The law governing the effects of foreign insolvency proceedings on lawsuits pending in the home forum

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Abstract:

The issue of the legal consequences of the recognition of insolvency proceedings pending abroad is a central feature of cross-border insolvency regimes and will represent an unavoidable question in crafting an EU legal instrument addressing the treatment Third Countries' insolvency proceedings. A specific facet of this question is addressed in this chapter, namely the consequence of the recognition of a foreign insolvency proceeding on lawsuits pending in the recognising jurisdiction, specifically lawsuits where claims against the insolvent are matter of dispute. It is submitted that, as part of the regime of coordination between the procedures for claims' verification within the insolvency proceedings, and these lawsuits, the regulation of the effects of the opening of an insolvency proceedings on pending lawsuits requires a careful delimitation between the remit of the *lex fori concursus*, as defined in article 7 EIR, and that of the *lex fori processus* referred to in article 18 EIR. A refinement of the boundaries between the two *leges* is particularly necessary regardless that the scope of article 18 EIR is broadened as to cover the effects of recognition of insolvency proceedings going on outside the EU, or article 20 MLCBI is enacted, given the wide array of solutions to the coordination problem followed by jurisdictions around the world. It is further submitted that improvements in the current regime may be simply achieved by way of interpretation of the existing EIR text, rather its amendment.

Keywords: recognition, effects, applicable law, pending lawsuits, claims, verification of claim, *lex fori concursus*, *lex fori processus*.

A. *Coordinating the verification of claims within insolvency proceedings and lawsuits on the same claims pending elsewhere: facets of the issue and its cross-border layers*

All insolvency systems are equipped with procedures for verifying claims lodged in insolvency proceedings. A crucial aspect of the regulation of these systems is the provision for coordinating the verification procedure within the insolvency proceedings and lawsuits with the same objective that were already pending when the insolvency proceedings commenced[1]. The aim of these procedural coordination mechanisms is clearly to avoid unnecessary duplication of litigation on the same claims, which could result in the court system wasting its time and resources, and, in the worst cases, in the insolvency court and the court before which the lawsuit is pending issuing inconsistent judgments.

This issue may be resolved by prioritising either the pending lawsuit (requiring the insolvency court to which a dispute on a claim is brought to refrain from adjudicating it until the lawsuit has concluded) or the verification procedure before the insolvency court (in which case, the lawsuit pending elsewhere shall be discontinued, or at least stayed until the insolvency procedure is completed). As we will explore further in this text, jurisdictions around the world are divided[2]. Some give priority to the lawsuit, thus allowing its resumption or simply providing for its continuation despite the filing of the insolvency case; other jurisdictions prioritise the verification procedure, thus requiring the discontinuation of the lawsuit.

Another aspect of the coordination mechanism concerns the binding effect of judgments rendered in these lawsuits. A rule stating that these judgments are not binding upon the insolvency practitioner and cannot be relied upon by the claimant to secure inclusion in the list of claimants entitled to distribution in the insolvency proceedings aligns with the coordina-

1 On this point, see the UNCITRAL Legislative Guide on Insolvency Law, part 2, mn 33, 41 and 42.

2 As acknowledged also by the UNCITRAL Legislative Guide on Insolvency Law, part 2, mn 33: 'Since most insolvency laws include a mechanism to process claims—addressing submission, verification and admission—and to make distributions, proceedings with respect to those claims conducted outside the insolvency case are rendered superfluous. Nevertheless, some insolvency laws provide that, where legal proceedings against the debtor (including both commencement and continuation of those proceedings) are within the scope of the stay, those proceedings can be commenced or continued at the discretion of the court if it is considered necessary to preserve a claim *or establish the quantum of a claim*' (emphasis added).

tion strategy that prioritises the verification process. When coordination fails and the lawsuit proceeds despite a rule requiring its termination, it is only logical to prevent the litigant from benefitting from bypassing the verification process. Conversely, a rule stipulating that these judgments are *res judicata* against the insolvency practitioner fits within the framework where lawsuits already underway are allowed to run parallel to the verification procedure.

In cross-border cases, the coordination issue comes with an additional twist, particularly when the lawsuits are pending in a different country from the one where the insolvency proceedings are underway. Assuming that the insolvency proceedings opened in the first state are recognised in the second, there comes the question of identifying the law governing these two aspects of coordination mechanism, i.e. whether it is the law of the state in which the lawsuit is pending (the *lex fori processus*), or the law of the state in which the insolvency proceedings were opened *(the lex fori concursus*).

