of the *lex fori concursus* is, as said, to protect the confidence of others[23].

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21 As PINHEIRO, Lima Luís, O Regulamento Comunitário Sobre Insolvência - Uma Introdução, Civil da União Europeia, Almedina, Coimbra, 2007, p. 39/40

22 Francisco J. Garcimartín alférez, El reglamento de insolvencia: una aproximación general, http://www.uam.es/centros/derecho/privado/dipriv/Reglamento%20insolvencia.htm

23 Also RIBEIRO, António da Costa Neves, Processo Civil da União Europeia, Coimbra Editora, Coimbra, 2002, pág. 247/248: "a disposição pretende proteger a confiança de terceiros adquirentes de boa fé relativamente a actos de disposição sobre imóveis, navios

The typical course which they are thinking is one in where the open insolvency abroad have not yet found reflected in the local registrar. In this case it seems reasonable that the protection of *bona fide* third-party is not different compared to foreign insolvency proceedings against local insolvency proceedings.

Therefore, the effectiveness of a declaration of insolvency for these acts are not subject to the foreign *lex fori concursus*, but the status of property law or the State under whose authority the register.

It is questionable, however, if for this provision is sufficient to lose its meaning in the registration of the declaration of insolvency or if is necessary bad faith from the third-party purchaser[24].

However, article 14 must be applied along with the presumption stablished in the article 24.2[25].

The article 24.2 sets a presumption in two phases: enforcement following or previous to the publication.

After publication, the burden of proving the obligation rests with the debtor. before publication, it is presumed that the debtor did not comply with knowledge of insolvency, being the trustee to prove the otherwise.

When to apply article 14?

Like the article 14, also European Insolvency Regulation's article 5 refers to third parties' rights *in rem.*

The main difference between the two articles is a temporal one.

From the point of view of time, Article 5 only applies to the property rights established before the commencement of proceedings.

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ou aeronaves, inscritos em registos públicos, que asseguram a publicidade e garantem a boa fé do adquirente a título oneroso (não basta o título gratuito) confiando nestes registos".

24 Francisco J. Garcimartín alférez, El reglamento de insolvencia: una aproximación general, http://www.uam.es/centros/derecho/privado/dipriv/Reglamento%20insolvencia.htm

25 **"Where such an obligation is honoured before the publication provided for in Article 21 has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been unaware of the opening of insolvency proceedings; where the obligation is honoured after such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings".**

The Article 14 refers to acts of disposal of the debtor made after the opening of main proceedings.

The most common is that these acts are directly ineffective under the *lex fori concursus*: one of the typical effects of insolvency is to deprive the debtor of the powers of disposition, as we have already seen.

Can we apply article 14 if the third party is the debtor?

Arises a problem of interpretation: if the third party is the debtor? Can we apply the article 14?

Two different views emerge:

•in one view, article 14 is not applicable – in this way LIMA PINHEIRO, according to who it follows in his view clear from the title, text and purpose of the precept that it is inapplicable where the debtor is the acquiring party;

•in another view, article 14 is applicable – in this way CARVALHO FERNANDES/ LABAREDA.

In our opinion, the article 14 is not applicable if the third party is the debtor, because that isn't the purpose of the rule contained in the article.

Problems regarding the application of article 14

As we have already said, article 14 regards one of the substantive matters of the process of insolvency.

Not all the state members have the same substantive solution for the protection of third-party purchasers.

In order to conciliate substantive solutions in all the state members, the European Insolvency Regulation should'n contain a conflict rule, but a imperative one.

An imperative rule that would conciliate an international insolvency proceedings.

"Recognition of insolvency proceedings"

The principal of mutual trust as meaning of recognition of insolvency proceedings:

In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary and appropriate that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

That was one of the reasons why Regulation (EC) No 1346/2000 of 29 May 2000 was created.

In fact, the Regulation provides for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings.

Automatic recognition means that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States.

Recognition of judgments delivered by the courts of the Member States is based on the principle of mutual trust.

To that end, grounds for non-recognition are reduced to the minimum necessary.

This is also the basis on which any dispute are resolved where the courts of two Member States both claim competence to open the main insolvency proceedings.

The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.

