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**“Centre of main interests” – a New  
Concept in European Insolvency  
Law.**

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# Summary

It has been a long job trying to unify the rules of cross-border insolvencies within the European Union. In the 1960's the work started and as time went by and the Union grew larger it became necessary to modify the high ambitions of unification, set up from the beginning. Legislation about insolvency with cross-border effects is necessary as a safeguard for an internal market. The preparations, which have been extended over 40 years, ended up with the adoption of an EC Regulation, coming into force on 31 May, 2002<sup>1</sup>. By this Regulation a European judgment regarding insolvency in a main proceeding will encompass assets in the whole Union (with the exception of Denmark) and will automatically be recognised and enforceable in other Member States. Although the creditors will still have the possibility to protect assets within their respective countries by applying for a territorial proceeding, despite the main proceeding going on. The territorial proceeding will then operate as a secondary proceeding side-by-side with, but still subject to, the main proceeding.

The provisions set up for jurisdiction are introducing a new concept – the centre of a debtor's main interests – as the place to apply for a main proceeding. Regarding legal persons, this place is presumed to be located where the registered office is, in the absence of proof to the contrary. The meaning of the new concept will therefore be highlighted only if a company's main interests are elsewhere than the registered office. Since it is a new concept, not used in EU Law before, one interesting question is of course how the European Court of Justice (ECJ) will interpret it. Since the concept is a compromise between *the state of incorporation theory* and *the "real seat" theory*, existing in national law of the Member States, my main question is whether the interpretation will be made uniformly or by reference to national law. There is no definition of the concept in the Regulation, but the preamble to the Regulation contains some guidance, why a subquestion is whether this preamble will be used by the ECJ in interpretation or not.

Unusually enough, there is an Explanatory Report<sup>2</sup> drawn up as guidance to the content of the Regulation. The Explanatory Report was originally written in relation to the 1995 Convention on Insolvency Proceedings<sup>3</sup>, which preceded the Regulation and never came into force. The Explanatory Report is by the Swedish delegate in the ad hoc Committee of the Convention, held to be important as a source of law, even if it was not published and has no official status. A second

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<sup>1</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1. Hereinafter called the Regulation.

<sup>2</sup> Explanatory Report on the Convention on Insolvency Proceedings (Authors: Virgos, Miguel, Spain and Schmidt, Etienne, Luxembourg). Council's document 6500/1/96, dated 8 July 1996, hereinafter called the Explanatory Report or the Report.

<sup>3</sup> The Convention on insolvency proceedings of the 23 November 1995, hereinafter called the Convention.

subquestion is therefore whether the Explanatory Report will be used while interpreting this new concept or not.

The Regulation contains another key concept, namely “establishment”. An establishment in a Member State is a pre-condition for jurisdiction concerning a territorial/secondary proceeding. In contrast to the other concept this one is well known in EU Law. I have looked at how it relates to “the right of establishment” within the meaning of the EC Treaty, Articles 43 and 48 and within the provisions of special jurisdiction in Brussels I, Article 5.5.

Besides preparatory documents and legislative acts I have studied literature and articles in the field. The materials used are in some cases commentaries to the Convention, but they are still valid in relation to the Regulation since there are no real substantial differences between the Convention and the Regulation. The Regulation is applicable to both natural and legal persons, but this work is concentrated on legal persons.

The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters – also known as “the Brussels Convention”<sup>4</sup> – has recently been replaced by a Regulation with some substantive amendments. In this work I refer to it as Brussels I or the Brussels Convention, to be separated from Brussels II<sup>5</sup>.

I have come to the conclusion that the ECJ will apply a uniform interpretation of “centre of main interests” in order to make the Regulation effective, obtain unified rules of jurisdiction and avoid “forum shopping”. Nevertheless, the ECJ will probably draw inspiration from national law of the Member States while giving the uniform interpretation. The preamble will probably be of help in interpreting the concept, but it is leaving a large scope of interpretation, why it will not be decisive. The Explanatory Report will probably not play a major role either, while interpreting this concept, since it is more restrictive than the preamble and enough guidance will be found in national law.

Regarding “establishment” I think the intended interpretation is closer to the concept in Brussels I than in the Treaty, even if it is clear that the Brussels I concept was not intended to apply to the Regulation concept. The definition in the Regulation is wide and leaves a large scope of interpretation for the ECJ. Still, as an exception to a main rule – just like in Brussels I – it is possible that the interpretation will be held rather narrow.

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<sup>4</sup> The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded on 27 September 1968, for a consolidated text, see OJ 1998 C 27/1.

<sup>5</sup> Brussels I: Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1, entered into force on 1 March 2002. Brussels II: Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Joint Children, OJ 2000 L 160/19, entered into force on 1 March 2001.

# 1 Introduction

I find the concept “centre of main interests” interesting, since it is a new concept and a key element in the Regulation. It determines applicability of the Regulation - it is only applicable if the centre is situated within the Community (see 4.1 The Objective and Scope). It is decisive for jurisdiction regarding main proceedings (see 5 The Centre of Main Interests) and decisive concerning the main rule of the proceedings (see 4.4 Lex Concursus). It is also decisive for determining where a claim is situated. According to Article 2.g of the Regulation, claims shall be regarded as situated in the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3.1 of the Regulation. Apparently, it is important to know how the concept will be interpreted.

The other key element in the Regulation is “establishment”. An establishment in a Member State makes it possible to open up a territorial/secondary proceeding (see 6 Establishment). The meaning of “establishment” within the Regulation is therefore useful for the creditors to know. In contrast to “centre of main interests”, “establishment” is known and used in EU Law. The meaning of it within the Treaty is held to be very broad (see 6 Establishment). The meaning of it within Brussels I is considered to be very narrow (see 6 Establishment). Since there is a definition of the concept in the Regulation (Article 2.h), which is not the case for “centre of main interests”, one could believe that there is very little scope of interpretation. I will make an attempt to estimate where “establishment” within the Regulation will be put in relation to the Treaty concept and the Brussels I concept.

## 2 Background

Insolvency law has for a long time been discussed as an area in need of international legislation. It is a complex area involving many parties - the debtor, creditors, employees - and interests - not only legal, but also economical and social. Flessner puts it this way: “Insolvency proceedings typically involve, by their all-encompassing nature, a large range of parties as well as complex debtor-creditor relationships in a crisis situation where decisions with important economic consequences have to be made swiftly”<sup>6</sup>. Virgos explains the necessity of a common legal framework in this area of law with the facts that insolvency is not an area where private initiatives can compensate for the lack of legislation, because there is a risk for destructive competition for the debtor’s assets among the creditors, acting in self-interest<sup>7</sup>.

### 2.1 Insolvency Principles

There are different normative principles governing insolvencies in different jurisdictions, which explains why basic rules applicable to insolvencies can differ fundamentally from one member state to another. You could even talk about different “insolvency cultures”. Wood describes a *pro-creditor* jurisdiction as allowing a creditor to protect himself against an insolvency, e. g. by security or set-off and a *pro-debtor* jurisdiction aiming to maximise the defaulter’s assets so as to increase the assets available for distribution. The pro-creditor argument is that people should be able to avoid losses resulting from a debtor default. The pro-debtor argument is that defaulters (and their employees) ought to be saved and that all creditors ought to contribute to this rescue<sup>8</sup>. He ranks England, Ireland, Germany, the Netherlands and Sweden as more pro-creditor jurisdictions than Denmark, Italy, Greece, Portugal, Spain, Belgium, Luxembourg and France, which are considered as more pro-debtor<sup>9</sup>.

Generally it is every state’s choice how to cooperate with other jurisdictions in private international law matters. Historically the EU Member States have based their international laws regarding insolvency on two different models – the universal and the territorial. The universal model demands a single insolvency procedure comprising all the assets of the debtor, including those located in other countries. It presupposes the mutual recognition of the effects of insolvency proceedings. It is an internationally-oriented model. The territorial model demands a local insolvency procedure for the assets of the debtor located

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<sup>6</sup> Flessner, A, “German International Insolvency Law and its Relation to the EC Convention on Insolvency Proceedings”. *European Business Law Review*, 1999, vol 10, no 1-2, p 2.

<sup>7</sup> Virgos, Miquel, *The 1995 European Community Convention on Insolvency Proceedings: an Insider’s View*, The Hague, Boston, Kluwer Law International, 1998, p 1.