The second aspect (the binding effect, in the procedure of admission of claims, of the judgement that ascertains the existence or non-existence of a claim) touches on the unfolding of a phase of the insolvency procedure, and is therefore, rather intuitively, regulated by the *lex fori concursus*. This is what is provided for in art. 7(h) EIR, which subjects to the *lex fori concursus* the regulation of 'the lodging, verification and admission of claims'. Similarly, art. 10(2)(g) of Directive 2001/24/EC (on the insolvency of credit institutions), and art. 274(2)(g) of Directive 2009/138/EC (on the insolvency of insurance companies). Furthermore, a provision with a similar content has been included in the draft 'legislative instrument' on the law applicable to cross-border insolvency proceedings, currently being prepared by UNCITRAL's *Working Group V*[3]. The *lex fori concursus*, among other things, also regulates the recognition of the judgement issued in the *forum processus*, an issue that is logically preliminary to that of its binding effect upon the insolvency practitioner and the general body of creditors.

The first aspect (the fate of the credit process) touches on the question of the effects of the opening of the insolvency procedure on the ongoing law-

3 The *travaux preparatoires* can be read at https://uncitral. un.org/en/working_groups/5/insolvency_law; see the draft approved during the sixty-fifth session of the working group, which includes the rule that 'Except as provided otherwise in these legislative provisions, the lex fori concursus shall govern all aspects of the commencement, conduct, administration and closure of insolvency proceedings and their effects' (Chapter II, art. A, § 1, *incipit*).

suits, the regulation of which the main systems of international insolvency law all place within the remit of the *lex fori processus*.

Article 18 EIR (formerly Article 15 of Regulation No. 1346 of 2000) states that 'the effects of insolvency proceedings on a pending lawsuit [...] concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending [...]'[4]. This provision creates an exception to the extension principle found in Articles 7 and 20 EIR. According to this principle, the commencement of insolvency proceedings in one Member State would ordinarily trigger the same legal effects in other Member States, as governed by the law under which the proceedings are instituted. However, when determining the outcome of a lawsuit pending in a jurisdiction other than the one in which the insolvency proceedings are ongoing, the court hearing that lawsuit will not apply a foreign *lex concursus* (the law governing the debtor's insolvency). Instead, it will assume that a court within its own jurisdiction has declared the debtor bankrupt and will adjudicate the case as if under domestic law[5]. The reason for mandating the application of the *lex fori processus* instead of the *lex fori concursus* in determining the effects of insolvency on the lawsuit is based on the idea that the expectations of the parties will be better preserved if the consequences of the commencement of an insolvency proceeding abroad are regulated by the law of the local forum, rather than by a foreign, often unforeseen, insolvency law. In this respect, Article 18 EIR shares its rationale with other provisions of the EIR that point to a law other than the *lex concursus*[6].

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4 The parts of the provision omitted here deal in a similar fashion with arbitral proceedings. Analogous provisions are contained in article art. 32 of Directive 2001/24/EC (on insolvency of credit institutions); art. 292 Directive 2009/138/EC (on insolvency of insurance undertakings).

5 For instance, the Court of Appeal of Amsterdam (25 August 2005, cited in Wessels, p. 635) determined the consequences of a French *liquidation judiciaire* on a lawsuit pending in the Netherlands pursuant to articles 27 to 31 of the Dutch Insolvency Act (*Faillissementswet*, or *Fw*), even if no Dutch *faillissement* had been opened in respect of the same debtor.

6 See recital 67 to the EIR: 'To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provision should be made for a number of exceptions to the general rule'. On article 18 EIR particularly, see also Virgós/Schmit, mn 142; Wessels, p. 635; Virgós/Garcimartín, 140; Smid, *Deutsches*, p. 82; Dammann in Pannen EuInsVO art. 15, mn 4; Oberle in Hess InsO – EuInsVO art. 18, mn 2; Calvo Caravaca/Carrascosa Gonzáles, p. 142. On top of expectation of the parties, convenience for the court is also mentioned as a rationale, as the application of the local insolvency law would spare the court from the task of

As commentators explain, application of Article 18 EIR follows a two-stages process: firstly, the court before which the lawsuit is pending must identify which proceedings governed by its insolvency law bear most structural and functional similarities with the insolvency proceedings pending abroad, and recognised; secondly, the court must attach to the recognition of the foreign proceedings the same consequences that the opening of the corresponding domestic proceedings would have if they had been opened[7].

