

## RESEARCH ARTICLE



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# Preventive restructuring frameworks: Jurisdiction, recognition and applicable law

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## Abstract

The Preventive Restructuring Directive (PRD) has triggered a new era of regulatory competition. Member States are introducing new laws aimed at making themselves the new destination of choice for corporate restructuring. However, the PRD has failed to provide a clear answer to some key issues: international jurisdiction, recognition and applicable law. This article analyses these questions in detail and proposes answers.

## 1 | INTRODUCTION

Against the background of the global economic crisis caused by the COVID-19-pandemic, efficient corporate restructuring tools are more important than ever. Thus, the fact that the EU has already started to introduce harmonised preventive restructuring frameworks by way of the Preventive Restructuring Directive (PRD)<sup>1</sup> in 2019 is even more pertinent. As a general rule, the implementation deadline was July 17, 2021; but Member States encountering particular difficulties may benefit from an extension until July 17, 2022 (cf. Article 34 of the PRD).

Given that the PRD gives Member States a wide leeway, it has created a new European regulatory competition of restructuring laws. The first competitors have already thrown down the gauntlet:

- In the Netherlands, the WHOA law<sup>2</sup> has created a new “Dutch scheme”, which can be used since January 1, 2021.
- Germany has introduced a new “Unternehmensstabilisierungs- und -restrukturierungsgesetz“ (StaRUG),<sup>3</sup> which also entered into force on January 1, 2021.
- Greece has also already implemented the PRD in the context of a general reform of its insolvency law, which already entered into force on January 1, 2021 as well.<sup>4</sup>

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- Austria has adopted a new Restrukturierungsordnung (ReO),<sup>5</sup> which entered into force on July 17, 2021.
- In France, the PRD was implemented by Ordonnance n° 2021-11936, which amended book VI of the Code de Commerce; the new provisions are applicable to proceedings opened as of October 1, 2021.

Who the winner of this competition will be will not only depend on the best “legal design” and the most effective courts and insolvency practitioners but also on the crucial question of international jurisdiction for preventive restructuring frameworks. Unfortunately, the PRD fails to provide any clear “rules of the game” on this.

Theoretically, three solutions for international jurisdiction are conceivable:

- i. the European Insolvency Regulation (EIR 2015)<sup>7</sup> applies; or
- ii. the Brussels Ibis Regulation<sup>8</sup> applies, or
- iii. the rules of private international law of the Member States apply.

A closely connected – and equally important – question is: The law of which Member State applies? Unfortunately, the PRD also leaves this question unanswered. If the EIR 2015 applied, the answer would be clear: pursuant to Article 7 of the EIR 2015, the *lex fori concursus* would govern. Otherwise, the answer is not as straightforward.

In the following, the article first analyses if and under which circumstances the EIR 2015 applies (Part 2). Subsequently, it examines which rules will apply to preventive restructuring frameworks not covered by the EIR 2015 (Parts 3–5). In the end, the main findings are summed up (Part 6).

## 2 | PREVENTIVE RESTRUCTURING FRAMEWORKS AS INSOLVENCY PROCEEDINGS WITHIN THE MEANING OF THE EIR 2015

### 2.1 | Prerequisites

The EU legislator has deliberately abstained from including all preventive restructuring frameworks automatically into the scope of the EIR 2015. Instead, to be covered by the EIR 2015, preventive restructuring frameworks must meet the requirements set out in Article 1 of the EIR 2015. This is made clear by recital 13 and confirmed by Article 6(8) subparagraph 2 of the PRD; moreover, a 2018 non-paper by the Commission also clearly proceeds on the basis of this assumption.<sup>9</sup>

#### 2.1.1 | Collective proceedings

Firstly, the EIR 2015 applies only to collective proceedings (cf. Article 1(1) subparagraph 1 of the EIR 2015). According to the legal definition in Article 2(1) of the EIR 2015, collective proceedings are not only proceedings that include all of a debtor’s creditors, but also partially collective proceedings provided that they include a significant part of the debtor’s creditors and do not affect the claims of creditors, which are not involved in them. Pursuant

to recital 14 sentence 2, proceedings that involve only the financial creditors of a debtor should also be covered.

Preventive restructuring frameworks do not necessarily have to cover all creditors. Member States may, for example, completely exclude claims of existing or former workers (cf. Articles 1 (5)(a) and 2(2) of the PRD). Moreover, the restructuring plan does not need to include all creditors, which could generally be included pursuant to the law of the relevant Member State (cf. Articles 2(2), 8(1)(e) and 15(2) of the PRD). However, creditors who are not involved must not be affected by the restructuring plan (Article 15(2) of the PRD). Hence, preventive restructuring frameworks fulfil all the criteria of “collective proceedings” within the meaning of the EIR 2015.<sup>10</sup>

### 2.1.2 | Based on laws relating to insolvency

Secondly, the collective proceedings must be based on laws relating to insolvency (cf. Article 1 (1) subparagraph 1 of the EIR 2015). However, pursuant to Article 1(1) subparagraph 2, the EIR 2015 also covers proceedings that may be commenced in situations where there is only a likelihood of insolvency. Hence, preventive restructuring frameworks – which are possible when there is a likelihood of insolvency (cf. Article 4(1) of the PRD) – can, in principle, be insolvency proceedings within the meaning of the EIR 2015.<sup>11</sup>

### 2.1.3 | Purpose

Thirdly, where proceedings – like preventive restructuring proceedings – may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or cessation of the debtor's business activities (Article 1(1) subparagraph 2 of the EIR 2015). Pursuant to Article 4(1) of the PRD, the very purpose of preventive restructuring proceedings is to prevent insolvency and ensure the viability of the debtor.

### 2.1.4 | At least partial divestment, control or moratorium

Fourthly, one of the three alternative criteria set out in Article 1(1) subparagraph 1 lit. a-c of the EIR 2015 must be fulfilled. According to Article 5 of the PRD, preventive restructuring frameworks are debtor-in-possession proceedings; the appointment of a practitioner in the field of restructuring is only mandatory under certain circumstances (cf. Article 5(3) of the PRD). Therefore, the criterion of Article 1(1) subparagraph 1 lit. a of the EIR 2015 may be met, but it will not necessarily be met in all cases.<sup>12</sup>

However, the criterion set out in Article 1(1) subparagraph 1 lit. b of the EIR 2015 is met in any event. Pursuant to Article 15(1) of the PRD, restructuring plans will only be binding upon all affected parties when confirmed by a judicial or administrative authority. National law must provide for an appeal against a decision to confirm or reject a restructuring plan that can be brought before a higher judicial authority (Article 16(1) of the PRD). This is sufficient for Article 1(1) subparagraph 1 lit. b of the EIR 2015, because according to recital 10 sentence 5 of the EIR 2015, the term “control” should include situations where the court only intervenes on appeal by a creditor or other interested parties.<sup>13</sup> Moreover, the criterion set out in Article 1

(1) subparagraph 1 lit. c of the EIR 2015 is also met because, pursuant to Article 6 of the PRD, the debtor can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan.<sup>14</sup>

### 2.1.5 | No exception pursuant to Article 1(2) of the EIR 2015

Article 1(2) of the EIR 2015 sets out exceptions for four categories of debtors (insurance undertakings, credit institutions, investment firms and collective investment undertakings). However, these types of creditors are also excluded from the scope of the PRD anyway (cf. Article 1(2) lit. a-c of the PRD).

### 2.1.6 | Public proceedings

Fifthly, the EIR 2015 applies only to public proceedings, that is, proceedings that are subject to publicity (cf. recital 12 of the EIR 2015). Whereas the recitals to the EIR 2015 explicitly acknowledge that confidential proceedings may play an important role, they at the same time emphasize that their very nature makes it impossible for a creditor or a court in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the European Union (cf. recital 13 of the EIR 2015).