<sup>8</sup> Wood, Philip R, *Principles of International Insolvency*, Sweet & Maxwell, London, 1995, p 3.

<sup>9</sup> Wood, p 4-5.

within the country, with effects limited to that territory. Parallell proceedings can be going on in different states at the same time. It is a protective, nationally-oriented model<sup>10</sup>. There can be features of protective measures in the universal model as well as elements of cooperation in the territorial model.

Since cross-border insolvencies involve many aspects it has been difficult to reach consensus on the principles that must govern them. Along with accessions of new member states to the European Union the work has not been easier.

## 2.2 The Convention

A committee of experts on bankruptcy was set up in 1960<sup>11</sup>. They were convened by the European Commission and were drawn from the original six Member States<sup>12</sup>. Insolvencies had been excluded from the ongoing work with the Brussels Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (signed in 1968) with the intention of being regulated separately. The committee submitted a proposal in 1970, which was renegotiated 1973, following the accession of the first three additional Member States. The definitive version of this draft was sent to the Council in 1980 and published in 1982 as “Bankruptcy, compositions and similar procedures”. The work was suspended in 1985<sup>13</sup>.

From 1980, in the Council of Europe, there were also negotiations going on in this field, which resulted in the adoption of the European Convention on certain international aspects of bankruptcy in 1990, also known as “the Istanbul Convention”<sup>14</sup>. The Convention will enter into force after a minimum of three ratifications have been lodged. It has been signed by eight states and ratified by one, so it has not yet entered into force. The states which have signed the Convention are Belgium, Cyprus, France, Germany, Greece, Italy, Luxembourg and Turkey. Cyprus has ratified it<sup>15</sup>. Although the Istanbul Convention had the effect of reviving work [regarding cross-border insolvencies] at the Community level<sup>16</sup>.

In May, 1989 an informal meeting of EU Justice Ministers in San Sebastian

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<sup>10</sup> Virgos, p 2.

<sup>11</sup> Surzur, Anne, *Convention on insolvency proceedings. The result of thirty five years of negotiation: principal provisions of the new draft*, Europe Information Service (EIS), 1995, p 1.

<sup>12</sup> Fletcher, Ian F, *Insolvency in Private International Law*, Clarendon Press, Oxford, 1999, p 247.

<sup>13</sup> Surzur, p 1 and 11, inter alia quoting Draft Convention and report in the European Community Bulletin, supplement 2/82.

<sup>14</sup> The European Convention on certain international aspects of bankruptcy, Council of Europe, opened for signature on 5 June 1990 in Istanbul.

<sup>15</sup> Current status at the Council’s of Europe homepage <http://conventions.coe.int> on 22 May 2002.

<sup>16</sup> Surzur, p 2.

reopened the question. In 1990 COREPER<sup>17</sup> granted an ad hoc Committee a mandate to draw up a new draft, appointing the German expert Manfred Balz as its permanent Chairman<sup>18</sup>. The Committee presented a draft Convention, which was preliminarily signed by every member state in September, 1995. It was formally opened for assignment in November, 1995 and Great Britain was the only member state that didn't sign it before expiration of the assignment period in May, 1996. This was because of the restrictions of trade due to "mad cow" disease<sup>19</sup>. The Convention was made available in all official EU-languages, all equal without priority for any version<sup>20</sup>. It is a good idea to compare different versions though, since at least the Swedish version – according to Mellqvist – may contain linguistic errors, or "flaws" as he calls it<sup>21</sup>.

In this context it might be of interest to mention the UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997<sup>22</sup>. It serves as a model for legislation when a debtor has assets in more than one state. It is drafted so as to enable each enacting State to insert into the text of the enacted Article such specific references as are necessary to enable the provision to function as an integral part of the insolvency law of that State<sup>23</sup>. According to Fletcher the fact that it is open to a State to enact as much, or as little of the Model Law as it pleases is likely to be viewed by some as an Achilles' heel<sup>24</sup>. The UNCITRAL Model Law has been adopted in Eritrea, Mexico, South Africa and within Yugoslavia, Montenegro<sup>25</sup>.

## 2.3 The Regulation

After expiration of the assignment period of the Convention the work entered into a deadlock. At the same time cooperation in Justice and Home Affairs had been transferred from the third to the first pillar by the Treaty of Amsterdam<sup>26</sup>. This transfer meant that supranational legislation – such as directives and regulations – should be used instead of conventions. During a transitional period of five years from the entry into force of the Treaty of Amsterdam, the Council can only act unanimously on a proposal from the Commission or on the initiative of a Member

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<sup>17</sup> Committee of Permanent Representatives of Member States to the Institutions of the European Union.

<sup>18</sup> Surzur, p 2 and 37.

<sup>19</sup> Mellqvist, Mikael, "Gränsöverskridande konkurshandtering, EU:s konvention om insolvensförfaranden". Ny Juridik, 1996, nr 4, p 9.

<sup>20</sup> Mellqvist, Ny Juridik 4:96, p 17.

<sup>21</sup> Mellqvist, Ny Juridik 4:96, p 17.

<sup>22</sup> The Draft Model Legislative Provisions on Cross-Border Insolvency, adopted on 30 May 1997 by the United Nations Commission on International Trade Law, hereinafter called the UNCITRAL Model Law.

<sup>23</sup> Fletcher, 1999, p 330.

<sup>24</sup> Fletcher, 1999, p 361.

<sup>25</sup> Current status at the United Nations homepage, <http://www.uncitral.org>. on 30 April 2002.

<sup>26</sup> The Treaty of Amsterdam entered into force on 1 May 1999.



State after consulting the Parliament<sup>27</sup>. At the initiative of Germany and Finland, the Commission

submitted, in May, 1999, a Draft Regulation to the Council<sup>28</sup>. After the consultation procedure the Council adopted the Regulation on 29 May, 2000.

The United Kingdom and Ireland are not participating fully of cooperation in Justice and Home Affairs, but can choose to participate<sup>29</sup>. Regarding this Regulation they have chosen to be parties of it. Denmark, on the other hand, has by the Edinburg decision chosen to be excluded from cooperation in Justice and Home Affairs<sup>30</sup>. Accordingly it follows from the preamble of the Regulation that Denmark is not bound by nor subject to the application of the Regulation<sup>31</sup>. However, Denmark has indicated that it wishes to apply the same rules as those defined in the Regulation on the basis of an agreement to be concluded between it and the Community<sup>32</sup>.

## 2.4 Differences between the Convention and the Regulation

The substantive rules in the Regulation are in principle identical to those in the Convention. However there are small differences, mainly due to the fact that the judicial form of the legislation is changed. The Regulation is directly applicable with a common date of entering into force in all Member States. Signing and ratification are not needed, as they were for the Convention. The Regulation has another judicial basis – Articles 61 and 67 EC – than the Convention, which was founded on Article 220 EC Treaty (now 293 EC).

Furthermore Denmark was part of the Convention, but is not part of the Regulation.

The Regulation has another relation to EC law, which is natural since it is a supranational legal act, in contrast to a convention, having the character of an intragovernmental legal act. According to the preamble of the Convention it was stated that "the High Contracting Parties to this Convention, Member States of the European Union, [...] aware that this Convention does not affect the application of the provisions of Community law which, in relation to particular matters, lay down rules relating to insolvency proceedings or of national law harmonized in implementation of such Community law". The meaning of this was

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<sup>27</sup> Article 67 EC.

<sup>28</sup> Commission's Draft Council Regulation on Insolvency Proceedings, submitted to the Council on 26 May 1999, OJ 1999 C 221/8.

<sup>29</sup> Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the EU and the EC Treaties.

<sup>30</sup> Articles 1 and 2 of the Protocol on the position of Denmark annexed to the EU and the EC Treaties. Decision of the Heads of State or Government, meeting within the European Council at Edinburgh on 12 December 1992, concerning certain problems raised by Denmark on the Treaty on European Union.

<sup>31</sup> Recital 33 of the preamble to the Regulation.

<sup>32</sup> Council's Press Release of 29 May 2000, 183.

that Community law would have priority in an eventual conflict with the Convention<sup>33</sup>. This statement has no correspondence in the Regulation, since the legislation now is part of EC law.