The first stage of the process is particularly tricky, since pairing proceedings instituted under different laws may not be a straightforward task all the times. Consider a German *Insolvenzverfahren* pending against a medium-sized company, a common *GmbH*: the corresponding Spanish proceeding will presumably be a *concurso*: both proceedings have as their prerequisite, as a rule, actual insolvency (i.e., the debtor's current inability to meet its obligations regularly by normal means); they entail, as a rule, the debtor's loss of the power of disposition and administration of its assets (divestment); and they may result either in a covenanted restructuring of the content of creditors' rights (through an *Insolvenzplan* or *convenio*), or in the liquidation of the assets and distribution of the proceeds among all creditors. Likely, the corresponding Italian proceeding will be a *liquidazione giudiziale*[8]. But what if the *Insolvenzverfahren*, as it can well happen, is opened in the event of imminent insolvency (*drohende Zalungsunfähigkeit*: § 18 *Insolvenzordnung*, or *InsO*)? The Spanish equivalent will still be the *concurso*, which can be based both on *insolvencia actual* or *inminente* (art. 2 of the *Ley concursal*, or *LC*). However, the *liquidazione giudiziale* requires actual insolvency, thus the Italian 'doppelgänger' of the German proceedings will likely be a *concordato preventivo* (with purpose of liquidation: art. 84 of the *Codice della crisi d'impresa e dell'insolvenza*, or CCII)[9].

Moreover, in both the *Insolvenzverfahren* and the *concurso* the debtor, under certain conditions, and appropriately supervised by the court, may retain some powers of administration and disposition of the estate (*Eigenverwaltung* and *intervención de la administración concursal*, respectively: § 270 InsO and Art. 106 LC). This is never the case with *liquidazione giudiziale*, while all other procedures (*concordato preventivo*, *accordi di*

finding out what the foreign *lex concursus* is: thus OLG Köln, 17 October 2007, in ZIP 2007, p. 228 et seqq.

7 Duursma-Kepplinger, in Duursma-Kepplinger, Duursma, Chalupsky, art. 15, mn 18–21.

8 Small-sized companies are eligible for *liquidazione controllata*; certain companies (such as cooperatives) are instead eligible for *liquidazione coatta amministrativa*.

9 Again, there's a variant available to SMEs, i.e. the *concordato minore*.

ristrutturazione, piano di ristrutturazione soggetto ad omologazione) available to medium-to-large enterprises are debtor-in-possession: the Italian counterpart will thus be one of those, depending on the content of the plan.

Finally, the German and Spanish proceedings may yield a restructuring plan, instead of a piecemeal liquidation of the estate: this is also true of the *liquidazione giudiziale*; consequently, while the Spanish counterpart will in any case be a *concurso,* the Italian counterpart, depending on whether the *Insolvenzverfahren* bound to the sanctioning of an *Insolvenzplan* is based on actual or imminent insolvency, or on whether the debtor has been divested, will be a *liquidazione giudiziale* or another one of the above-mentioned procedures, depending on the content of the plan.

Similarly to the EIR, other cross-border insolvency law regimes subject a lawsuit pending in the home forum to the effects of the debtor's access to an insolvency proceeding emanating from the *lex fori processus*.

This holds obviously true for the regimes of cross-border insolvency law that follow the 'assimilation principle', i.e. that generally attach to the recognition of foreign insolvency proceedings the same effects of the opening of domestic proceedings, including those the effects upon pending lawsuits.[10]

Moreover, the implementation of the MLCBI yields the same results: Article 20 provides that recognition of foreign main proceedings will result in the stay of proceedings pending against the debtor in that state, and that the scope of this suspension is governed by the same provisions that regulate the effects of local insolvency proceedings on pending proceedings.[11]

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10 Two examples: art. 170(1) of the Swiss Federal Act on Private International Law ('Unless this law provides otherwise, the recognition of a foreign bankruptcy decree entails, for the debtor's property located in Switzerland, the legal consequences of bankruptcy as provided by Swiss law'); as well as art. 4 of the Argentine *Ley de concursos y quiebras* ('*La declaración de concurso en el extranjero es causal para la apertura del concurso en el país, a pedido del deudor o del acreedor cuyo crédito debe hacerse efectivo en la Republica Argentina*'): evidently, in the latter case the application of the *lex fori* is a consequence of the opening of a domestic proceeding.