As confidentiality may be of particular importance in case of preventive restructuring proceedings as it can be crucial for exploring and preparing the support of key creditors,<sup>15</sup> the PRD deliberately refrained from requiring publicity of preventive restructuring frameworks, instead leaving this question to the Member States. Therefore, preventive restructuring proceedings can only constitute insolvency proceedings within the meaning of the EIR 2015 if and to the extent the respective Member State requires publicity.<sup>16</sup>

In Germany, §§ 84–88 of the StaRUG<sup>17</sup> (which will only enter into force on July 17, 2022) provide for the possibility of public restructuring proceedings (*öffentliche Restrukturierungssachen*). However, pursuant to § 84(1) sentence 1 of the StaRUG, the proceedings are only made public if the debtor requests it; the request must be filed before the first decision of the court and can only be withdrawn until the first decision of the court in the restructuring proceedings. Hence, the debtor can choose whether he prefers public or confidential restructuring proceedings.<sup>18</sup> Likewise, the “Dutch scheme” gives the debtor a choice between filing for public proceedings (*openbare akkoordprocedure buiten faillissement*) or closed proceedings (*besloten akkoordprocedure buiten faillissement*), cf. Article 369(6) of the FW.<sup>19,20</sup>

The Austrian ReO<sup>21</sup> also provides for a choice of the debtor: Pursuant to § 44 of the ReO, commencement of restructuring proceedings is only made public upon request of the debtor; in this case, the ReO explicitly names the proceedings *Europäisches Restrukturierungsverfahren* (European restructuring proceedings).

By contrast, the French Ordonnance n° 2021-1193<sup>22</sup> takes a rather different approach: It merges the *sauvegarde accélérée* and the *sauvegarde financière accélérée* into a single procedure (new *sauvegarde accélérée*) and adapts the existing provisions (in particular by introducing a new section on classes of creditors). As the *sauvegarde* procedure is a public procedure,<sup>23</sup> the new *sauvegarde accélérée* is also a public procedure. However, the mandatory requirement of a prior confidential *conciliation* procedure has been retained.<sup>24</sup>

### 2.1.7 | Listed in Annex A

At any rate, insolvency proceedings within the meaning of the EIR 2015 are only proceedings listed in Annex A. After the CJEU had ruled to that effect<sup>25</sup> with respect to the EIR 2000,<sup>26</sup> this was made explicitly clear in the EIR 2015 in Article 1(1) subparagraph 3, Article 2(4) and recital 9 sentences 2–3 of the EIR 2015. The list in Annex A is exhaustive and constitutive.<sup>27</sup>

The Netherlands has already notified *openbare akkoordprocedure buiten faillissement*, Germany has notified *öffentliche Restrukturierungssachen* and Austria has notified *Europäische Restrukturierungsverfahren* for inclusion into Annex A. All of them have meanwhile been included in the Commission's proposal to update the EIR 2015<sup>28</sup>, on which agreement has already been reached in the trilogue<sup>29</sup>. The French *sauvegarde accélérée* is already included in Annex A of the EIR 2015.

### 2.1.8 | Interim conclusion

Preventive restructuring frameworks that are subject to publicity can constitute insolvency proceedings within the meaning of the EIR 2015 – but only if they are included into Annex A of the EIR 2015.<sup>30</sup> Once the German *öffentliche Restrukturierungsverfahren*, the Dutch *openbare akkoordprocedure buiten faillissement*, and the Austrian *Europäische Restrukturierungsverfahren* have been included into Annex A, they will be insolvency proceedings within the meaning of the EIR 2015. The French *sauvegarde accélérée* already is.

## 2.2 | Legal consequences

### 2.2.1 | International jurisdiction

International jurisdiction for preventive restructuring frameworks (PRFs), which are insolvency proceedings within the meaning of the EIR 2015, is governed by Article 3 of the EIR 2015. Hence, the courts of the Member State within the territory of which the debtor's centre of main interests (COMI) is situated have international jurisdiction to open main insolvency proceedings (“main PRF”).<sup>31</sup> If the debtor has an establishment in another Member State, the courts of that Member State have international jurisdiction to open a secondary PRF or territorial PRF (as the case may be and provided the respective requirements are met).<sup>32</sup>

### 2.2.2 | Recognition and enforcement

The decision to open preventive restructuring proceedings, which are insolvency proceedings within the meaning of the EIR 2015, is recognised *ipso iure* in all Member States from the moment it becomes effective in the State of the opening of proceedings (Articles 19(1) and 20(1) of the EIR 2015, the so-called rule of priority).<sup>33</sup> Recognition may only be refused in exceptional cases if such recognition would be manifestly contrary to that Member State's public policy (Article 33 of the EIR 2015).<sup>34</sup> Article 32(1) of the EIR 2015 provides that the following decisions are also automatically recognised in all other Member States: (i) judgments concerning the course and closure of insolvency proceedings as well as compositions approved by

the court; (ii) judgments deriving directly from the insolvency proceedings and which are closely linked with them (so-called annex judgments); (iii) judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it. Enforcement of such decisions is governed by Articles 39–44 and 47–57 of the Brussels Ibis Regulation.

### 2.2.3 | Applicable law

Pursuant to Article 7(1) of the EIR 2015, in principle, the applicable law is the law of the Member State within the territory of which the proceedings are opened (*lex fori concursus*). However, this general rule is subject to the various special rules set out in Articles 8 ff. of the EIR 2015.

### 2.2.4 | Group restructurings and insolvencies

If the undertaking subject to preventive restructuring proceedings is a member of a group of companies as defined in Article 2(13) of the EIR 2015, the special rules on groups set out in Chapter V of the EIR 2015 will apply. Hence, the rules on cooperation and communication laid down in Articles 56–60 of the EIR 2015 will apply.<sup>35</sup> Moreover, there is the possibility of group coordination proceedings (Articles 61–77 of the EIR 2015). In this context, it is irrelevant whether the insolvency proceedings against the other group members are also preventive restructuring proceedings or “regular” insolvency proceedings.

## 3 | NON-EIR PRFS: QUALIFICATION AND APPLICABLE LAW

The big question is: What about preventive restructuring frameworks that are not covered by the EIR 2015?

### 3.1 | Contractual approach?

It has been proposed to qualify preventive restructuring frameworks and other pre-insolvency proceedings as contracts, which require judicial assistance to bind dissenting parties.<sup>36</sup> A similar approach has also been advocated with regard to English schemes of arrangement.<sup>37</sup> The consequence of such a contractual approach would be that the courts of the EU Member States would determine the applicable law on the basis of the Rome I Regulation.<sup>38</sup> Hence, the parties – that is, the undertaking to be restructured and its members and creditors – would be able to conclude a choice of law agreement (cf. Article 3 of Rome I).

In the absence of a valid choice of law, the governing law would be determined on the basis of Article 4 of Rome I.<sup>39</sup> “Restructuring agreements” do not fall within the scope of any of the categories listed in Article 4(1) of Rome I. Moreover, it cannot be determined unequivocally which party effects the characteristic performance: on the one hand, one could argue that the undertaking to be restructured effects the characteristic performance, because it is the one

being restructured; on the other hand, one could just as well argue that the creditors and shareholders whose claims or shareholdings are affected effect the characteristic performance. Hence, one must fall back on Article 4(4) of Rome I, according to which the governing law is the law of the country with which the contract is most closely connected. In case of a “restructuring contract”, the undertaking to be restructured is virtually at the “heart of the matter”; hence, one could argue that the closest connection lies with the country where that undertaking has its registered office (albeit there would presumably also be arguments to consider the head office or the COMI to be decisive).

At any rate, there are strong arguments against the contractual approach and the application of Rome I. Pursuant to settled case law of the CJEU, “matters relating to a contract” covers only situations in which an obligation is freely assumed by one party towards another.<sup>40</sup> Pursuant to Article 15(1) of the PRD, restructuring plans that are confirmed by a judicial or administrative authority are binding upon all affected parties – that is, even upon the creditors and shareholders that were outvoted. For them, there is by no means a “voluntary commitment”; rather, the restructuring plan will only be made binding upon them by way of a judicial or administrative decision. A qualification as a contract must therefore be rejected.<sup>41</sup> Moreover, Article 1(2)(f) of Rome I lays down an exception for questions governed by the law of companies. As will be expounded below, there are very strong arguments for qualifying preventive restructuring proceedings as matters of company law; hence, the application of the Rome I Regulation must be ruled out for this reason as well.

### 3.2 | Autonomous “private international restructuring law”?

Another potential approach would be a recourse to autonomous private international restructuring law. However, most legal systems do not contain any special rules in this respect. Hence, it has been suggested in German literature to apply the rules of autonomous private international insolvency law by way of analogy.<sup>42</sup> From a German perspective (and probably also from the perspective of many other legal systems), this would effectively mean that preventive restructuring proceedings would, in principle, be governed by the *lex fori concursus*.