What is also worth mentioning is that the conditions for preliminary rulings are not exactly the same in this matter as in matters governed by Article 234 EC. According to Article 68.1 EC only a "court or tribunal of a Member State against whose decisions there is no judicial remedy under national law" is entitled to ask for a preliminary ruling, whereas even other courts or tribunals may ask for a preliminary ruling according to Article 234 EC. It is mandatory according to the Regulation to ask for a preliminary ruling if it is necessary for a judgment, since Article 68.1 EC says that the court or tribunal *shall* ask for a preliminary ruling. This was voluntary according to the Convention, since Article 44 stated that the courts listed in the Article *may* ask for a preliminary ruling. Additionally, the Council, the Commission or a Member State may ask for a ruling even if there is no pending case before a court, according to Article 68.3 EC. This was however also possible for a "competent authority in a Contracting State" according to the Convention, Article 45.

According to Article 44 of the Regulation it "replaces" other Conventions between Member States. The word "supersede" was used instead in the Convention, Article 48. In the Swedish text the words "ha företräde" were used in the Convention. They have been changed to "ersätter" in the Regulation. I don't think there is a practical difference despite the different wording.

In the Swedish text of Article 3.1 of the Convention the word *företag* has been changed to "bolag", probably to comply with the other language versions. They are using the words "company or legal person", "sociétés et les personnes morales" and "Gesellschaften und juristischen Personen"<sup>34</sup>. The wording in the Swedish version of Article 4.2.m of the Convention and the Regulation has also been amended from "rättshandlingars nullitet, återgång eller ogiltighet" to "återvinningsbestämmelser eller liknande bestämmelser", which is the correct legal term<sup>35</sup>. Concerning Sweden the Regulation is – due to domestic legislative amendments – not encompassing "Offentligt ackord", which was listed in Annex A to the Convention.

There may be other differences which I have not found, but no substantial amendments.

## 2.5 Comparison with other Conventions

The Regulation is a "double" or "direct" convention, containing both rules about recognition/enforcement and jurisdiction. Additionally it contains choice-of-law

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<sup>33</sup> Bogdan, Mikael, *Sveriges och EU:s internationella insolvensrätt*, Norstedts Juridik, Stockholm, 1997, p 155.

<sup>34</sup> The meaning of *företag* as encompassing private persons having an own business has been pointed out by Bogdan, p 164.

<sup>35</sup> Mellqvist considered the formulation in the Convention as "unfortunate", Ny Juridik 4:96, p 40.

provisions. Brussels I is also double, but it does not contain conflict law rules, so the Regulation goes a step further.

The Nordic Bankruptcy Convention<sup>36</sup> is a "simple" or "indirect" convention, which contains only recognition/enforcement rules and no direct rules of jurisdiction, which means that jurisdiction is not limited by the convention and can still be determined by each contracting state on its own<sup>37</sup>. The Nordic Bankruptcy Convention additionally contains choice-of-law provisions, with *lex concursus* as a main rule<sup>38</sup>.

After the entry into force of the Regulation will, regarding Sweden, replace the Nordic Bankruptcy Convention in relation to Finland<sup>39</sup>. The Nordic Bankruptcy Convention will still apply concerning Denmark, Iceland and Norway and will also have priority if the Regulation is irreconcilable with it<sup>40</sup>.

The Istanbul Convention is also of the "simple" or "indirect" type, which merely lays down rules of indirect international jurisdiction. It leaves the Parties free to continue to apply their existing national rules of jurisdiction, even against debtors resident or domiciled in another Party<sup>41</sup>.

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<sup>36</sup> The Nordic Bankruptcy Convention concluded at Copenhagen on 7 November 1933. The original version of the Convention remains applicable in Iceland. Certain amendments – not affecting main principles – have been made and entered into force between Denmark, Finland, Norway and Sweden, see Bogdan p 142-143.

<sup>37</sup> Bogdan, p 144.

<sup>38</sup> Bogdan, p 147.

<sup>39</sup> Article 44 of the Regulation.

<sup>40</sup> Article 44.3 of the Regulation.

<sup>41</sup> Fletcher, 1999, p 304.

### 3 The Explanatory Report

An Explanatory Report is written to the Convention. The Report is written in all official EU-languages. Several Member States wanted the Report to be published as an important source of law<sup>42</sup>, but this was never done. The reason why is not clear. It might simply be due to the fact that the Convention never came into force. But this can be argued against since there has been a publication of an explanatory report to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters<sup>43</sup>, which convention was later on, without coming into force, replaced by a regulation – Brussels II. In that case the Explanatory Report was approved the same day as it was signed, which makes a difference. The Explanatory Report of the Insolvency Convention was completed at a late stage. The Report is dated 8 July, 1996 and the assignment period of the Convention expired in May, 1996. To publish an explanatory report when the assignment period has expired is illogical. Later on, when the Regulation was adopted, the legal instrument was changed and regulations are not traditionally accompanied by explanatory reports, which may explain why the Explanatory Report was never published.

Instead of explanatory reports, regulations have preambles. In this case the text of the preamble to the Insolvency Regulation is to a large extent drawn from the Explanatory Report. Nevertheless the Explanatory Report has no official status and it is an open question if this will prevent the ECJ from using it when interpreting the Regulation. Mellqvist is of the opinion that the Report will be of great importance as a secondary source of law when the Regulation will come into force<sup>44</sup>. The Report has been produced collectively by the expert group [called the ad hoc Committee in this work, see 2.2 The Convention] and the group is unified concerning the content of the Report. Several states have made their assignment of the Convention conditional by the fact that the Explanatory Report should be given a certain content and be drawn up in a certain way<sup>45</sup>. Mellqvist means that his opinion – that the Explanatory Report will be of great importance as a source of law – is shared amongst many of the persons who have worked with both the Convention and the Regulation. But he is aware that this point of view might not be accepted “in a wider circle”<sup>46</sup>.

The new order, with regulations instead of conventions concerning private international law, is criticized by Lueke, since the motives for the legislation will not be as well documented as before. He means that commentary-like reports by

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<sup>42</sup> Mellqvist, *Ny Juridik* 4:96, p 18.

<sup>43</sup> The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, signed on 28 May 1998, OJ 1998 C 221/1. The Explanatory Report published in OJ 1998 C 221/27.

<sup>44</sup> Mellqvist, Mikael, “EU:s förordning om insolvensförfaranden – en följetong i europeisk insolvensrätt – del 1”. *Ny Juridik*, 2000, nr 1, *Ny Juridik* 1:00, p 21.

<sup>45</sup> Mellqvist, *Ny Juridik* 4:96, p 18.

<sup>46</sup> Mellqvist, *Ny Juridik* 1:00, p 21-22.

the drafters of the text have proven to be an important source for interpretation, as far as conventions are concerned<sup>47</sup>. He means that the "whereas-clauses" in preceding regulations are normally too succinct to substitute for a report. However, regarding this Regulation he finds it well documented, due to the fact that it mainly contains the draft text of the Convention previously agreed upon<sup>48</sup>.

It has been difficult to find out if the Explanatory Report will be considered a source of law, even if it is not formally accompanying the Regulation. None of the other authors I have studied, has argued about the Report as a source of law as thoroughly as Mellqvist. Bogdan seems to accept his line of thought, referring to him, but notably calling the Explanatory Report "an important tool of interpretation", not a source of law<sup>49</sup>. Some of the authors I have studied have referred to the Report while commenting on the substance of the Regulation, although they were commenting on the Regulation and not the Convention, Lauterfeld and Lueke for example<sup>50</sup>. This might be a sign that they share Mr Mellqvist's opinion, but that is only an assumption and I can not be sufficiently sure to draw that conclusion.

Since it is a detailed report – Fletcher finds it more detailed and precise than the reports accompanied by the Brussels Convention (now Brussels I) and the Rome Convention<sup>51</sup> - I find it very likely that it will be used in some way by the ECJ, but maybe not by formal reference to it. It happens that the ECJ uses preparatory documents, for example to confirm an interpretation that is already reached by other arguments<sup>52</sup> and when interpreting secondary legislation<sup>53</sup>. International private law is an area where the preparatory work are often cited by the ECJ<sup>54</sup>. The Explanatory Report is not published, which might weaken its position as a source of law, since the level of transparency of the preparatory

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<sup>47</sup> Lueke, Wolfgang Dr, "The New European Law on International Insolvencies: A German perspective". Bankruptcy Developments Journal, 2001, p 371, quoting the Jenard & Schlosser Report on the Convention on Jurisdiction and Judgments in Civil and Commercial Matters of 27 September 1968, OJ 1979 C 59/1, 71.