11 See for example 11 U.S. Code § 1520(a)(1) and Article 20(2) of *Schedule 1* of the UK *Cross-Border Insolvency Regulations 2006*. The former provision reads: 'Upon recognition of a foreign proceeding that is a foreign main proceeding sections 361 and 362 [the automatic stay provisions, *ed.*] apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States'; the latter closely mirrors that of the Model Law in providing that the stay of domestic actions has the same scope and effect 'as if the debtor, in the case of an individual, had been adjudged bankrupt under the Insolvency Act 1986 or had his estate seized under the Bankruptcy (Scotland) Act 1985 M2, or, in the case of a debtor other than an individual, had been made the subject of a winding-up order under

Back to Article 18 EIR, it should be noted that it poses delicate coordination problems with the Article 7 EIR, particularly with the provision contained in Paragraph 2(f), which subjects to the *lex fori concursus* 'the effects of the insolvency proceedings on proceedings brought by individual creditors'. Commentators (and the EU Court of Justice) agree that the unfortunate term 'proceedings' (*procédures*, *Rechtsverfolgungsmaßnahmen*, *ações, azioni giudiziarie*) contained in this provision includes only enforcement proceedings (more explicit, in this sense, is the Spanish version of the EIR, which speaks of *ejecuciones individuales*), while the 'lawsuits' (*instances, Rechtsstreitigkeiten, procesos, ações judiciais*, *procedimenti giudiziari*) referred to in Art. 18 EIR would include only cognition proceedings, initiated by the debtor before entering insolvency, or against him.[12]

Article 18, as we shall observe below, also raises problems of coordination with other provisions of Article 7, which arise precisely by examining the issues raised by the coexistence of a procedure for the verification of claims in one state, and litigation on the same claims in other states. The thorniest questions arise precisely when the *leges* indicated as applicable by Article 7 (to concurrent verification) and Article 18 (to pending proceedings),

the Insolvency Act 1986,' and that such suspension is subject 'to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case'. Note that the MLCBI provision does not postulate any 'pairing' of the foreign proceedings to a local one, as the relevant provision of the *lex fori processus* are clearly identified: e.g., regardless of the type of proceedings that are granted recognition in the U.S., lawsuits pending before an American court will always face the consequences set out in §§ 361 and 362.

12 Virgós/Schmit, mn 142; Bork/Mangano, p. 170; Virgós/Garcimartín, p. 76–77 and p. 140; Fletcher in Moss/Fletcher/Isaacs, p. 71 (93); Dammann, Sénéchal, p. 556 et seqq.; Garcimartín/ Virgós in Bork/Van Zwieten, EIR art. 18, p. 338; Paulus, EuInsVO art. 18, mn 3; De Cesari/Montella, p. 133–134; Duursma-Kepplinger in Duursma-Kepplinger/Duursma/Chalupsky EInsVO art. 15, mn 27; Undritz in Schmidt EuInsVO art. 18, mn 6; Smid, *Deutsches,* p. 84; Thole in Vallender EuInsVO art. 18, mn 4; Reinhart in in Stürner/Eidenmüller/Schoppmeyer IV, EuInsVO 2015 art. 18, mn 4; Dahl/Kortleben in Brinkmann, EuInsVO art. 18, mn 6; Lupoi, in Maffei Alberti EIR art. 18, mn 5; McCormack, p. 163; Wessels, p. 635; Calvo Caravaca/Carrascosa Gonzáles, p. 141–142.
See also AG Bobek, 9.6.2016 – case C-212/15, ECLI:EU:C:2016:427 paras 48 et seqq. – *ENEFI Energiahatékonysági Nyrt* v *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*; ECJ 9.11.2016 – case C-212/15, ECLI:EU:C:2016:841 paras 31–35 – *ENEFI Energiahatékonysági Nyrt* v *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*; ECJ 6.6.2018 – case C-250/17, ECLI:EU:C:2018:398 paras 29–32 – *Virgílio Tarragó da Silveira* v *Massa Insolvente da Espírito Santo Financial Group SA*; on article 32 of Directive 2001/24/EC, see ECJ 24.10.2013 – case C-85/12, ECLI:EU:C:2013:697 paras 51–58 – *LBI hf* v *Kepler Capital Markets SA e Frédéric Giraux*.

respectively, make divergent basic choices as to how verification and passive litigation should be coordinated.