This approach has two undisputable advantages: the synchronization of *forum* and *ius* and the synchronisation with the EIR 2015 (pursuant to Article 7(1) of the EIR 2015, generally the *lex fori concursus* applies). However, this approach would mean that each Member State could ultimately determine itself when its restructuring law should apply. Conflicts would be inevitable. This can hardly have been the intention of the European legislator. In addition, this approach overlooks the fact that restructuring proceedings that do not fall within the scope of the EIR 2015 are not insolvency proceedings. As already mentioned and to be explained in more detail below, there are very strong arguments for qualifying preventive restructuring proceedings as matters of company law.

### 3.3 | Qualification as a company law matter

According to Article 4(1) of the PRD, preventive restructuring frameworks are available “where there is a likelihood of insolvency” – but the company is precisely not (yet) insolvent. At first glance, the legal regime for preventive restructuring frameworks is characterised by elements that are also well-known in the insolvency context, especially the possibility of a moratorium (Articles 6 and 7 of



the PRD), class formation (cf. Article 8(1)(d) and recitals 44–46 of the PRD) and appointment of a practitioner in the field of restructuring in certain cases (cf. Articles 5(2) and 5(3) of the PRD).

By contrast, the restructuring plan itself is already a “hybrid” instrument – after all, a plan as the basis for company transformations is also a well-established instrument in company law.<sup>43</sup> A (merger) plan as the basis for national mergers was first required EU-wide by the Third Company Law Directive of 1978.<sup>44</sup> Today, the plan is firmly enshrined as the basis not only for national mergers and divisions, but also for cross-border mergers, divisions and conversions in the Company Law Directive (CLD)<sup>45</sup> (cf. Articles 86d, 91, 122, 137 and 160d of the CLD).

In addition, preventive restructuring frameworks have been deliberately designed to be able to make use of “classic” company law instruments in order to restructure the undertaking, for example, capital increases, capital reductions and changes of the capital structure (including debt-equity-swaps), sales of part of the business or of the business as a whole or company transformations (cf. recital 2 sentences 1 and 3 of the PRD). Consequently, the European legislator has inserted a new Article 84(4) into the CLD. It provides that Member States shall derogate from certain provisions of the CLD to the extent and for the period that such derogations are necessary for the establishment of preventive restructuring frameworks. This ensures that the effectiveness of the process of adoption and implementation of a restructuring plan is not jeopardised by the general company law rules.<sup>46</sup> Thus, the preventive restructuring framework is effectively superseding general company law rules: changes of the articles of association, capital increases and reductions, mergers, divisions, conversions, etc. can be adopted directly as elements of the restructuring plan.<sup>47</sup> Though equity holders on principle<sup>48</sup> vote on the restructuring plan, their vote can be overruled by way of a cross-class cram-down (cf. Articles 9 and 11 of the PRD).

In addition, preventive restructuring frameworks are very similar to company transformation measures: They also provide a structured legal framework with participation of the relevant stakeholders by way of which the company is set on a new basis and which has *erga-omnes*-effect for and against all affected parties.<sup>49</sup> Hence, there is a particularly close nexus with the company that is being restructured.<sup>50</sup> The company is effectively the bond that connects all parties affected by the preventive restructuring framework.<sup>51</sup>

Ultimately, preventive restructuring frameworks lie right at the cross-roads of company and insolvency law.<sup>52</sup> Some are caught by the very wide net which the EIR 2015 has cast by including (subject to certain conditions) also pre-insolvency proceedings. There are thus very good reasons to qualify all other preventive restructuring frameworks as matters of company law.<sup>53</sup>

On the premise that preventive restructuring frameworks that do not constitute insolvency proceedings within the meaning of the EIR 2015 are qualified as company law matters, they are – in line with the EU incorporation theory<sup>54</sup> – governed by the law of the Member State of the company’s registered offices as *lex societatis*.<sup>55</sup> At any rate, an unequivocal decision of the CJEU to that effect or a clarification by the European legislator would be highly desirable.

## 4 | NON-EIR PRFS: INTERNATIONAL JURISDICTION

### 4.1 | Annex proceedings within the meaning of Article 6(1) of the EIR 2015?

One might consider qualifying preventive restructuring frameworks that are not insolvency proceedings within the meaning of the EIR 2015 as annex proceedings within the meaning of



Article 6(1) of the EIR 2015. Preventive restructuring proceedings that are not insolvency proceedings within the meaning of the EIR 2015 may transition into insolvency proceedings within the meaning of the EIR 2015, for example, because the restructuring is not successful. Hence, one cannot deny that there is a close link. Nevertheless, they cannot be qualified as annex proceedings. Annex proceedings are actions that derive directly from insolvency proceedings within the meaning of the EIR 2015 (cf. Article 6(1) of the EIR 2015) – not proceedings that may (potentially) transition into insolvency proceedings within the meaning of the EIR 2015.<sup>56</sup>

## 4.2 | Applicability of the Brussels Ibis Regulation?

Pursuant to Article 1(1) sentence 1, the Brussels Ibis Regulation applies in civil and commercial matters, subject to the exceptions set out in Article 1(1) sentence 2, (2). The term “civil and commercial matters” must be interpreted autonomously.<sup>57</sup> At any rate, preventive restructuring frameworks are evidently neither revenue, customs, administrative matters nor *acta iure imperii* within the meaning of Article 1(1) sentence 2 of the Brussels Ibis Regulation. However, Article 1(2)(b) of the Brussels Ibis Regulation explicitly excludes:

“bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”

Some authors are of the opinion that this exception also covers preventive restructuring frameworks that are not insolvency proceedings within the meaning of the EIR 2015.<sup>58</sup> They point to recital 7 sentence 4 of the EIR 2015, which explicitly states that the mere fact that a national procedure is not listed in Annex A should not imply that it is covered by the Brussels Ibis Regulation.<sup>59</sup> Where a Member State decided deliberately against including certain types of proceedings into the EIR 2015, there was much to suggest that it could not rely on recognition of such proceedings on the basis of the Brussels Ibis Regulation.<sup>60</sup> Hence, international jurisdiction and recognition of proceedings were governed by autonomous private international law rules.<sup>61</sup> This position was also taken in a Non-Paper of the Commission of 2018.<sup>62</sup> The Dutch legislator even expressly provided in Article 369(7) lit. b of the FW that international jurisdiction for closed proceedings (*besloten akkoordprocedure buiten faillissement*) is governed by Dutch private international law relating to civil procedure (namely Article 3 of the Rv).<sup>63,64</sup>

Ultimately, however, this point of view is not convincing. After all, Article 1(2) no. 2 of the Brussels Convention<sup>65</sup> – the predecessor of today’s Article 1(2) lit. b of the Brussels Ibis Regulation – was deliberately designed with regard to the creation of an insolvency convention,<sup>66</sup> which then – via the detour of a draft for a Convention on Insolvency Proceedings<sup>67</sup> – became the EIR 2000. The *Schlosser* Report on the Brussels Convention emphasised that the two conventions were “intended to dovetail almost completely with each other”.<sup>68</sup> Similarly, the *Virgós/Schmit* Report also specifically stressed that actions excluded from the scope of the Brussels Convention should now be subject to the Convention on Insolvency Proceedings (which later became the EIR 2000) “to avoid unjustifiable loopholes between the two Conventions”.<sup>69</sup> Hence, the goal was the creation of a jurisdiction system without any gaps.

Against this background, the CJEU consistently emphasises that the Brussels I Regulation/Brussels Ibis Regulation and the EIR 2000/EIR 2015 must be interpreted in such a way as to avoid any overlap between the rules of law laid down by those instruments and any legal

vacuum.<sup>70</sup> Accordingly, actions excluded under Article 1(2) lit. b of the Brussels I Regulation/Brussels Ibis Regulation fall within the scope of the EIR 2000/EIR 2015.<sup>71</sup> Conversely, actions that fall outside the scope of the EIR 2000/EIR 2015 fall within the scope of the Brussels I Regulation/Brussels Ibis Regulation.<sup>72</sup>

In summary, the exception in Article 1(2) lit. b of the Brussels Ibis Regulation must be interpreted to the effect that it only encompasses insolvency proceedings covered by the EIR 2000/EIR 2015. Therefore, preventive restructuring frameworks that do not constitute insolvency proceedings within the meaning of the EIR 2015 fall within the scope of the Brussels Ibis Regulation.<sup>73</sup>