<sup>48</sup> Lueke, p 371.

<sup>49</sup> Bogdan, p 154-155.

<sup>50</sup> Lauterfeld, Marc in "Centros and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo-foreign Companies in German International Company and Insolvency Law?" European Business Law Review, 2001, vol 12, no 3-4, p 79-88. Lueke, Wolfgang Dr in, "The New European Law on International Insolvencies: A German perspective". Bankruptcy Developments Journal, 2001, p 369-405.

<sup>51</sup> Fletcher<sup>54</sup>, "The European Convention on Insolvency Proceedings: An overview and comment with US interest in Mind". Brooklyn Journal of International Law, 1997, vol 23, no 1, p 34, quoting P Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979, Martino de Almeida Cruz et al, Report on the Convention, 1990 and Mario Giuliano & Paul Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, 1980.

<sup>52</sup> Bernitz, Ulf, *Sverige och Europarätten*, Norstedts Juridik, Stockholm, 2002, p 32 quoting Öberg, Ulf "Några anteckningar om användningen av förarbeten inom gemenskapsrätten", Juridisk Tidskrift vid Stockholms Universitet, 2000-01, p 492 ff.

<sup>53</sup> Bernitz, p 32 quoting Rasmussen, Hjalte, "EU-ret i kontekst", 4 udg, 2001, p 167.

<sup>54</sup> Öberg, *supra* note 50, p 497, giving these examples: case 201/82 Gerling, p 17, C-383/95 Rutton, p 20, C-295/95 Farrell, p 24, C-260/97 Unibank, p 20 and C-8/98 Dansommer A/S, p 27-28.

work is decisive in that respect<sup>55</sup>. However, the Explanatory Report is not secret and can easily be ordered and delivered electronically at the Council's, why the level of transparency can not be held that low, despite that it was not published.

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<sup>55</sup> Öberg, p 493, quoting Plender, "The Interpretation of Community Acts by Reference to the Intentions of the Authors", *Yearbook of European Law*, vol 2, 1982, p 94; Bredimas, *Methods of Interpretation of Community Law*, 1978, p 58 ff.

# 4 Overview of the Regulation

The Regulation is not a new "European Insolvency Act", substituting national law in all Member States. It is basically legislation of private international law character. Like conventions it will interplay with national law regarding, for example, the estate, that will be governed by the law of the Member State where the proceedings were opened. The purpose has not been to harmonise the whole field of insolvency law, but the intention has been to let the principle of universality come through with exceptions. Besides rules about jurisdiction (Article 3) the Regulation contains provisions about applicable law (Articles 4-15) and recognition/enforcement (Articles 16-26).

## 4.1 The Objective and Scope

The judicial basis for the Regulation is Articles 61.c (reference to Article 65) and 67.1 EC. By Article 65 EC it follows that measures in the field of judicial cooperation in civil matters having cross-border implications shall only be taken if they are necessary for "the proper functioning of the internal market". The purpose to obtain such a market is to be found in the preamble of the Regulation, stating that the activities of undertakings having cross-border effects also regarding insolvencies affect the proper functioning of the internal market<sup>56</sup>. The objective of the Regulation is then to make cross-border insolvency proceedings operate efficiently and effectively and to avoid "forum shopping"<sup>57</sup>.

The Regulation applies to "collective insolvency proceedings which entail partial or total divestment of a debtor and the appointment of a liquidator". Regarding Sweden it is applicable to "konkurs" and "företagsrekonstruktion"<sup>58</sup>. The scope can be amended on the initiative of a Member State or the Commission, by the Council acting by qualified majority<sup>59</sup>.

The Regulation is applicable only if the centre of the debtor's main interests is located in the Community<sup>60</sup>. An exception is made concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties and collective investment undertakings<sup>61</sup>. They are excluded simply because insolvency concerning such undertakings is to be regulated separately<sup>62</sup>. There are no

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<sup>56</sup> Recital 3.

<sup>57</sup> Recitals 2 and 4.

<sup>58</sup> Article 1.1 and Annex A attached to the Regulation.

<sup>59</sup> Article 45.

<sup>60</sup> Recital 14.

<sup>61</sup> Article 1.2 and recital 9.

<sup>62</sup> Two directives are adopted in this field; Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ 2001 L 125/15, that shall be complied with on 5 May 2004 and Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the

definitions of the excepted undertakings in the Regulation, nor explanations in the preamble. The excepted undertakings are thus defined in the Explanatory Report with reference to current directives at that time. "Insurance undertaking" was covered by Directives 73/239/EEC and 79/267/EEC, "credit institution" by Directive 77/789/EEC, "investment undertaking" by Directive 92/22/EEC and "collective investment undertaking" by Directive 85/611/EEC<sup>63</sup>. If the centre of the debtor's main interests is not located in the Community the Regulation is not applicable, since Article 3.1 and 3.2 - according to the Explanatory Report - assume that the centre of main interests is in a Member State. If there is no "Community-jurisdiction" international private law will apply. Even when the centre of a debtor's main interests is in a Member State the provisions of the Regulation are restricted to relations with other Member States. Regarding non-Member States each State has to define its appropriate conflict rules<sup>64</sup>. Accordingly there is an important limit of the scope of the Regulation, not clearly defined in the Regulation, but important to mention.

Another limit of interest is the one in relation to Brussels I. Actions directly derived from insolvency and in close connection with insolvency proceedings are excluded from Brussels I, according to case 133/78 *Gourdain v Nadler*<sup>65</sup>. To avoid loopholes between the Regulation and Brussels I, these related actions have been made subject to the Regulation. Related actions can concern further conduct of the proceedings, judicial approval of compositions, adjustment or avoidance of antecedent transactions, imposition of civil liability upon directors and others held responsible for mismanagement and formal closure<sup>66</sup>. Article 25 states that judgments deriving directly from insolvency proceedings and which are closely linked with them shall be recognised and enforced in the same way as judgments concerning the opening of proceedings. According to the Explanatory Report actions derived from insolvency proceedings are also subject to the rules of

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reorganisation and winding up of insurance undertakings, OJ 2001 L 110/28, that shall be implemented before the 20 April 2003.

<sup>63</sup> Explanatory Report, para 57-60;

First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance.

First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance.

First Council Directive 77/780/EEC of 12 December 1977 the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance.

Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.

Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>64</sup> Explanatory Report, para 44 and 82.

<sup>65</sup> Case 133/78 *Henri Gourdain v Franz Nadler*, [1979] E C R 733.

<sup>66</sup> Fletcher, 1999, p 288.



jurisdiction in the Regulation<sup>67</sup>. I don't think the wording of Article 25 supports that intention, since that Article only regulates recognition and enforceability. I find no other support for that view in the Regulation either. Bogdan means that such an extensive interpretation of the jurisdiction provisions in Article 3 has no support in its wording and that it is doubtful if it is necessary, since it would not be unreasonable to invoke that jurisdiction concerning such issues simply could be regulated by each Member State's national law<sup>68</sup>. Schollmeyer is of the opinion that the problem of jurisdiction for related civil proceedings has not been resolved by the Regulation and that the drafters of it therefore failed with one important goal –to fully complement Brussels I<sup>69</sup>.

## 4.2 Cross-border Implications/Effects

The Regulation is concluded to regulate insolvency proceedings having cross-border *implications*, which is the term used in Article 65 EC. In the preamble of the Regulation it follows indirectly that the Regulation is applicable to insolvency proceedings having cross-border *effects*<sup>70</sup>. The terms differ and may have a slightly different meaning. The condition for applicability of the Regulation – cross-border implications or effects - is not explicitly mentioned in the legal text. I find this unfortunate, since such an important condition should be clearly stated, to avoid uncertainty. Since the legal instrument is a regulation, directly applicable in the Member States and directly forms part of national law, its wording should exclude applicability to domestic insolvencies. This cross-border condition is in my opinion clearer in Brussels I and Brussels II, because it follows more or less automatically since it is a party-to-party situation. In the Rome Convention on the Law Applicable to Contracts it is clearly stated that it applies to "contractual obligations in any situation involving a choice between the laws of different countries"<sup>71</sup>.