The Principal and the Exceptions:

The Judgement of the Court (Grand Chamber) of 25.05.2006 - Case No C-341/04, Eurofood IFSC Ltd - presented an interpretation of Article 16./1 of the Regulation, which is poured on the principle that governs the recognition of the insolvency process, whereby "Article 16. under Article 1, first subparagraph, of Regulation No 1346/2000 should be interpreted as meaning that the main

insolvency proceedings opened by a court of a Member State shall be recognized by the courts the other Member States, without their being able to review the jurisdiction of the court of the State Opening. The priority rule defined in this provision, which provides that the proceedings opened in a Member State is recognized in all Member States as soon as they produce their effects in the state of openness, based on the principle of mutual trust that allowed the imposition of a compulsory system of jurisdiction and the waiver by those States corresponding to their internal rules on recognition and enforcement of foreign judgments in favor of a simplified mechanism for the recognition and enforcement of judgments in the context of insolvency proceedings. If a party wishes to challenge the jurisdiction assumed by the court which opened this process, considering that the center of the debtor's main interests is situated in a Member State other than where they opened the main insolvency proceedings, shall use the courts Member State of the opening of this process, the remedies prescribed by the national law of that State against the decision of opening.".

In fact, the recognition of judgments in bankruptcy proceedings is automatic, not requiring any prior decision required the state to have them recognized the effects produced in the state in which decisions were made. It is the affirmation of a principle of mutual trust between jurisdictions, already pointed to the Regulation Brussels I Regulation and the Brussels II.

The general principle of recognition is valid for all cases opened by virtue of international jurisdiction derived from Article 3. of the Regulation, it is not necessary that the decision is final.

The effects it produces in the requesting State are the same that produces the requested State.

The process only territorial effect in the State of initiation and do not affect the debtor's situation in other states.

The main process is the one that produces these universal effects.

Not apply here, the reasons for refusal of recognition provided for in Articles 34. and 35. of the Brussels I Regulation ", unless the reason for refusal under Article 26. in connection with the public ordinance.

Recognition covers even cases where the debtor can not be subjected to such measures in the requested State, in virtue of his or her professional nature of the subject of public law, as happens in certain countries with non-traders, the intercede unless reasons clearly contrary to public policy of this State, as indicated in Article 26.

The relationship between a case (where the state court located in the center of main interests of the debtor) and a secondary process, according to paragraph 3 of Article 16. shall consist of the recognition of a decision issued in the main proceedings later preclude the opening of secondary proceedings (Court of the State where the establishment is situated by the debtor) without the Court

that the establishment is located has to examine the debtor's insolvency.

The system of recognition and enforceability of other judgments regulates Article 25. that must be interpreted taking into account what is provided in Article 68./2 of Regulation No. 44/2001 on the reference Brussels Convention .

Summarizing, decisions taken by the court responsible for the main proceedings must be immediately recognized in other EU countries without additional inspection, except:

- if this recognition effect contrary to the public in this country;
- for decisions that restrict or postal secrecy of individual liberty.

However, restricting the rights of creditors (moratorium or debt forgiveness, for example) is only possible for those countries which have given their express agreement.

When a court in one EU country decides to open insolvency proceedings, the decision must be recognized in all other EU countries, although the debtor can not be subjected to this process in these countries. The effects of the decision are provided by the law of opening the proceedings and cease in the event of opening of secondary proceedings in another EU country.

The liquidator appointed by a competent court can act in other EU countries under the powers conferred by the law of the country's opening, but under the law of the territory of which carries the activity. The liquidator may in particular move the goods from the debtor, an action is in the interests of creditors to oppose the goods are transferred from the country which the proceedings leading to another country, after the opening of proceedings, subject to real rights third party or subject property.

All creditors domiciled in the EU who have obtained full or partial satisfaction of their claims on assets of the debtor must repay what they got from the liquidator (subject to proprietary rights of third parties or subject property). It was prepared a consolidated account of shares allocated in the Union to ensure that creditors have equal pro rata shares.

Other measures may be advertising in other EU countries, at the request of the liquidator (publication of the opening of insolvency proceedings and / or enrollment in a public register). May be ordered a mandatory publication, although publication is not a condition for the recognition process in another EU country.

If it happens that a person is not informed about the opening of the proceedings may be assumed that it acts in good faith to implement the obligation for the benefit of the debtor, instead of

the liquidator in proceedings in another EU country. It is considered that if this obligation takes place before publication of the decision, the person is not required to be reported. However, if such execution occurs after publication, it is presumed that the person had knowledge of the information, unless proven otherwise.

The Public Order as an Exception:

The refusal of receipt of the effects of insolvency proceedings are limited to obvious reasons of public policy, especially relating to fundamental principles, rights, freedoms and privileges guaranteed by the Constitution (articles 16. and following the Portuguese Constitution). The order follows the law of the Requested State, not having a uniform content across the Community.
The Regulation does not allow on this recognition, verification of the international jurisdiction of the State of origin. Limited to verification of matters within the scope of regulation, and is from a judicial body that declares itself competent according to Article 3./1.
If the Court has addressed questions of interpretation of the mechanism will resort to court under Article 68. / 1 of the EC Treaty.