## 4.3 | Grounds of jurisdiction

### 4.3.1 | SoA model?

Some authors propose to apply the model developed for UK schemes of arrangements (SoAs) (SoA model) *mutatis mutandis* also to preventive restructuring frameworks.<sup>74</sup> SoAs pursuant to Part 26 of the Companies Act 2006<sup>75</sup> are compromises or arrangements between a company and its creditors (or any class of them), or its members (or any class of them) (cf. section 895 (1) of the CA 2006). In case of a SoA, there is neither a plaintiff nor a defendant in the proper sense. However, English courts qualified all affected creditors – the so-called scheme creditors – as defendants.<sup>76</sup> Consequently, they reasoned that the courts of all Member States where a scheme creditor has his domicile had general international jurisdiction (Articles 4 and 63 of the Brussels Ibis-Regulation). However, where a sufficient number of scheme creditors had their domicile in the United Kingdom, the courts applied Article 8(1) of the Brussels Ibis Regulation to confer international jurisdiction on the English court to sanction a scheme also affecting creditors domiciled elsewhere, arguing that the “claims” against all scheme creditors were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.<sup>77</sup>

Transferring this model to preventive restructuring frameworks would have the consequence that Articles 4 and 8(1) of the Brussels Ibis Regulation would confer special international jurisdiction on each Member State where a sufficient number of affected parties has its domicile within the meaning of Articles 4 and 63 of the Brussels Ibis Regulation. This would entail enormous potential for forum shopping.<sup>78</sup>

Example<sup>79</sup>: A company with a registered office and head office in Germany seeks a preventive restructuring framework. Its creditors are an Irish bank and large suppliers in Germany, Spain, Italy, France and the Netherlands. The company could *de facto* choose whether it wishes to conduct preventive restructuring proceedings in Ireland, Germany, Spain, Italy, France or the Netherlands.

In addition, there would be the possibility to conclude a jurisdiction agreement pursuant to Article 25 of the Brussels Ibis Regulation.<sup>80</sup> This would increase the possibilities for forum shopping even further.<sup>81</sup> Moreover, significant problems would arise where the preventive restructuring framework were to include claims relating to rights in rem in immovable property or tenancies of immovable property, because for such claims, the courts of the Member State in which the property is situated would have exclusive international jurisdiction pursuant to

Article 24(1) of the Brussels Ibis Regulation.<sup>82</sup> This would leave only two options: either that Member State also has international jurisdiction for all the other claims pursuant to Articles 4, 8 and 63 of the Brussels Ibis Regulation or it would be necessary to conduct several preventive restructuring frameworks.<sup>83</sup>

Similar problems would arise where employees were to be included as creditors.<sup>84</sup> Then, Article 22(1) of the Brussels Ibis Regulation would confer exclusive international jurisdiction on the courts of the Member State in which the respective employee is domiciled.<sup>85</sup> In addition, the “SoA model” would not allow the inclusion of parties domiciled in third states: Articles 4 (1) and 8(1) of the Brussels Ibis Regulation confer international jurisdiction only with respect to persons domiciled in a Member State.<sup>86</sup>

At any rate, the “SoA model” is fundamentally incompatible with the very nature of preventive restructuring frameworks: Ultimately, it entails artificially fragmenting preventive restructuring frameworks (which are designed as [partially] collective proceedings) into individual actions against the affected creditors – only to then piece them together again afterwards into one single proceeding in order to attain international jurisdiction of the courts of the “desired” Member State.<sup>87</sup>

#### 4.3.2 | Exclusive jurisdiction pursuant to Article 24(2) of the Brussels Ibis Regulation?

All these problems would not arise if there was an exclusive international jurisdiction for preventive restructuring frameworks. A basis for this could be Article 24(2) of the Brussels Ibis Regulation. As regards English SoAs, the application of Article 24(2) of the Brussels Ibis Regulation was predominantly rejected.<sup>88</sup> However, this was before the CJEU judgment in *E.ON/Czech Holding* (see on the relevance of this seminal judgment in more detail below). Besides, the rejection of Article 24(2) of the Brussels Ibis Regulation may also have been largely driven by practical considerations: The English courts had no interest whatsoever to even consider applying Article 24(2) of the Brussels Ibis Regulation, because the result would have been that they would not have had international jurisdiction for SoAs for non-UK-companies.<sup>89</sup>

##### *General scope of Article 24(2) of the Brussels Ibis Regulation*

Article 24(2) sentence 1 of the Brussels Ibis Regulation provides that in proceedings that have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat, shall have exclusive jurisdiction, regardless of the domicile of the parties. According to sentence 2, the court shall apply its rules of private international law in order to determine the seat. However, as a consequence of the jurisprudence of the CJEU (*Centros*,<sup>90</sup> *Überseering*,<sup>91</sup> *Inspire Art*<sup>92</sup>), the incorporation theory must be applied *vis-à-vis* EU and EEA Member States (“home country principle” or “EU incorporation theory”).<sup>93</sup> Therefore, exclusive international jurisdiction lies with the Member State where the company has its registered office.<sup>94</sup>

According to the settled case law of the CJEU, the provisions of the Brussels Ibis Regulation must be interpreted independently, by reference to its scheme and purpose.<sup>95</sup> The rules on special and exclusive jurisdiction must be interpreted strictly.<sup>96</sup> The rules of exclusive jurisdiction laid down in Article 24 of the Brussels Ibis Regulation seek to confer exclusive jurisdiction on

the courts of a Member State in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them by reason of a particularly close link between those disputes and that Member State.<sup>97</sup>

The essential objective pursued by Article 24(2) of the Brussels Ibis Regulation is that of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of the company or as regards the validity of the decisions of its organs.<sup>98</sup> In the interest of the sound administration of justice, exclusive jurisdiction has been conferred on the courts of the Member States in which the company has its seat because they seem to be those best placed to deal with such disputes.<sup>99</sup> The exclusive jurisdiction of the courts of the Member State in which the company has its seat also synchronises *forum* and *ius*, that is, jurisdiction and applicable law.<sup>100</sup>

#### *Extension to valuation proceedings in E.ON Czech Holding*

In its judgment in *E.ON/Czech Holding*, the CJEU has applied Article 22(2) of the Brussels I Regulation ( $\hat{=}$  Article 24(2) of the Brussels Ibis Regulation) to proceedings for the review of the reasonableness of the consideration that the principal shareholder of a company is required to pay to the minority shareholders of that company in the event of the compulsory transfer of their shares to that principal shareholder (squeeze-out). Consequently, Article 24(2) of the Brussels Ibis Regulation must apply also to all other types of proceedings regarding the review of the reasonableness of a cash compensation or a share exchange ratio (especially in cases of mergers, divisions and conversions).<sup>101</sup>

Four aspects were of decisive relevance for the CJEU regarding the application of Article 22(2) of the Brussels I Regulation ( $\hat{=}$  Article 24(2) of the Brussels Ibis Regulation) to such valuation proceedings:

- i. The proceedings concerned the partial validity (regarding the amount of compensation) of a decision of an organ of a company;
- ii. The existence of a close link between the courts of the Member State and the dispute, because it was a Czech company and Czech law was applicable;
- iii. Predictability of the rules of jurisdiction and legal certainty;
- iv. The application of the general rule of jurisdiction of the courts of the Member State in which the defendant is domiciled in Article 2(1) of the Brussels I Regulation ( $\hat{=}$  Article 4(1) of the Brussels Ibis Regulation) would not have ensured that the objectives of the Regulation are achieved.

In line with these considerations, by way of the Mobility Directive 2019,<sup>102</sup> the EU legislator conferred exclusive international jurisdiction for valuation proceedings in the context of cross-border mergers, divisions and conversions on the courts of the Member State whose law governs the respective merging, dividing or converting company (Articles 86i(5), 126a(5), (6) subparagraph 1 sentence 2, 160i(5), (6) subparagraph 1 sentence 2 of the CLD).

#### *Applying the rationale of E.ON/Czech Holding to preventive restructuring frameworks*

Preventive restructuring frameworks do not – at least directly – have as their object the validity of the constitution, the nullity or dissolution of companies or other legal persons, or the validity of the decisions of their organs. However, the same or at least similar aspects as those on which the CJEU relied on in *E.ON/Czech Holding* and those that underly the jurisdiction rules in the

CLD argue in favour of applying Article 24(2) of the Brussels Ibis Regulation also to preventive restructuring frameworks.