In an insolvency situation the cross-border implications concern of course to a great extent assets situated in different Member States, which would probably be the first thing to think about when examining the condition. In the Nordic Bankruptcy Convention "assets" is chosen as a cross-border condition. It follows from Article 2 of the Nordic Bankruptcy Convention, which says that the Convention is applicable if an insolvency in a Contracting State encompasses assets in another Contracting State.

Dahan refers to cross-border insolvencies as insolvency proceedings which

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<sup>67</sup> Explanatory Report, para 77.

<sup>68</sup> Bogdan, p 167.

<sup>69</sup> Schollmeyer, Eberhard, "The New European Convention on International Insolvency". Bankruptcy Developments Journal, 1997, vol 13, no 2, p 434 and 441.

<sup>70</sup> Recitals 3 and 8.

<sup>71</sup> The Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, OJ 1998 C 27/36, article 1.

relate to more than one Member State and means that this may be because of the debtor's commercial activities in the jurisdiction concerned or the location of assets, the debtor's residence, contracts with third parties, etc<sup>72</sup>.

Fletcher describes it as follows: "The debtor may own or have interests in property not all of which is exclusively within the jurisdiction of a single state. Liabilities may be owed to parties whose forensic connections are predominantly with a different country to that with which the debtor is associated; or the relevant obligations may be governed by foreign law, may have been incurred outside the debtor's home country or may be due to be performed abroad"<sup>73</sup>.

Cross-border insolvencies seem to encompass a great deal and if the question arises before the ECJ in a preliminary ruling I assume that the interpretation has to be made broadly.

It is not unlikely that cross-border implications can appear after the opening of a domestic insolvency proceeding. It does not follow from the Regulation how such an insolvency should be handled. Recognition of a judgment opening insolvency proceedings seems to depend on the use of the jurisdiction provisions in the Regulation<sup>74</sup>. Since these provisions probably are not identical to domestic rules in any Member State this can cause problems, especially if the insolvency proceeding should have been considered as a main proceeding according to the Regulation. I assume that a domestic judgment will be considered as falling outside the scope of the Regulation and not be recognised by it, which might give rise to future amendments of the Regulation.

### 4.3 Main and Territorial/Secondary Proceedings

This Regulation contains a compromise between the principle of universality and the principle of territoriality. According to the preamble a main proceeding aims at encompassing all assets in the Member States<sup>75</sup> and is automatically recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings<sup>76</sup>. Recognition no longer depends on each state's own private international law. The effect of recognition is thus only partial, since secondary proceedings still can be opened in another Member State, despite the opening of a main proceeding<sup>77</sup>. This can be made under special conditions – if a debtor possesses an establishment within the territory in another Member State than where the centre of the debtor's main interests is situated. Such a proceeding is secondary and is restricted to the assets in the territory where the establishment is situated<sup>78</sup>. Under special conditions it is

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<sup>72</sup> Dahan, Frédérique, "The European Convention on Insolvency Proceedings – Good News for Lawyers?". *Developments in European Company Law 1996*, vol 1, p 216.

<sup>73</sup> Fletcher, 1999, p 5.

<sup>74</sup> Articles 16-17.

<sup>75</sup> Recital 12.

<sup>76</sup> Article 16.1.

<sup>77</sup> Articles 16.2 and 17.1.

<sup>78</sup> Articles 3.2 and 16.2.

also possible to open territorial proceedings without a main proceeding being opened<sup>79</sup>. The solution with secondary proceedings is an option for a creditor to "protect" local assets. However the creditor can choose to lodge his claim in the main insolvency proceedings instead<sup>80</sup>. That option may of course be less attractive, because of different legal systems with different rules about priority of claims, language problems and so on. The liquidators in the different proceedings are thus obliged to cooperate and communicate with each other; for example the liquidator in the main proceeding shall be given the opportunity to submit proposals on the liquidation of assets in the secondary proceeding<sup>81</sup>. Secondary proceedings are also subject to main proceedings by the fact that assets remaining in a secondary proceeding after termination shall immediately be transferred to the main proceeding<sup>82</sup>. The compromise between the principles of universality and territoriality has been criticized. Leuke is of the opinion that it renders considerably more complex and costly the handling of transnational insolvencies, but he is aware that this was the only feasible approach<sup>83</sup>.

## 4.4 Lex Concursum

As a main rule, the law applicable to insolvency proceedings and their effects is that of the "State of the opening of proceedings" – *lex concursus*<sup>84</sup>. There are different exceptions to that rule, which concern inter alia right in rem, set-off, immovable property and contracts of employment. The choice-of-law rules have been commented on by different authors. Fletcher considers that they provide a practical and realistic solution to many troublesome questions which arise in a cross-border insolvency<sup>85</sup>. Dahan reflects over "the urgent need for harmonisation of concepts and a common understanding of where each Member State stands with regard to insolvency policy"<sup>86</sup>. Segal finds that the operation of the choice-of-law rules, by virtue of the various exceptions to, and carve-outs from, the general rule providing for the application of the law of the state of the opening of proceedings, combined with the practicalities of conducting business across the Community, means that the Community-wide effect of even a main proceeding will be limited<sup>87</sup>. Schollmeyer thinks that choice-of-law rules rather than allocation of jurisdiction is a modern solution and that it furthers integration

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<sup>79</sup> Article 3.4.

<sup>80</sup> Article 39.

<sup>81</sup> Article 31.

<sup>82</sup> Article 35.

<sup>83</sup> Lueke, p 405.

<sup>84</sup> Article 4.

<sup>85</sup> Fletcher, Ian F, "The European Union Convention on Insolvency Proceedings: Choice-Of-Law Provisions". Texas international law journal, 1998, vol 33, no 1, p 139.

<sup>86</sup> Dahan, p 230.

<sup>87</sup> Segal, Nick, "The choice of Law Provisions in the European Union Convention on Insolvency Proceedings". Brooklyn journal of international law, 1997, vol 23, no 1, p 73.

by adopting a federal model which affects the fifteen substantive bankruptcy laws as little as possible<sup>88</sup>.

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<sup>88</sup> Schollmeyer, p 441.

# 5 The Centre of Main Interests

The conditions in Article 3.1 of the Regulation for jurisdiction regarding a main proceeding contain a rebuttable presumption:

The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

*French version:*

Les juridictions de l'État membre sur le territoire duquel est situé le centre des intérêts principaux du débiteur sont compétentes pour ouvrir la procédure d'insolvabilité. Pour les sociétés et les personnes morales, le centre des intérêts principaux est présumé, jusqu'à preuve contraire, être le lieu du siège statutaire.

*German version:*

Für die Eröffnung des Insolvenzverfahrens sind die Gerichte des Mitgliedstaats zuständig, in dessen Gebiet der Schuldner den Mittelpunkt seiner hauptsächlichen Interessen hat. Bei Gesellschaften und juristischen Personen wird bis zum Beweis des Gegenteils vermutet, daß der Mittelpunkt ihrer hauptsächlichen Interessen der Ort des satzungsmäßigen Sitzes ist.

*Swedish version:*

Domstolarna i den medlemsstat inom vars territorium platsen där gäldenärens huvudsakliga intressen finns, har behörighet att inleda ett insolvensförfarande. För bolag och andra juridiska personer skall sätet anses vara platsen där de huvudsakliga intressena finns, om inte annat visas.

In the Istanbul Convention the same expression and presumption as in the Regulation are used (Article 4.1). In the UNCITRAL Model Law a foreign main proceeding is defined as "a foreign proceeding taking place in the State where the debtor has the centre of its main interests" (Article 2.6).

The 1980 Draft Convention used "the centre of administration" (*centre des affaires*) instead of the final concept. There was a definition of the concept meaning "the place where the debtor usually administers his main interests". There was also a rebuttable presumption – "in case of firms, companies and legal persons – that the registered office is the place where the debtor's main interests are usually administered".