We will examine these issues by considering two hypothetical cases. Before that, it may be useful to illustrate, with some examples, how such coordination can be articulated in different ways.

B. Two methods for verifying disputed claims in insolvency

Coordination between the process of claim verification and lawsuits regarding individual claims largely depends on the structure of the former, particularly at the stage where objections to the admission of such claims, raised by parties with an interest (such as fellow creditors, the insolvency practitioner, or even the debtor themselves), must be resolved by a judge before any distribution of proceeds or any voting on a composition can take place.

Depending on the extent to which the so-called *vis attractiva concursus* encompasses disputes that might affect the liabilities of the estate, the law may require that such divergences be settled either in a separate venue or incidentally within the insolvency proceedings.

In the first instance, the parties involved in the dispute must either initiate a new lawsuit (possibly before the same court that is hearing the insolvency case) or resume the lawsuit that was pending when the insolvency procedure commenced. We shall refer to this as the 'double track' method.

Alternatively, the parties must submit their disagreement to the same judge presiding over the insolvency case. Claims already brought before another judge may be an exception, in which case the 'double track' method would again be applicable. However, if the law designates the bankruptcy judge as the sole authority to hear any dispute regarding claims lodged within the proceedings, we shall describe this as the 'single track' method.

Each method entails a different approach to dealing with pending lawsuits: the former allows their continuation, while the latter necessitates their discontinuation.

Before delving deeper into this topic, it may be helpful to examine each method more closely through a few examples drawn from jurisdictions both within and outside the EU.

I. Examples of the 'double track' method

§ 179 of the German Insolvency Act (InsO) stipulates that if objections to a claim are raised either by the insolvency practitioner or a fellow creditor, the claimant wishing to be included in the schedule of claims (*Insolvenztabelle*) among creditors entitled to the distribution of the debtor's assets must petition for the ascertainment (*Feststellung*) of her claim. Conversely, if her claim is supported by a judgment or any title permitting the commencement of a forced execution, it is up to the objecting practitioner or creditor to bring an appeal against the judgment or to seek the annulment of the title (*Widerspruch*). In both scenarios, the petition will initiate an ordinary lawsuit, parallel to the insolvency procedure, as clarified by the first line of § 180 InsO. Furthermore, the second line of this provision states that if a controversy regarding that claim was already pending between the debtor and the claimant, the objections to the claim will be addressed within the same lawsuit after its resumption (*Wiederaufnahme*), according to § 86 InsO; thus the lawsuit will be litigated on in the pristine venue, and the judgment rendered therein will bind the insolvency practitioner and all of the creditors (§ 183, first line, InsO)[13].

A similar approach is followed in Austria, in accordance with §§ 7, 110, and 113 of the *Insolvenzordnung* (or IO)[14]: the first provision in the order regulates the interruption of the pending lawsuits and the steps towards their resumption, that can only happen as soon as the hearing for claims' verification (*Prüfungstagsatzung*) has taken place; in the second and fourth provisions mentioned basically mirror § 180 InsO, while § 113 grants *erga omnes* effect to the judgments made in the duly resumed lawsuits.

Article L624–2 of the French Commercial Code (*Code de commerce*) stipulates that the *juge-commissaire*, who is generally tasked with deciding whether a claim should be allowed in the schedule of claims or not, must refrain from doing so when claims for which lawsuits are pending are involved. Instead, the *juge-commissaire* must take note of this circumstance in his decision. Furthermore, Article L622–22 allows the creditor to resume the lawsuit as soon as she has lodged the claim by summoning the insolvency practitioner but prevents the competent court from ordering the debtor

13 Smid, *Forderungen*, p. 193 et seqq.
14 Roth, p. 218 et seqq.; p. 289 et seqq.

to pay (even if the creditor prevails), as the court's sole responsibility will be to ascertain whether the creditor holds such a right[15].

Similarly, Dutch law provides that claims against which objections have been raised will be adjudicated by the insolvency court unless a dispute was already pending at the time of the commencement of the *faillissement* (see Articles 29 and 122, first paragraph of the *Faillissementswet*)[16].

Spanish law differs from French law mainly in one respect: the pending lawsuit will not be stayed upon the opening of a *concurso*. Article 137 of the *Ley concursal* (LC) states that, as a rule, lawsuits to which the debtor is a party that are ongoing at the time of the commencement of the insolvency case shall continue unless the law exceptionally stays them or joins them to the insolvency proceedings. No exception is provided for lawsuits on claims. Finally, Article 262 states that claims being disputed before another court shall be included in the schedule of claims (*lista de acreedores*) contingently, in the same way as conditional claims[17].