*Relation to company law and manifest close connection with the courts of the Member State of the company's registered office:* As outlined above,<sup>103</sup> there are good reasons to qualify preventive restructuring frameworks which do not constitute insolvency proceedings within the meaning of the EIR 2015 as company law matters. Restructuring measures – like for example, capital increases and reductions, amendments of the articles of association or company transformations – can be included in the restructuring plan instead of being decided upon by a “regular” resolution of the shareholders. Hence, the restructuring plan is effectively a substitute for a resolution of the shareholders.<sup>104</sup> Moreover, as a restructuring plan confirmed by a judicial or administrative authority is binding upon all affected parties (Article 15(1) of the PRD), there is – like in case of “regular” decisions of company organs – a special interest in a uniform decision (instead of potentially conflicting judgments).<sup>105</sup> If preventive restructuring frameworks that do not constitute insolvency proceedings within the meaning of the EIR 2015 are qualified as company law matters, they are – according to the EU incorporation theory<sup>106</sup> – governed by the law of the Member State in which the company has its registered office.<sup>107</sup> Hence, the rationale of Article 24(2) of the Brussels Ibis Regulation to confer jurisdiction upon the courts of the Member States of the company's seat, which are generally most familiar with that Member State's company law (and thus synchronise *forum* and *ius*), also argues in favour of international jurisdiction of the courts of the Member State of the company's registered office for preventive restructuring frameworks.

*Predictability and legal certainty:* Moreover, international jurisdiction of the courts of the Member State of the company's seat also corresponds with the objectives of predictability and legal certainty pursued by Article 24(2) of the Brussels Ibis Regulation.<sup>108</sup> The creditors and shareholders must expect that the courts of the Member State of the company's seat have international jurisdiction for legal proceedings that have as their object the restructuring of the company.<sup>109</sup>

*Objectives of the Brussels Ibis Regulation:* Furthermore, in case of preventive restructuring frameworks, applying the general jurisdiction rules in Articles 4(1) and 63 of the Brussels Ibis Regulation would likewise not ensure that the objectives of the Regulation are achieved.<sup>110</sup> As shown above,<sup>111</sup> the result would be that the courts of each Member State where one of the affected parties has its domicile would potentially have international jurisdiction. This would effectively amount to an invitation to forum shopping.<sup>112</sup>

### *Interim conclusion*

Overall, there are good arguments for applying Article 24(2) of the Brussels Ibis Regulation to preventive restructuring frameworks, resulting in exclusive jurisdiction of the courts of the Member State where the company has its registered office.<sup>113</sup> Admittedly, this extends the scope of Article 24(2) of the Brussels Ibis Regulation rather far. However, the “SoA model” ultimately twists the provisions of the Brussels Ibis Regulation a great deal more.<sup>114</sup> After all, the Brussels Ibis Regulation was originally tailored to adversarial proceedings. Therefore, the CJEU had to “bend” it somewhat in *E.ON/Czech Holding* with regard to valuation proceedings. Applying Article 24(2) of the Brussels Ibis Regulation to preventive restructuring frameworks would only continue along this path.<sup>115</sup> Moreover, this solution would have two crucial advantages: The exclusive jurisdiction of the courts of the Member States of the company's registered office prevents forum shopping and leads to a synchronisation of *forum* and *ius*.<sup>116</sup>

At any rate, an unequivocal decision by the CJEU on the question of international jurisdiction for preventive restructuring frameworks that do not constitute insolvency proceedings within the meaning of the EIR 2015 or a clarification by the European legislator would be highly desirable.

## 5 | NON-EIR PRFS: RECOGNITION AND ENFORCEMENT

On the premise that the Brussels Ibis Regulation applies to preventive restructuring frameworks, all judgments rendered in its context – in particular the judicial confirmation of the plan – must be recognised *ipso iure* pursuant to Article 36(1) of the Brussels Ibis Regulation.<sup>117</sup> Enforcement is thus governed by Articles 39 ff. of the Brussels Ibis Regulation.<sup>118</sup>

## 6 | SUMMARY

Unfortunately, the PRD has failed to provide a clear answer to the key questions of international jurisdiction, recognition and applicable law. As this article has shown, one must differentiate between preventive restructuring frameworks covered by the EIR 2015 and those that are not. Preventive restructuring frameworks that are subject to publicity constitute insolvency proceedings within the meaning of the EIR 2015 once they have been included into Annex A of the EIR 2015. International jurisdiction for such preventive restructuring frameworks is governed by Article 3 of the EIR 2015. As regards recognition and enforcement, Articles 19(1) and 20 of the EIR 2015 and Article 32(1) of the EIR 2015 apply respectively. Pursuant to Article 7(1) of the EIR 2015, the applicable law is generally the *lex fori concursus* (subject to the exceptions set out in Articles 8 ff. of the EIR 2015).

All other preventive restructuring frameworks fall within the scope of the Brussels Ibis Regulation. There are good arguments for applying Article 24(2) of the Brussels Ibis Regulation, resulting in exclusive jurisdiction of the courts of the Member State of the company's registered office. Recognition and enforcement of decisions is governed by Articles 36(1) and 39 ff. of the Brussels Ibis Regulation. The governing law is the *lex societatis*. Given the current conflicting approaches in academic literature, a clear ruling on these key issues by the CJEU or a clarification by the EU legislator would be highly desirable.

## ENDNOTES

<sup>1</sup> Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ 2019, L172/18.

<sup>2</sup> Wet van 7 oktober 2020 tot wijziging van de Faillissementswet in verband met de invoering van de mogelijkheid tot homologatie van een onderhands akkoord (Wet homologatie onderhands akkoord), Staatsblad 2020, 414. On this see for example, *Bil* FIP 2019, 8 ff.; *Marshall/Cho/Orbán* (2020) II *INSOL World* 27 ff.; *Nijns* TvI 2019, 257 ff.; *Pannevis* FIP 2019, 30 ff.; *van den Sigtenhorst* TvI 2019, 268 ff.; *Veder* FIP 2019, 53 ff.; *Walters* (2020) 21 *Co Law* 121 ff.

<sup>3</sup> Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (Unternehmensstabilisierungs- und -restrukturierungsgesetz – StaRUG) v. December 22, 2020, BGBl. I, 3256. On this see: *Bea/Dressler* NZI 2021, 67 ff.; *Bork* ZRI 2021, 345 ff.; *Brückmans* ZInsO 2021, 125 ff.; *Gehrlein* BB 2021, 66 ff.; *Kranzfelder/Ressman* ZInsO



2021, 191 ff.; *Marotzke* ZInsO 2021, 21 ff.; *Rath* BB 2021/2, I; *Schmittmann* BB 2021/4, I; *Schmittmann* ZInsO 2021, 211 ff.; *Scholz* ZIP 2021, 219 ff.; *Smid* ZInsO 2021, 117 ff.; *Smid* ZInsO 2021, 198 ff.; *Stahlschmidt* ZInsO 2021, 205 ff.; *Vallender* MDR 2021, 201 ff. See on the government draft: *Bork* ZRI 2020, 457 ff.; *Brinkmann* ZIP 2020, 2,361 ff.; *Desch* BB 2020, 2,498 ff.; *Cranshaw/Portisch* ZInsO 2020, 2,561 ff.; 2,617 ff.; *Deppenkemper* ZIP 2020, 2,432 ff.; *Floether/Erdman* TLE -033-2020; *Gehrlein* DB 2020, 2,393 ff.; *Heckschen/Weitbrecht* NZI 2020, 976 ff.; *Kahlert* DStR 2020, 2,569 f.; *Korch* NZG 2020, 1,299 ff.; *Kuntz* ZIP 2020, 2,423; *Lissner* ZInsO 2020, 2,688 ff.; *Müller* ZIP 2020, 2,253 ff.; *Paulus* ZIP 2020, 2,363; *Poertzgen* ZInsO 2020, 2,509 ff.; *Proske/Streit* NZI 2020, 969 ff.; *Ringelspacher/Ruch* ZRI 2020, 636 ff.; *Römermann* GmbH 2020, R324 ff.; *Sämisich* ZInsO 2020, 2,520 ff.; *Sämisich-Deichgräber* ZRI 2020, 581 ff.; *Schäfer* ZIP 2020, 2,164 ff.; *Schluck-Amend/Hefner* ZRI 2020, 570 ff.; *J. Schmidt* EuZW 2020, 955; *Schulz* NZI 2020, 1,073 ff.; *Skauradszun* ZRI 2020, 625 ff.; *Steinwachs/Steinwachs* ZInsO 2020, 2,462 ff.; *Vallender* ZInsO 2020, 2,579 ff., 2,677 ff.; *Vuia* ZInsO 2020, 2,401 ff.; see on the ministerial draft: *Albrecht* ZInsO 2020, 2,418 ff.; *Bork* ZInsO 2020, 2,177; *Frind* NZI 2020, 865 ff.; *Frind* ZInsO 2020, 2,241 ff.; *Hofmann* NZI 2020, 871 ff.; *Lissner* ZInsO 2020, 2,248 ff.; *Proske/Streit* AG 2020, R295 f.; *Sämisich/Deichgräber* ZInsO 2020, 2,364 ff.; *Smid* ZInsO 2020, 2,184 ff.; *Spahlinger* DB 2020/41, M4 f.; *Thole* ZIP 2020, 1985 ff.