## 5.1 Incorporation/Real Seat

The new concept "centre of main interests" is not known in EC law. Omar considers it an attempt to compromise between the *state of incorporation doctrine* used by Denmark, Finland, Sweden, Ireland, the Netherlands, United Kingdom and the *real seat doctrine*, used by Austria, Belgium, France, Germany

and Luxembourg<sup>89</sup>. The doctrines contain two contrasting conflict of law theories regarding the recognition of foreign legal persons. According to the incorporation theory, a company is governed by the law according to which it is (duly) established, whereas the latter [real seat] theory prescribes that the law of the country where the company has its real seat (i.e. its management and control centre) is applicable to company relationships. Thus, the incorporation theory stands for party autonomy while the real seat theory stands for an objective proper law test<sup>90</sup>. Rammeloo adds Italy, as a country using the real seat theory, to the enumeration above<sup>91</sup>.

Since the enumeration does not encompass all EU Member States, it may be that the real seat theory – with slight modifications – is the rule in the majority of Member States, which has been said by Lauterfeld<sup>92</sup>.

Usually, "the place of the registered office" is also "the place where the company or legal person is incorporated", but this is not compulsory under each system of law adhering to the incorporation theory<sup>93</sup>. According to the Explanatory Report (paragraph 75) the registered office was held to normally correspond to the debtor's head office.

In German Company Law – also applicable to German Insolvency Law – the real seat theory is established by case law<sup>94</sup>. It uses the company's principal place of business as an objective connecting factor<sup>95</sup>. The real seat theory "German-style", *the Sitztheorie*, has been defined by the *Bundesgerichtshof* as "the locus where the internal management decisions are transformed into the day to day business activities of a company"<sup>96</sup>. The German case law has further established that "the seat of a company is assumed, where the company is registered"<sup>97</sup>.

In French Insolvency Law jurisdiction is determined by where the debtor has its seat or, in default of a seat in France, where its principal business

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<sup>89</sup> Omar, Paul J, "Centros revisited; Assessing the impact on corporate organisation in Europe". *International Company and Commercial Law Review*, 2000, p 407-408.

<sup>90</sup> Rammeloo, Stephan, *Corporations in Private International Law. A European perspective*, Oxford University Press, Oxford, 2001, p 87.

<sup>91</sup> Rammeloo comments on these countries and Switzerland through the book.

<sup>92</sup> Lauterfeld, p 79, quoting Grossfeld, Bernard, in: Julius von Staudinger (ed), *Kommentar zum Bürgerlichen Gesetzbuch, Internationales Gesell-shaffsrecht*, Berlin 1998, para 152 *et seq.*

<sup>93</sup> Rammeloo, p 16.

<sup>94</sup> Lauterfeld, p 79, quoting RGZ 77, 19 (22); RGZ 159, 33 (46); BGHZ 51, 27 (28); BGHZ 97, 269 (271 *et seq.*); BayObLG (1993) Eu ZW 548 and p 81.

<sup>95</sup> Lauterfeld, p 79, quoting Kropholler, Jan, *Internationales Privatrecht*, 2<sup>nd</sup> edition, Tübingen 1994, at page 471; Ebke, Werner F, "Centros – Some Realities and Some Mysteries", *hand out* at the "Symposium on the Centros Decision of the European Court of Justice and its consequences", King's College London, 28-29 April 2000, at page 2 *et seq.*

<sup>96</sup> Lauterfeld, p 79, quoting BGHZ 97, 269 (272); also BayOBLG, (1986) *IPRax* 161, 163.

<sup>97</sup> Lauterfeld, p 79, quoting OLG München (1986) *NJW* 2197; Kropholler, *supra* note 95, at page 473.

interests are located<sup>98</sup>. A French court will examine whether the location of the seat corresponds to the reality of business activity. Where the seat located overseas is deemed a fiction because in reality the board of directors operates in France, this fact would give jurisdiction<sup>99</sup>. Also, French Insolvency Law goes beyond the real seat doctrine and states that French courts are competent to conduct insolvency proceedings, even in the absence of a seat in France and notwithstanding that the foreign seat may be real, where the company's centre of business interests is deemed to be located within the jurisdiction<sup>100</sup>.

The effects of the real seat doctrine are complex and differ between states that acknowledge its use, depending often on the precise context in which it is sought to apply the principle<sup>101</sup>.

The ECJ has never really expressed a preference for either doctrine under European Union Law<sup>102</sup>. In the *Daily Mail* judgment the ECJ stated that "In defining, in Article 58 [now 48], the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company"<sup>103</sup>. However, Omar has interpreted the *Centros* judgment<sup>104</sup> as "an implicit preference for the state of incorporation doctrine"<sup>105</sup>. Rammeloo is also of the opinion that neither of the theories has been imposed upon EC member states by Articles 43 and 48 [EC] and that European law as it now stands still permits EC member states to adhere to the real seat theory<sup>106</sup>.

## 5.2 Relating Concepts

The closest concept to compare to is, in my opinion, the concept for jurisdiction in Brussels I, since the regulations are located in the same context and with somewhat common motives – inter alia to avoid "forum shopping". Brussels II is not about companies and the Rome Convention is not about jurisdiction. I will therefore leave these legislative acts of private international law without comparison. The concept for jurisdiction in Brussels I concerning the main rule is domicile. To determine whether a party is domiciled in a Member State reference is made in Article 59 to internal law. This provision is identical to the

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<sup>98</sup> Omar, Paul J, "Jurisdiction in the European Insolvency Convention: A practical problem". *International company and commercial law review*, 1999, vol 10, no 7, 1999, p 225, quoting Decree No 85-1388 of December 27, 1985, Art 1.

<sup>99</sup> Omar, 2000, p 408, quoting *Cour d'Appel de Paris*, July 9, 1960, *Juris-Classeur Commercial* fasc 3130, para 31.

<sup>100</sup> Omar, 2000, p 408, quoting Art 1 of Decree No 85-1388 of December 27, 1985 and *Cassation civile*, July 21, 1987, D 1988, p 169.

<sup>101</sup> Omar, 2000, p 408.

<sup>102</sup> Omar, 2000, p 408.

<sup>103</sup> Case 81/87, *The Queen v H M Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC*, [1988] E C R 5483, paragraph 21.

<sup>104</sup> Case C-212/97, *Centros Ltd v Erhvervs- og Selskabsstyrelsen*, [1999] E C R I-1459.

<sup>105</sup> Omar, 2000, p 408.

<sup>106</sup> Rammeloo, p 317-318.

corresponding Article 52 of the Brussels Convention. When it comes to legal persons the rules concerning determination of domicile have changed. According to Article 60 of Brussels I a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, or central administration, or principal place of business. It is almost identical to the concept in Article 48 EC, "the right of establishment". Apparently there are three alternatives and domicile will be determined within this provision, since reference is not made to private international law. This is a change compared to the Brussels Convention, Article 53 where the seat of the legal person should be treated as its domicile and in order to determine that seat reference was made to private international law. Additionally, in Article 60 of Brussels I there is an explanation for the purposes of the United Kingdom and Ireland of "statutory seat". This means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.

Other concepts of interest can be found in European Company Law. In the Regulation on the Statute for a European Company one of the conditions for applicability is that the companies have registered offices and head offices within the Community. If a company with its registered office in a Member State has its head office outside the Community the Regulation can apply if the company has a real and continuous link with a Member State's economy<sup>107</sup>. I suppose this is the "real seat arrangement" that is mentioned in recital 27 of that Regulation. In the closely related area – European Tax Law – the key is "residence"<sup>108</sup>.

### 5.3 No Definition

In contrast to the 1980 Draft Convention the Regulation contains no definition of "the debtor's centre of main interests". It was suggested during the preparatory work to the Regulation to define the concept. The Committee on Citizen's Freedoms and Rights, Justice and Home Affairs thought that there should be an incorporated definition to achieve maximum legal clarity<sup>109</sup>. This was however not passed forward by the Parliament<sup>110</sup>. The preamble of the Regulation will under these circumstances, one would assume, be of great importance regarding interpretation of the concept. Recitals 13 of the preamble reads as follows:

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<sup>107</sup> Article 2 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the statute for a European Company, OJ 2001 L 294/1. It will come into force 3 years after adoption, which is on 8 Oct 2004.

<sup>108</sup> See for example Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ 1990 L 225/6.

<sup>109</sup> Report of the Committee's on Citizens' Freedoms and Rights, Justice and Home Affairs opinion on 28 January 2000, document A5-0039/2000, page 14, see <http://europa.eu.int/prelex/apcnet.cfm>.