Portugal had the opportunity to enforce a statement made during the EU Council of 25 September 1995, stating that under the conditions laid down in Article 26., the Portuguese public policy may be invoked in defense of local interests in the face of major alicação of Article 37. on the conversion of a territorial proceedings opened before the main proceedings, if those interests are not adequately safeguarded when the conversion. This statement came to be made on approving the Regulation for the application of Articles 26. and 37. º, as shown by the text published in JOC No. 183 of 30 June 2000.

For example, see the Judgement decided in the Court (Grand Chamber) of 05.02.2006 in Case C-341/04, Eurofood IFSC Ltd., whereby the "Article 26. of Regulation No 1346/2000 should be interpreted as meaning that a Member State may refuse to recognize insolvency proceedings opened in another Member State when opening the decision has been taken in flagrant violation the fundamental right to be heard, which provides a person affected by this process. Although the concrete modalities of the right to be heard may vary depending on the urgency in deciding that there can be no restriction on the exercise of that right must be justified and surrounded by procedural guarantees ensuring that persons affected by this process an effective opportunity to challenge measures adopted in urgency. Although the jurisdiction of the court to determine whether there was a clear violation of the right to be heard during the course of the proceedings in the court

of another Member State, this court can not confine itself to implement its own conception of the oral hearing and the fundamental nature of the latter is in its legal order and must determine, having regard to all circumstances, if the people affected by that process or not they had sufficient opportunity to be heard.".

The Effects of Recognition:

The article 17. stipulates a difference between recognizing decia given in recognition of main proceedings and the decision in Case territorial/secondary.

In this case (Court with jurisdiction, by virtue of Article 3. / 1), recognition implies ipso jure the extension, to all States of the effects attributed to the process under State law to open the case, without any prior judicial formality on efficacy.

It just that the authorities of the requested State that might be faced with the decision, check if it is a decision that falls within the scope of regulation and whether there any reason to refuse, according to Article 26.

As stated in the report of Professor Virgos on the relevant standard (and with the same text) to the Convention on insolvency proceedings: "The automatic recognition system and the model range of effects reinforces the universality of the case. The decision to open with a range identical effect in all States, from the time fixed by the Law of the State Opening. The inhibition of debtor, the liquidator's appointment, the prohibition of individual plays, the incorporation of all assets of the debtor in bankruptcy, regardless of the state where located, the obligation to repay all the creditors who have obtained the title individual, after the opening of proceedings, etc.. effects are determined by the Law of the State of openness that you cultivate simultaneously in all states.
The main proceedings can not have effect in respect of goods and legal situations that are outside the scope of territorial proceedings opened. The process is intended to defend the territorial local interests, and to this end, the national law is applicable. However, the main process can influence the course of territorial proceedings, under the rules of coordination and subordination under the Convention (here it is the Rules) and which are subject to the territorial processes. "

The final part of Article 17/2 regulates the particular situation in which a territorial proceedings - secondary or independent - is given by reason of ending a moratorium or even for debt forgiveness.

This provision, according to that report, makes clear that the secondary processes limiting the rights of creditors "can only affect the debtor's assets located in the State of opening of territorial

proceedings. Creditors concerned may, therefore, without limitation, seek the full payment of their claims on assets located in other states. Of course, nothing prevents those creditors voluntary consent a major limitation of their rights also affecting the assets were located in territory of the opening of territorial proceedings. However, this limitation additional is only enforceable against creditors who have accepted individually, not by a majority decision. This principle must be viewed in relation to Article 34/2.".

FINAL REMARKS

Other problems can arise from the vast matters that the Regulations leave to be addressed by national legislation, considering that there are still considerable differences between different countries.

Major, but not exclusive, findings of this study are:

- Notwithsanding the fact that "centre of main interest" is a vital operating concept of the Regulation in what concerns the determination of international jurisdiction, there is a lack of legal rules on this matter, which gives way to uncertainty and court disputes, what naturally jeopardizes the uniform application of the Regulation. Therefore, we suggest some urgent amendments.

- As we have already said, article 14 regards one of the substantive matters of the process of insolvency. Not all the state members have the same substantive solution for the protection of third-party purchasers. In order to **conciliate** substantive solutions in all the state members, the European Insolvency Regulation should'n contain a conflict rule, but a imperative one that would conciliate an international insolvency proceedings. Avoiding the possibility of "*forum shopping*".

- The main is that recognition of insolvency proceedings is to ensure heart safety and confidence of all who live in countries of the Member States. Hence, decisions taken by the court responsible for the main proceedings must be immediately recognized in other EU countries without additional inspection, except if this recognition effect contrary to the public in this country or for decisions that restrict or postal secrecy of individual liberty.

This is, the refusal of receipt of the effects of insolvency proceedings are limited to obvious reasons of public policy, especially relating to fundamental principles, rights, freedoms and privileges guaranteed by the Constitution.