<sup>4</sup> Law 4738/2020 (Πρόταση οφειλών και παροχή δευτέρας ευκαιρίας και άλλες διατάξεις, Αρ. Φύλλου 207). See on this *Sakkas/Bazinas* Eurofenix summer 2021, 40.

<sup>5</sup> Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung – ReO), BGBl. I Nr. 14/2021.

<sup>6</sup> Ordonnance n° 2021-1193 du 15 septembre 2021 portant modification du livre VI du code de commerce, JORF n°0216 du 16 septembre 2021. See on this *Borga/Théron* D. 2021, 1773 ff.; *Vallens* D. 2021, 2141 ff.

<sup>7</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015 on insolvency proceedings, OJ 2015, L141/19.

<sup>8</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2012, L351/1.

<sup>9</sup> Non-Paper of the EU Commission of February 20, 2018, doc. 6,176/18.

<sup>10</sup> Cf. *MüKoInsO/Reinhart*, fourth ed. 2021, Article 1, EIR 2015, paragraph 12; *BeckOK StaRUG/Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 36; *Skauradszun* ZIP 2019, 1,501, 1,504; *J. Schmidt* ZInsO 2021, 654, 655.

<sup>11</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 655.

<sup>12</sup> *Idem*.

<sup>13</sup> *Idem*. See also *MüKoInsO/Reinhart*, fourth ed. 2021, Article 1, EIR 2015, paragraph 16.

<sup>14</sup> *Idem*. See contra *MüKoInsO/Reinhart*, fourth ed. 2021, Article 1, EIR 2015, paragraph 17.

<sup>15</sup> Cf. Non-Paper of the EU Commission of February 20, 2018, doc. 6,176/18, 5.

<sup>16</sup> *Dammann* in *Paulus/Dammann*, European Preventive Restructuring, first ed. 2021, Article 1, PRD, paragraph 69 f., 72; *MüKoInsO/Reinhart*, fourth ed. 2021, Article 1, EIR 2015, paragraph 13; *BeckOK StaRUG/Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 36; *J. Schmidt* ZInsO 2021, 654, 655. See also Non-Paper of the EU Commission of February 20, 2018, doc. 6,176/18, 5.

<sup>17</sup> Above note 3.

<sup>18</sup> cf. *BegrRegE StaRUG*, BT-Drs. 19/24181, 179.

<sup>19</sup> *Faillissementswet* (Wet van 30 september 1893, op het faillissement en de surséance van betaling), BWBR0001860.

<sup>20</sup> *Memorie van Toelichting*, Kamerstukken II 2018/19, 35,249, nr. 3 (henceforth: *MvT*), 6 ff.

<sup>21</sup> Above note 5.

<sup>22</sup> Above note 6.

<sup>23</sup> Cf. Article R621-8, Code de commerce.

<sup>24</sup> The *sauvegarde accélérée* is only open to debtors engaged in a *conciliation* procedure who have elaborated a plan to ensure the undertaking's continued existence, Article L628-1(2) Code de commerce.



- <sup>25</sup> CJEU of November 8, 2012, *Radziejewski*, C-461/11, ECLI:EU:C:2012:704, paragraph 24; CJEU of November 22, 2012, *Bank Handlowy*, C-116/11, ECLI:EU:C:2012:739, paragraph 33.
- <sup>26</sup> Council Regulation (EC) No 1346/2000 of May 29, 2000 on insolvency proceedings, OJ 2000, L160/1.
- <sup>27</sup> See *Brinkmann* in Brinkmann, European Insolvency Regulation, 2019, Article 1, paragraph 4 ff.; *J. Schmidt* in Mankowski/Müller/J. Schmidt, EuInsVO 2015, 2016, Article 1, paragraph 34 ff. (with further references).
- <sup>28</sup> Proposal for a Regulation of the European Parliament and of the Council replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, COM(2021) 231.
- <sup>29</sup> PE-CONS 73/21.
- <sup>30</sup> *J. Schmidt* ZInsO 2021, 654, 656. See also already *Garcimartin*, SSRN-id3205217, paragraph 17 ff.; see further also *Dammann* in Paulus/Dammann, European Preventive Restructuring, first ed. 2021, Article 1, PRD, paragraph 69 ff.; *McCormack*, The European Restructuring Directive, 2021, 2.36, 2.95; *MüKoInsO/Reinhart*, fourth ed. 2021, Article 1, EIR 2015, paragraph 11 ff.; *Riedemann* in Pannen/Riedemann/Smid, StaRUG, first ed. 2021, Vor §§ 84–88, paragraph 3; BeckOK StaRUG/Skauradszun, first ed., 1.4.2021, § 84 StaRUG, paragraph 36 ff.
- <sup>31</sup> *J. Schmidt* ZInsO 2021, 654, 656. See also already *Garcimartin*, SSRN-id3205217, paragraph 24.
- <sup>32</sup> BeckOK StaRUG/Skauradszun, first ed., 1.4.2021, § 84 StaRUG, paragraph 50; *J. Schmidt* ZInsO 2021, 654, 656. See also already *Garcimartin*, SSRN-id3205217, paragraph 31.
- <sup>33</sup> Cf. CJEU of May 2, 2006, *Eurofood*, C-341/04, ECLI:EU:C:2006:281, paragraph 39; CJEU of January 21, 2010, *MG Probud*, C-444/07, ECLI:EU:C:2010:24, paragraph 26; EuGH of July 5, 2012, *ERSTE Bank Hungary*, C-527/10, ECLI:EU:C:2012:417, paragraph 34.
- <sup>34</sup> Cf. CJEU of May 2, 2006, *Eurofood*, C-341/04, ECLI:EU:C:2006:281, paragraph 61; CJEU of January 21, 2010, *MG Probud*, C-444/07, ECLI:EU:C:2010:24, paragraph 31 ff.
- <sup>35</sup> See BeckOK StaRUG/Skauradszun, 1.4.2021, § 84 StaRUG, paragraph 57; *J. Schmidt* in Bork/van Zwieten (eds.), Commentary on the European Insolvency Regulation, second ed. 2021, 56.35 (forthcoming).
- <sup>36</sup> Seminal *Madaus* (2018) 19 *EBOR* 615, 624 ff.; see also *Madaus* DB 2019, 592, 594; *Seibt/von Treuenfeld* DB 2019, 1,190, 1,191.
- <sup>37</sup> See for example, *Mankowski* WM 2011, 1,201, 1,207; *Paulus* ZIP 2011, 1,077, 1,080 ff.; see also *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), paragraph 75 ff.; *Re DTEK Energy* [2021] EWHC 1551 (Ch), paragraph 37 ff.
- <sup>38</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (Rome I), OJ 2008, L177/6.
- <sup>39</sup> “Restructuring contracts” do not fall within the scope of the *leges speciales* in Articles 5–8, Rome I.
- <sup>40</sup> CJEU of June 17, 1992, *Handte/TMCS*, C-26/91, ECLI:EU:C:1992:268, paragraph 15; CJEU of March 25, 2021, *Obala*, C-307/19, ECLI:EU:C:2021:236, paragraph 83.
- <sup>41</sup> See for schemes of arrangement also *Kortmann/Veder* (2015) 3 *NIBLeJ* 239, Rn. 61; see further also *Block-Lieb* (2018) 92 *Am. Bankr. L. J.* 1, 21. Rejecting a contractual qualification as regards the German StaRUG proceedings also *Skauradszun* KTS 2021, 1, 31 ff.; see further also *Thole* ZIP 2021, 2153, 2154.
- <sup>42</sup> *Skauradszun* NZI 2021, 568, 571; BeckOK StaRUG/Skauradszun, 1.4.2021, § 84 Rn. 105 f.; see also *Thole* ZIP 2021, 2153, 2158 f. (*lex fori* principle).
- <sup>43</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 659.
- <sup>44</sup> Third Council Directive of October 9, 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies, OJ 1978, L295/36.
- <sup>45</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of June 14, 2017 relating to certain aspects of company law, OJ 2017, L169/46; last amended by Regulation (EU) 2021/23 of the European Parliament and of the Council of December 16, 2020 on a framework for the recovery and resolution of central counterparties and amending Regulations (EU) No 1095/2010, (EU) No 648/2012, (EU) No 600/2014, (EU) No 806/2014 and (EU) 2015/2365 and Directives 2002/47/EC, 2004/25/EC, 2007/36/EC, 2014/59/EU and (EU) 2017/1132, OJ 2021, L22/1.