<sup>110</sup> Parliament's opinion on 2 March 2000, OJ 2000 C 346/80.



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.

*French version:*

Le centre des intérêts principaux *devrait* correspondre au lieu où le débiteur gère habituellement ses intérêts et qui est *donc* vérifiable par les tiers.

*German version:*

Als Mittelpunkt der hauptsächlichen Interessen *sollte* der Ort gelten, An dem der Schuldner gewöhnlich der Verwaltung seiner Interessen nachgeht und *damit* für Dritte feststellbar ist.

*Swedish version:*

Begreppet platsen där de huvudsakliga intressena finns *bör* motsvara den plats där gäldenären vanligtvis förvaltar sina intressen och *därför* är fastställbar för tredje man.

However, this is a very broad explanation, leaving a choice whether to follow it, since the word "should" is used. The explanation is not a definition and is not exhaustive. You could consider it as an example of the concept. The intent seems to be that the debtor shall be active in the place, but – most important – visible for third parties at that place. Lauterfeld is of the opinion that "transparency and objective ascertainability" are to be given special emphasis in interpreting "COMI" [centre of main interests] as connecting factor<sup>111</sup>. Furthermore Lauterfeld thinks that it should not be permissible for a corporate debtor to take advantage of some secret conduct, or of a "rootless" arrangement for conducting the control and management of operations, such that outsiders cannot identify any *locus* at which these functions are discharged on a regular or "day-to-day" basis<sup>112</sup>.

The Commission had, during the preparatory work to the Regulation, another explanation of the concept, which is more like a definition. The preamble to the proposed Regulation reads as follows (recital 13):

The centre of main interests is taken as meaning a place with which a debtor regularly has very close contacts, in which his manifold commercial interest are concentrated and in which the bulk of his assets is for the most part situated. The creditor is also very familiar with that place.

Finally, the line of thought behind the concept is also developed in the Explanatory Report. Paragraph 75 reads as follows:

The concept of "centre of main interests" *must* be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is *therefore* ascertainable by third parties.

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<sup>111</sup> Lauterfeld, p 83, citing Fletcher, Ian I in "International Insolvency at the Crossroads. A Critical Approach of Current Trends", *hand out* at the Schmitthoff Symposium on Finance of International Trade – Law and Trade in the 21 st Century, Centre of Commercial Law Studies, Queen Mary and Westfield College, 1-3 June 2000, at page 4.

<sup>112</sup> Lauterfeld, p 83, quoting Fletcher, *supra* note 108, at page 4.

*Swedish version:*

Begreppet ”huvudsakliga intressen” *skall* tolkas som den plats där gäldenären vanligtvis förvaltar sina intressen *och* där detta går att uppfatta även av tredje man.

In my opinion there is a difference between the two versions of the Explanatory Report. In the Swedish version there seems to be a condition that the place shall be ascertainable by third parties, whereas this is held as an effect in the English version. There is a difference between ”must” and ”shall” – but maybe without significance in practice. It seems as if the differences can be explained by translation errors. Still, this explanation of the concept is much firmer – like the definition proposed by the Commission – compared to the one stated in the final preamble to the Regulation. In the Regulation the firmer position has been abandoned and the scope of interpretation has in my opinion become wider. It seems as if the concept in the Regulation has intentionally been left very open, perhaps in order for the ECJ to be rather free in interpreting it.

Furthermore it follows from the Explanatory Report (paragraph 75) that it is considered important that the place is known to the debtor’s potential creditors, in order for them to calculate the legal risks in the case of insolvency. By using the term ”interests”, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression ”main” serves as a criterion for the cases where these interests include activities of different types which are run from different centres. In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence. These explanations have not been taken up in the Regulation. They show the original intent of the authors and might be of interest from that aspect when interpreting the concept.

Because of the absence of a definition of “centre of main interests” there is a potential for conflict if two jurisdictions purport to open main proceedings independently in time [a positive jurisdictional conflict]<sup>113</sup>. There is also a possibility that no court will consider itself competent to open proceedings [negative jurisdictional conflict]. There is no provision in the Regulation dealing with such conflicts, which have been pointed out by some authors<sup>114</sup>. The problem about positive jurisdictional conflicts has now been taken care of by recital 22 of the Regulation, stating that “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”.

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<sup>113</sup> Omar, 1999, p 225.

<sup>114</sup> Fletcher, 1999, p 261 and Lueke, p 381. Omar, 1999, p 255 and Bogdan, p 163 about positive jurisdictional conflicts.

## 5.4 Interpretation by the ECJ

It is of course very difficult to know how the ECJ will interpret this new concept. The intent of the authors to the Regulation regarding interpretation can be found in the Explanatory Report (paragraph 43), which reads as follows:

“In the same way as in the 1968 Brussels Convention and the 1980 Rome Convention, two principles should be followed when interpreting its [the Convention’s] provisions: the principle of respect for the international character of the rule, and the principle of uniformity. The Convention is a self-contained legal structure, and its concepts cannot be placed in the same category as concepts belonging to national law. The Convention must retain the same meaning within different national systems. Its concepts may not therefore be interpreted simply as referring to the national law of one or other of the States concerned. When the substance of a problem is directly governed by the Convention, the international character of the Convention requires an autonomous interpretation of its concepts. An autonomous interpretation implies that the meaning of its concepts should be determined by reference to the objectives and system of the Convention, taking into account the specific function of those concepts within this system and the general principles which can be inferred from all the national laws of the Contracting States”.

Two examples of concepts which are meant to be found in national law are mentioned in the Explanatory Report (paragraph 43) – “insolvency” in Article 1 of the Regulation and “rights in rem” in Article 5 of the Regulation.

Regarding the Brussels Convention (now Brussels I) the ECJ has stated: “As far as possible, the Court of Justice gives the terms used in the Brussels Convention an autonomous interpretation, rather than by reference to national law, so as to ensure that the Convention is fully effective, having regard to the objectives of Article 220 of the EC Treaty (now Article 293 EC), in the implementation of which the Convention was adopted [...]”<sup>115</sup>.

The ECJ has however also pointed out that neither option of interpretation excludes the other, since the appropriate choice can be made only in relation to each of the provisions of the Brussels Convention (now Brussels I)<sup>116</sup>. As an example of reference to national law, “place of performance” in Article 5.1 of Brussels I has been determined by rules of conflict of laws<sup>117</sup> and when an “action is brought” within the meaning of Article 21 of the Brussels Convention (now Article 27 of Brussels I) according to national law<sup>118</sup>. The explanation of the choice of interpretation has been the lack of unification of substantive laws<sup>119</sup> and that there was no attempt to unify the particular rule<sup>120</sup>.

Lauterfeld means that “COMI” is formally an autonomous concept, but

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<sup>115</sup> Case C-440/97 *Groupe Concorde and Others v The Master of the Vessel Suhadiwarno Panjan*, [1999] E C R I-0000, paragraph 11.

<sup>116</sup> Case C-440/97, *supra* note 115, paragraph 12.

<sup>117</sup> Case 12/76 *Tessili v Dunlop*, [1976] E C R 1473, paragraph 13. The result of that judgment has been confirmed by case C-440/97, *supra* note 115.

<sup>118</sup> Case 129/83 *Zelger v Salinitri*, [1984] E C R 2397, paragraph 15-16.

<sup>119</sup> Case 12/76, *supra* note 117.

<sup>120</sup> Case 129/83, *supra* note 118.

that the scope for interpretation of it is limited. He suggests that only the criteria given by the Bundesgerichtshof match the requirements of “COMI” in all respects, since the “day-to-day business activity” is the basis for the creditor’s assessment of the company and not the management decision itself<sup>121</sup>.

Omar argues on his behalf, that it is not inconceivable that the ECJ will have regard to French usage in formulating the definition of “centre of main interests”, since the term is used in French law<sup>122</sup>.

Dahan means generally that the concepts of the Regulation must be understood uniformly and cannot simply be interpreted in accordance with existing domestic ones<sup>123</sup>.

Fletcher is of the opinion that a uniform interpretation should be promoted by the fact that the same expressions [“centre of main interests” and “establishment”] were about to be included in the UNCITRAL Model Law [and were later included, as will be seen in chapter 6 of this work], which is an international instrument sharing a common purpose<sup>124</sup>. He argues that the key concepts may be seen as forming part of the global movement to develop a standardised framework for processing cross-border insolvency issues and that it is desirable for a coherent synthesis to be attempted at the earliest possible date to avoid multiple sets of incompatible rules<sup>125</sup>.