Outside Europe, noteworthy examples include articles 84, 127 and 130 of the Mexican *Ley de concursos mercantiles*, that allow the lawsuit to continue and the winning creditor to rely upon the judgment to be included in the claimants' list; the Uruguayan *Ley de proceso concursal*, whose Articles 52 and 103 show clear similarities to Spanish law, and the Japanese Insolvency Act (the *Hasanhō*, Law No. 75 of 2 June 2004), whose Articles 126 and 127 establish a framework similar to the German and Austrian systems.

Small differences aside, the common feature of these laws is that litigation on claims is 'outsourced' to other courts, either completely (as in Germany, Austria and Japan) or in part (as in France, Netherlands, Spain, Mexico and Uruguay), specifically the litigation that was already ongoing at the time of the commencement of the procedure.

The reason for this approach is evidently to keep the bankruptcy court free from 'sideline litigation' as much as possible and allow it to focus on the primary tasks of monitoring the insolvency procedure and managing the insolvent's estate.

It can be observed, however, that this is a general objective of insolvency laws, regardless of whether they follow a 'double' or 'single-track' method in the verification of claims. In jurisdictions following the latter method, the

15 Le Cannu/Robine/Jeantin, p. 456 et seqq.
16 Vriesendorp, p. 296 et seqq.
17 Extensively on the topic, Menéndez Estébanez, p. 412 et seqq.; see also Guerrero Palomares, p. 100 et seqq.

aim is simply to minimise the formalities of the verification process rather than to limit its scope.

II. Examples of the 'single-track' method

Among European jurisdictions, Italy and Portugal follow the 'single track method', although with considerable exceptions (which will not be addressed here). Interestingly, in neither jurisdiction does this method result from black-letter law; rather, it is the consequence of well-established lines of judicial rulings.

Under Article 151 of the Italian Act on Insolvency and Restructuring (CCII), in force since the summer of 2022, all claims, regardless of their rank (and even if they may be exempted from the prohibition of seeking satisfaction through individual enforcement actions, as is provided for some types of mortgages), must be lodged and ascertained according to the procedure set out in the Act, particularly Articles 200 et seqq. This provision replicates Article 52 of the former *Legge fallimentare* (which had been in force for eighty years from 1942 onwards), a provision that courts consistently construed as prohibiting any litigation related to insolvency claims outside the *fallimento* itself[18]. Since such a conclusion is anything but apparent from the letter of the law, an often-cited argument supporting it is that Article 204(2)(c) CCII states that only claims already ascertained by a non-final judgment (that is, a judgment still subject to appeal) shall be contingently listed in the schedule of claims (*stato passivo*)[19]. This means the creditor might have her share of proceeds provisionally set aside until the judgment ascertaining her claim becomes final, so that, should the judgment be successfully challenged at the appellate stage, such proceeds can be distributed among the other creditors[20]. The argument runs as follows: disputes on claims entitled to such provisional enlistment must be settled not by the bankruptcy judge but through the usual litigation process within the frame of the pending lawsuit. *A contrario*, courts maintain that

18 See, for example, Cass. 24.1.2023, no. 2090; Cass. 28.3.2022, no. 9853; among lower courts, e.g., App. Messina 11.2.2022; App. Milano 7.4.2021; Trib. Roma 24.7.2023; Trib. Bergamo 24.5.2023, all available on <bdp.giustizia.it> Find extensive references in Montanari Giur. comm., 2015, 94 (94).

19 Montanari, *passim*.

20 See such principle thoroughly explained and applied in App. Napoli, 11.6.2024, no. 2598.

claims already being litigated in lawsuits that have not reached the judgment stage at the time of the opening of the *fallimento* (now rebranded as *liquidazione giudiziale*) are not entitled to such treatment and, consequently, must be litigated before the bankruptcy court (the *giudice delegato* first, then the *collegio*). Consequently, lawsuits regarding those claims must be discontinued unless a judgment on the merits (whether favourable to the claimant or not[21]) has already been issued. In that case, it will be up to the insolvency administrator (the *curatore*) to file an appeal, and it will be her responsibility to stand as a party should an appeal be filed by the creditor, or in cases where the appellate proceedings have already started at the time the insolvency case commenced.