<sup>46</sup> Cf. recital 96 sentence 1 of the PRD.

<sup>47</sup> *J. Schmidt* ZInsO 2021, 654, 659.

<sup>48</sup> According to Article 9(3)(a) of the PRD, Member States may exclude equity holders from the right to vote. Article 12 of the PRD allows Member States to exclude equity holders from the application of Articles 9–11, but they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption, confirmation and implementation of the restructuring plan.

<sup>49</sup> *J. Schmidt* ZInsO 2021, 654, 659.

<sup>50</sup> *Idem*.

<sup>51</sup> *Idem*.

<sup>52</sup> Right to the point: *Villa/Engelberg* NTS 2020, 60.

<sup>53</sup> *J. Schmidt* ZInsO 2021, 654, 659.

<sup>54</sup> See below Part 4.3.2

<sup>55</sup> *J. Schmidt* ZIP 2021, 654, 661.

<sup>56</sup> *J. Schmidt* ZInsO 2021, 654, 656 f.

<sup>57</sup> CJEU of March 9, 2017, *Pula Parking*, C-551/15, ECLI:EU:C:2017:193, paragraph 33; CJEU of July 16, 2020, *Movic*, C-73/19, ECLI:EU:C:2020:568, paragraph 33.

<sup>58</sup> *Bil* FIP 2019, 8, 15; *Garcimartín*, SSRN-id3205217, paragraph 17; *Riedemann* in Pannen/Riedemann/Smid, *StaRUG*, first ed. 2021, Vor §§ 84–88 Rn. 7; *Thole* in *Münchener Kommentar zur Insolvenzordnung*, fourth ed. 2021, Article 19, EuInsVO 2015, paragraph 7; *Thole* ZIP 2020, 1985, 1998; *Veder* FIP 2019, 53, 60. See also *Dammann* in Paulus/Dammann, *European Preventive Restructuring*, first ed. 2021, Article 1, paragraph 81 ff.

<sup>59</sup> *Thole* in *Münchener Kommentar zur Insolvenzordnung*, fourth ed. 2021, Article 19, EuInsVO 2015, paragraph 7; *Thole* ZIP 2021, 2153, 2155; *Veder* FIP 2019, 53, 60 f.

<sup>60</sup> *Thole* in *Münchener Kommentar zur Insolvenzordnung*, fourth ed. 2021, Article 19, EuInsVO 2015, paragraph 7.

<sup>61</sup> See to that effect: *Bil* (2020) 33 *Insolv. Int.* 99, 105; *Bil* FIP 2019, 8, 15; *Dammann* in Paulus/Dammann, *European Preventive Restructuring*, first ed. 2021, Article 1, paragraph 84; *Thole* in *Münchener Kommentar zur Insolvenzordnung*, fourth ed. 2021, Article 19 EuInsVO 2015, paragraph 7; *Thole* ZIP 2021, 2153, 2155; *van den Sigtenhorst* TvL 2019, 268, 271 f.; *van Galen* KTS 2021, 225, 233; *Veder* FIP 2019, 53, 61; see also *Kern* NZI-Beilage 2021, 74, 76; *Riedemann* in Pannen/Riedemann/Smid, *StaRUG*, first ed. 2021, Vor §§ 84–88, paragraph 8.

<sup>62</sup> Doc. 6,176/18, 7.

<sup>63</sup> Wetboek van Burgerlijke Rechtsvordering, BWBR0001827.

<sup>64</sup> See on this also MvT (above note 23), 31 ff.

<sup>65</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1972, L299/32.

<sup>66</sup> Cf. *Schlosser* Report, OJ 1979, C59/71, paragraph 53.

<sup>67</sup> Convention on Insolvency Proceedings, November 23, 1995, CONV/INSOL/X 1.

<sup>68</sup> *Schlosser* Report, OJ 1979, C59/71, paragraph 53.

<sup>69</sup> *Virgós/Schmit* Report, doc. 6,500/96, paragraph 77.

<sup>70</sup> CJEU of September 4, 2014, *Nickel & Goeldner*, C-157/13, ECLI:EU:C:2014:2145, paragraph 21; CJEU of November 9, 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, ECLI:EU:C:2017:847, paragraph 17; CJEU of December 20, 2017, *Valach*, C-649/16, ECLI:EU:C:2017:986, paragraph 24; CJEU of October 4, 2018, *Feniks*, C-337/17, ECLI:EU:C:2018:805, paragraph 30; CJEU of February 6, 2019, *NK*, C-535/17, ECLI:EU:C:2019:96, paragraph 24; CJEU of September 18, 2019, *Riel*, C-47/18, ECLI:EU:C:2019:754, paragraph 33. See now also recital 7 sentence 3 of the EIR 2015.

- <sup>71</sup> CJEU of September 4, 2014, *Nickel & Goeldner*, C-157/13, ECLI:EU:C:2014:2145, paragraph 21; CJEU of November 9, 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, ECLI:EU:C:2017:847, paragraph 17; CJEU of December 20, 2017, *Valach*, C-649/16, ECLI:EU:C:2017:986, paragraph 24; CJEU of February 6, 2019, *NK*, C-535/17, ECLI:EU:C:2019:96, paragraph 24; CJEU of September 18, 2019, *Riel*, C-47/18, ECLI:EU:C:2019:754, paragraph 33.
- <sup>72</sup> CJEU of September 4, 2014, *Nickel & Goeldner*, C-157/13, ECLI:EU:C:2014:2145, paragraph 21; CJEU of November 9, 2017, *Tünkers France and Tünkers Maschinenbau*, C-641/16, ECLI:EU:C:2017:847, paragraph 17; CJEU of December 20, 2017, *Valach*, C-649/16, ECLI:EU:C:2017:986, paragraph 24; CJEU of February 6, 2019, *NK*, C-535/17, ECLI:EU:C:2019:96, paragraph 24; CJEU of September 18, 2019, *Riel*, C-47/18, ECLI:EU:C:2019:754, paragraph 33.
- <sup>73</sup> To this effect also *Mankowski* in Rauscher, *EuZPR-EuIPR*, fifth ed. 2021, Article 1, Brüssel Ia-VO, paragraph 134; *McCormack*, *The European Restructuring Directive*, 2021, 2.24 ff., 2.95; *Nijnens* TvI 2019, 257, 263 ff.; *J. Schmidt* ZIP 2021, 654, 658; *Skauradszun* ZIP 2019, 1,501, 1,503; *Skauradszun* in: *Kraemer/Vallender/Vogelsang*, *Handbuch zur Insolvenz*, 2020, Chapter 6, paragraph 18 ff.; *BeckOK StaRUG/Skauradszun*, first ed., 1.4.2021, § 84 StaRUG, paragraph 65; *Skauradszun/Nijnens* SSRN-id3426438, S. 22; *Skauradszun/Nijnens* Eurofenix autumn 2019, 19, 21. Further apparently also *von Bismarck/Schulz* NZI-Beilage 2019, 82, 84; *Madaus* DB 2019, 592, 598; *Madaus* Blog of October 2, 2020.
- <sup>74</sup> *Skauradszun* ZIP 2019, 1,501, 1,506; *Skauradszun* in: *Kramer/Vallender/Vogelsang*, *Handbuch zur Insolvenz*, 2020, Chapter 4, paragraph 19 ff.; *BeckOK StaRUG/Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 75 ff.; *Skauradszun/Nijnens* SSRN-id3426438, S. 28 ff.
- <sup>75</sup> 2006 c. 46. See in detail on SoAs: *Payne*, *Schemes of Arrangement*, 2014.
- <sup>76</sup> *Re Rodenstock* [2011] EWHC 1104 (Ch), paragraph 61; *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch), paragraph 12; *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), paragraph 31; *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), paragraph 51; *Re NN2 Newco Ltd*, *Re Politus BV* [2019] EWHC 1917 (Ch), paragraph 33 ff.; *Re Virgin Atlantic Airways Ltd.* [2020] EWHC 2191 (Ch), paragraph 59.
- <sup>77</sup> *Re Rodenstock* [2011] EWHC 1104 (Ch), paragraph 61; *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), paragraph 31; *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch), paragraph 51; *Re NN2 Newco Ltd*, *Re Politus BV* [2019] EWHC 1917 (Ch), paragraph 34; *Re Pizzaexpress Financing 2 Plc* [2020] EWHC 2873 (Ch), paragraph 29; *Re Virgin Atlantic Airways Ltd.* [2020] EWHC 2191 (Ch), paragraph 60 ff.; *Re DeepOcean 1 UK Ltd* [2020] EWHC 3549 (Ch), paragraph 38; *Re Steinhoff International Holdings NV* [2020] EWHC 3455 (Ch), paragraph 21 ff.
- <sup>78</sup> Cf. *Dammann* in *Paulus/Dammann*, *European Preventive Restructuring*, first ed. 2021, Article 1, PRD, paragraph 85; *Schlöder/Parzinger/Knebel* ZIP 2021, 1,041, 1,045; *J. Schmidt* ZInsO 2021, 654, 658; *Skauradszun* ZIP 2019, 1,501, 1,506; *Skauradszun* in: *Kramer/Vallender/Vogelsang*, *Handbuch zur Insolvenz*, 2020, Chapter 4, paragraph 20; *BeckOK StaRUG/Skauradszun*, first ed., 1.4.2021, § 84 StaRUG, paragraph 78; *Skauradszun/Nijnens* SSRN-id3426438, S. 33; see also *Thole* ZIP 2021, 2153, 2156.
- <sup>79</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 658; see also the example by *Skauradszun* ZIP 2019, 1,501, 1,506.
- <sup>80</sup> Cf. *Schlöder/Parzinger/Knebel* ZIP 2021, 1,041, 1,045; *J. Schmidt* ZInsO 2021, 654, 658; see with respect to a SoA for example, *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476 (Ch), paragraph 14 ff.; *Re Steinhoff International Holdings NV* [2020] EWHC 3455 (Ch), paragraph 21 ff.; dissenting (jurisdiction agreements not possible): *BeckOK StaRUG/Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 84.
- <sup>81</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 658.
- <sup>82</sup> Cf. *Dammann* in *Paulus/Dammann*, *European Preventive Restructuring*, first ed. 2021, Article 1, PRD, paragraph 85; *J. Schmidt* ZInsO 2021, 654, 658; *Skauradszun* ZIP 2019, 1,501, 1,506.
- <sup>83</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 658; *Skauradszun* ZIP 2019, 1,501, 1,506.
- <sup>84</sup> According to Articles 1(5)(a) and 2(1) no. 2 of the PRD, Member States are free to include or exclude existing or former workers. Germany, for example, has excluded them (§ 4 sentence 1 no. 1 StaRUG); so has the Netherlands (Article 369(4) FW).
- <sup>85</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 658; *Skauradszun* ZIP 2019, 1,501, 1,506.