In my opinion it is very likely that the ECJ will use this method to look at the objective and the location for the rule “in the general scheme” and will then find it necessary to apply a uniform interpretation in order to make the Regulation effective. If the concept was not given a uniform meaning, different interpretations could be made in different states, perhaps ending up with concurring fora. With such an order the objective to unify rules of jurisdiction and avoid forum shopping would not be fulfilled. A uniform interpretation is also supported by the fact that this has as far as possible been the aim of the ECJ before, regarding Brussels I. It is clear from the Explanatory Report and the preamble of the Regulation that the intent has been to unify jurisdiction rules in this field, where reference to national law would be in opposition to this intent. With that in mind, I find no good reason for the ECJ to refer to national law regarding this concept. But it is possible that the ECJ will be inspired by national law when determining how the autonomous concept will be interpreted. This view is supported by the fact that the Court of First Instance has held that reference to the law of the Member States may be done in order to interpret a provision that shall be given an independent and uniform interpretation, which might be necessary if the criteria for defining the meaning of the provision cannot be identified in Community law<sup>126</sup>.

The definition in German case law of the real seat theory and its

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<sup>121</sup> Lauterfeld, p 83.

<sup>122</sup> Omar, 1999, p 228.

<sup>123</sup> Dahan, p 224.

<sup>124</sup> Fletcher, 1997, p 49.

<sup>125</sup> Fletcher, 1997, p 54.

<sup>126</sup> See case T-85/91 Khouri v Commission, [1992] E C R II-2637, paragraph 32 and case T-9/92 Automobiles Peugeot SA and Peugeot SA v Commission, [1993] E C R II-493, paragraph 39.

resemblance with “centre of main interests” is difficult to deny, but there may be other definitions in other Member States also very close to the new concept. Anyway, with all the compromises made within the work of this Regulation it is difficult to believe that the ECJ would choose to refer to one theory in one Member State. In my opinion, the German definition will maybe influence the ECJ, but will not be totally decisive for the interpretation.

Since the preamble describes the concept and is more or less giving an example of it, I think it may be useful, but the ECJ will still have a very broad scope of interpretation. The ECJ has referred to the preamble in the beginning of interpretation of the Brussels Convention (now Brussels I)<sup>127</sup> and since this is a very natural thing to do I believe this will also be done concerning this concept, but it can not be decisive for interpretation either.

Maybe the Explanatory Report will be looked at in general, but since it differs slightly from the preamble regarding this concept I do not think reference will be made to it by the ECJ. The parts describing “main” and “interests” are not mentioned in the preamble and they are therefore more likely to be used in interpretation. The ECJ is however not bound by *travaux préparatoires* (preparatory work) and since enough guidance probably can be found in national law I find it unlikely that the Explanatory Report will play a major role in interpretation of this concept.

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<sup>127</sup> Case 14/76, *de Bloos v Bouyer*, [1976] E C R 1497 and case 33/78, *Somafer v Saar-Ferngas*, [1978] E C R 2183.

## 6 Establishment

The conditions in Article 3.2 of the Regulation for territorial jurisdiction read as follows:

Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

There is a definition of "establishment" in Article 2.h of the Regulation:

"establishment" shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

*French version:*

"établissement": tout lieu d'opérations où le débiteur exerce de façon non transitoire une activité économique avec des moyens humains et des biens.

*German version:*

"Niederlassung" jeden Tätigkeitsort, an dem der Schuldner einer wirtschaftlichen Aktivität von nicht vorübergehender Art nachgeht, die den Einsatz von Personal und Vermögenswerten voraussetzt.

*Swedish version:*

driftställe: varje verksamhetsplats där gäldenären annat än tillfälligt idkar ekonomisk verksamhet med personella och materiella resurser.

In the Istanbul Convention "establishment" is used as an alternative condition for jurisdiction, but is not defined (Article 4.2). In the UNCITRAL Model Law (Article 2.f) the same definition as in the Regulation is used, with the complement of "or services" directly after "goods".

The 1980 Draft Convention contained no definition, only the following pronouncement: "An establishment exists in a place where an activity of the debtor comprising a series of transactions is carried on by him or on his behalf"<sup>128</sup>.

Article 3.2 of the Regulation was one of the most debated provisions throughout the negotiations of the Convention. Several Member States wished to have the possibility of basing territorial proceedings not only on the presence of an establishment, but also on the mere presence of assets of the debtor (assigned to an economic activity) without the debtor having an establishment<sup>129</sup>. Finally they agreed to change their views provided that "establishment" would be interpreted in a broad manner. That is why the definition is made very open<sup>130</sup>. The definition

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<sup>128</sup> Fletcher calls it "an inadequate pronouncement", Fletcher, 1999, p 253.

<sup>129</sup> The Explanatory Report, para 70.

<sup>130</sup> The Explanatory Report, para 70.

was made to avoid the narrow interpretation of “establishment” as has been settled by the ECJ regarding Article 5 of Brussels I<sup>131</sup>.

Accordingly, the mere presence of assets does not enable local creditors to open territorial proceedings. The presence of an establishment of the debtor within the jurisdiction is necessary. “Place of operations”, according to the Explanatory Report (paragraph 71), means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional. The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an “establishment”. A certain stability is required. The negative formula (“non-transitory”) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor. The rationale behind the rule is that foreign economic operators conducting their economic activities through a local establishment should be subject to the same rules as national economic operators, as long as they are both operating in the same market. In this way, potential creditors concluding a contract with a local establishment will not have to worry about whether the company is a national or foreign one. Their information costs and legal risks in the event of insolvency of the debtor will be the same whether they conclude a contract with a national undertaking or a foreign undertaking with a local presence on that market. Naturally, the possibility of opening local territorial insolvency proceedings makes sense only if the debtor possesses sufficient assets within the jurisdiction. Whether or not these assets are linked to the economic activities of the establishment is of no relevance<sup>132</sup>.

The concept of establishment within the meaning of the right of establishment, Articles 43 and 48 EC, has by the ECJ been considered as fulfilled regarding an insurance undertaking, maintaining a permanent presence in another Member State consisting merely of an office managed by the undertaking’s own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case of an agency<sup>133</sup>. That definition is made in relation to the concept of freedom of services within the EC Treaty. The ECJ has described the concept of establishment within the meaning of the Treaty as “a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin”<sup>134</sup>.

Regarding “establishment” within Article 5.5 of Brussels I the ECJ has held that the exceptions to the general rule of jurisdiction in Article 2 of Brussels I must not be given a wide interpretation<sup>135</sup>. The concept has been defined as “a place of

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<sup>131</sup> The Explanatory Report, para 70.

<sup>132</sup> The Explanatory Report, para 71.

<sup>133</sup> Case 205/84 Commission v Germany, [1986] E C R 3755, paragraph 21.

<sup>134</sup> Case C-55/94 Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratori di Milano, [1995] E C R I-4195, paragraph 25.

<sup>135</sup> Case 33/78 Somafer v Saar-Ferngas, [1978] E C R 2183, paragraph 7.

business which has the appearance of permanency, such as the extension of a parent body, has a management and is materially equipped to negotiate business with third parties so that the latter, although knowing that there will if necessary be a legal link with the parent body, the head office of which is abroad, do not have to deal directly with such parent body but may transact business at the place of business constituting the extension<sup>136</sup>.

All the concepts have some kind of permanency in common (stable and continuous basis, permanent presence, non-transitory and appearance of permanency). Within the Treaty concept it would be enough with one person authorized to act permanently for the parent body in an office, which is not enough within the Brussels I concept. Within that concept there are conditions of organization and a visible link to the parent body. The Regulation concept is to my opinion closer to the Brussels I concept than to the Treaty concept, regarding the intent of the authors. But the definition in the Regulation is very wide and opens up for a broader interpretation. The Regulation concept is used within an exception to a main rule, just like the Brussels I concept. It is therefore possible that the ECJ will interpret it rather similarly to the Brussels I concept, despite the intent of the authors.

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<sup>136</sup> Case 33/78, *supra* note 135, paragraph 12.



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