In Portugal, the *Tribunal Superior de Justiça* has consistently held that as soon as the judgment opening the insolvency proceedings (*sentença de declaração de insolvência*) becomes final, the lawsuits on claims against the insolvent debtor that are pending must be terminated under Article 277(e) of the Portuguese Code of Civil Procedure, on the grounds that their continuation has become superfluous for the creditor, since she will have both the possibility and the obligation to lodge that very claim with the insolvency court and have it ascertained following the procedure set out in Articles 128 et seqq. of the *Código da Insolvência e da Recuperação de Empresas* (or CIRE)[22].

Outside Europe, Chilean[23], Bolivian[24], and Peruvian[25] laws provide that pending lawsuits shall be joined (*acumuladas*) with the insolvency proce-

21 Although the wording of article 204 exclusively refers to 'claims ascertained by a judgment' (thus, a judgment favourable to the plaintiff), courts construe the provision broadly: see for instance Cass. civ., 15.32022, no. 8463, in *Fall.*, 2022, pp. 939 et seqq.

22 See Ac. do STJ, 30.4.2024 (case 18490/16.8T8LSB.L1.S1-A); Ac. do STJ, 19.6.2018 (case 18860/16.1T8LSB-A.L1.S2); Ac. do STJ, 22.11.2018 (case 4144/17.1T8LSB.L1.S2); Ac. do STJ, 2.11.2017 (case 11674/16.0T8LSB.S1); Ac. do STJ, 26.9.2017 (case 3499/16.0T8VIS.S1); Ac. do STJ, 8.5.2013 (case 170/08.0TTALM.L1.S1); Ac. do STJ, 15.3.2012 (case 501/10. 2TVLSB.S1); Ac. do STJ, 13.1.2011 (case 2209/06.4TBFUN-L1.S1); Ac. do STJ, 25.3.2010 (case 2532/05.5TTLSB.L1.S1); among trial courts, Ac. do TRL Lisboa, 7.3.2017 (case 11804/16.2T8LSB-A.L1–7); Ac. do TRL Evora, 29.1.2015 (case 692/11.5TBCTX.E1); all judgments can be found at https://www.dgsi.pt/. See Epifânio, p. 187 et seqq.; Gonçalves, p. 310 ss.

23 See articles 142 and 143 of Law no. 20720 of 2013 (only arbitration proceedings and lawsuits pending in front of certain special courts are exempted).

24 See article 1591 of the *Código de comercio*.

25 See articles 32 and 33 of the *Ley general del sistema concursal*.

dure[26]. Lastly, in Argentina, the creditor is given the choice between resuming the lawsuit or seeking a quick ascertainment of her claim within the insolvency procedure[27].

The main rationale behind this method, as stated by Italian scholars and Portuguese higher courts, is the need to ensure that the *pari passu* principle is preserved in the determination of the estate's liabilities, which, in turn, determines the amount of the share of proceeds to which each creditor will be entitled[28]. This calls for the possibility of each creditor 'having her say' about the merits of fellow creditors' claims, as the higher the amount to which a claim is allowed to partake in the distribution, the less all creditors will eventually obtain from such distribution.

It is interesting to note that 'double track' jurisdictions, too, do not ignore the need to give all creditors the chance to actively dispute the substance of all claims lodged. However, they achieve this objective differently, by transforming the pending lawsuit into a multi-party procedure, for example, by mandating that creditors objecting to the allowance of a fellow creditor's claim be joined as parties in the resumed case (see, particularly, §§ 110 and 113 of the Austrian *Insolvenzordnung*, and Article 127 of the Japanese *Hasanhō*). 'Single track' jurisdictions, on the other hand, employ a different procedural technique by establishing a special, multi-party procedure unfolding before the insolvency court.

Once again, the divide between 'double track' and 'single track' jurisdictions does not stem from diverging policies but rather from the choice of different procedural devices.

C. Policy consistencies within the leges concursus...

The key takeaway from this brief comparative overview is that the fate of pending lawsuits on claims is closely intertwined with the structure of the process that leads to the ascertainment of the estate's liabilities. The connec-

26 From a purely domestic perspective, a joinder of the lawsuit to the verification process may sound as a form of 'double track', in that the lawsuit will not be discontinued, but rather transferred to another venue (the insolvency court), where it will continue. Viewed from a cross-border perspective, however, a law requiring a joinder to a foreign insolvency proceeding is tantamount to a provision demanding a termination of the lawsuit, being a formal transfer of the same from one jurisdiction to another clearly unconceivable.