- <sup>86</sup> Article 4(1) of the Brussels Ibis Regulation (and its predecessor, Article 2(1) of the Brussels Regulation) explicitly refers to “persons domiciled in a Member State”. With respect to Article 6(1) of the Brussels Regulation, the predecessor of Article 8(1) Brussels Ibis Regulation, it was for a long time controversial, whether it also applied to a defendant domiciled in a third state in the case where he is sued in proceedings brought against several defendants, some of whom are also persons domiciled in a Member State. However, the CJEU explicitly answered this question in the negative in 2013 (CJEU of April 11, 2013, *Sapir*, C-645/11, ECLI:EU:C:2013:228). In the course of the adoption of the Brussels Ibis Regulation, the European legislator did not overturn this precedent (see also Rauscher/*Leible*, EuZPR · EuIPR, 5. Aufl. 2021, Article 8, Brüssel Ia-VO, paragraph 9).
- <sup>87</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 658.
- <sup>88</sup> Cf. *Re Rodenstock* [2011] EWHC 1104 (Ch), paragraph 52; *Eidenmüller/Frobenius* WM 2011, 1,210, 1,214; *Mankowski* WM 2011, 1,201, 1,206; *Schwarz* in Hopt/Seibt, Schuldverschreibungsrecht, first ed. 2017, 14.118; *Thole* ZGR 2013, 109, 122.
- <sup>89</sup> Cf. *J. Schmidt* ZInsO 2021, 654, 659.
- <sup>90</sup> CJEU of March 9, 1999, *Centros*, C-212/97, ECLI:EU:C:1999:126.
- <sup>91</sup> CJEU of November 5, 2002, *Überseering*, C-208/00, ECLI:EU:C:2002:632.
- <sup>92</sup> CJEU of September 30, 2003, *Inspire Art*, C-167/01, ECLI:EU:C:2003:512.
- <sup>93</sup> *Lutter/Bayer/J. Schmidt*, EuropUR, sixth ed. 2018, 7.64 (with further references).
- <sup>94</sup> BGH ZIP 2011, 1837; *Mankowski* in Rauscher, EuZPR-EuIPR, fifth ed. 2021, Article 24, Brüssel Ia-VO, paragraph 118 ff. (with further references).
- <sup>95</sup> CJEU of May 16, 2013, *Melzer*, C-228/11, ECLI:EU:C:2013:305, paragraph 22; CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 25 (with further references).
- <sup>96</sup> CJEU of October 2, 2008, *Hassett und Doherty*, C-372/07, ECLI:EU:C:2008:534, paragraph 18; CJEU of May 12, 2011, *BVG*, C-144/10, ECLI:EU:C:2011:300, paragraph 30; CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 27.
- <sup>97</sup> CJEU of May 12, 2011, *BVG*, C-144/10, ECLI:EU:C:2011:300, paragraph 36; CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 30.
- <sup>98</sup> *Jenard-Report*, OJ 1979, C59/1, 35; CJEU of October 2, 2008, *Hassett und Doherty*, C-372/07, ECLI:EU:C:2008:534, paragraph 20; CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 31.
- <sup>99</sup> *Jenard-Report*, OJ 1979, C59/1, 35; CJEU of October 2, 2008, *Hassett und Doherty*, C-372/07, ECLI:EU:C:2008:534, paragraph 21; CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 32 (with further references).
- <sup>100</sup> Cf. CJEU of March 7, 2018, *E.On Czech Holding*, C-560/16, ECLI:EU:C:2018:167, paragraph 40 ff.; BGH ZIP 2011, 1837 paragraph 13; OLG Wien AG 2010, 49, 50; *Mankowski* in Rauscher, EuZPR-EuIPR, fifth ed. 2021, Article 24, Brüssel Ia-VO, paragraph 104 (with further references).
- <sup>101</sup> *Bayer/J. Schmidt* BB 2018, 2,562, 2,565; *Meilicke/Lochner* EWIR 2018, 389, 390; *J. Schmidt* EuZW 2018, 811, 814. But see on all of this also *Mankowski* in Rauscher, EuZPR-EuIPR, fifth ed. 2021, Article 24, Brüssel Ia-VO, paragraph 158 ff. (with further references).
- <sup>102</sup> Directive (EU) 2019/2121 of the European Parliament and of the Council of November 27, 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, OJ 2019, L321/1.
- <sup>103</sup> See Part 3.3.
- <sup>104</sup> *J. Schmidt* ZInsO 2021, 654, 660.
- <sup>105</sup> *Idem*.
- <sup>106</sup> See above.
- <sup>107</sup> *J. Schmidt* ZInsO 2021, 654, 661.
- <sup>108</sup> *Idem*.

<sup>109</sup> Idem.

<sup>110</sup> Idem.

<sup>111</sup> See Part 4.3.1.

<sup>112</sup> *J. Schmidt* ZInsO 2021, 654, 661.

<sup>113</sup> Idem.

<sup>114</sup> Idem.

<sup>115</sup> Idem.

<sup>116</sup> Idem.

<sup>117</sup> *Mankowski* in Rauscher, EuZPR-EuIPR, fifth ed. 2021, Article 1, Brüssel Ia-VO, Rn. 134; *J. Schmidt* ZIP 2021, 654, 661; *Skauradszun* ZIP 2019, 1,501, 1,507; BeckOK StaRUG/*Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 87.

<sup>118</sup> *J. Schmidt* ZIP 2021, 654, 661; *Skauradszun* ZIP 2019, 1,501, 1,507; BeckOK StaRUG/*Skauradszun*, 1.4.2021, § 84 StaRUG, paragraph 90.

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