27 See article 21(2)(2) of the *Ley de concursos y quiebras.*

28 Fabiani, p. 334.

tion between these two elements is so strong that it seems impossible to determine the outcome of lawsuits outside the proceedings independently of what occurs within. The consequences of commencing an insolvency case must differ depending on whether a venue to litigate the claims within the proceedings is provided or not.

Yet, as will be shown forthwith, Article 18 EIR, if construed literally, may have the extraordinary effect of severing two sides of the same coin by dictating that, in instances where the insolvency case and the lawsuit on the claim are pending in different jurisdictions, two different *leges concursus* will apply: that of the *forum concursus* will govern how claims are proven and ascertained by the insolvency court; that of the *forum processus* will determine whether the court in that forum will ever be allowed to issue a judgment on the merits of those claims, if seized before the insolvency cases had started.

The outcome of such a *depeçage* may not be dramatic if the two laws in question follow the same method for verifying disputed claims, as the treatment of the pending lawsuit under the insolvency law of its forum will not differ significantly from that it would face under the law of the insolvency forum. For instance, a lawsuit pending in France while the debtor party to it is made insolvent in Germany will be stayed under Article L622–22 and resumed as soon as the *Insolvenztabelle* excluding the creditor is published. Similarly, a lawsuit pending in Portugal while the debtor is adjudged bankrupt in Italy will be terminated in much the same way as if it had been pending in Italy.

In such cases, the combination of two similarly oriented insolvency laws leaves no gaps between the treatment of the lawsuit and the procedure for verifying the claim; or, in the worst scenarios, raises minor issues if such insolvency laws exhibit small differences. Problems, however, arise when the lawsuit's forum and the insolvency forum follow two different methods.

I. ... and their disruption under article 18 EIR.

1. Case A: The bankruptcy court ends up packed with litigants from the 'single track' jurisdiction

Imagine a Portuguese judge sitting in a *tribunal de comarca* learns that a *Rechtbank* in the Netherlands has recently placed a company made defendant in a case currently on her docket under the control of a *curator*. There are no questions regarding the jurisdiction of the Dutch bankruptcy court, nor does the *juíza* doubt the compatibility of the judgment opening the Dutch proceeding with Portuguese *ordre public*. Applying Article 18 EIR, the Portuguese judge will issue the judgment that Portuguese law would expect if a colleague of hers were to hand down a *sentença de declaração de insolvência*. She will, accordingly, terminate the lawsuit, inviting the parties to 'move' their dispute to the Dutch court. That would not pose a practical problem for the Portuguese plaintiff, as she could either lodge her claim using the standard form named in Article 55 EIR or ask her Portuguese lawyer to familiarise themselves with the relevant provisions of the *Faillissementswet*, as the assistance of an *Advocaat* will not be required (Article 53 EIR). This situation will align with her lawyer's expectations since the same would have happened had the defendant been made bankrupt in Portugal. Indeed, if the latter had the sense that things were not going well in the lawsuit, she might see its termination as an opportunity to refine her litigation strategy.

From the perspective of the Dutch court, however, such a turn of events may be less ideal, as it could find itself resolving disputes that, had they been pending in the Netherlands, would have remained in the original venue. If we add to this scenario the fact that the insolvent is a bank that, like many banks, was already facing a wave of litigation both domestically and abroad on the eve of its *Faillissement*, the situation for the *Rechtbank* could become overwhelming. Article 18 EIR (or, in this case, Article 32 of Directive 2001/24/EC) may have achieved its purpose of protecting the expectations of litigants, but it would do little to serve the policy of concentration underlying the Portuguese regime (as there is no insolvency proceeding going on there) and would hinder the Dutch court from achieving the simplification and swiftness that its law seeks by outsourcing sideline litigation[29].

2. Case B: Foreign litigants' broken expectations

Consider a reverse scenario: an Italian *tribunale* winds up a company that a French creditor has made defendant before a French *tribunal de commerce*.

29 *Mutatis mutandis*, case A's plot mirrors that of a couple of Italian cases adjudged by Cass., 26.9.2023, no. 2736 (in *Fall.*, 2024, p. 183 et seqq., with comment by De Cesari/Montella), and Cass. 21.6.2023, n. 17777 (in *Fall.*, 2023, p. 1359 et seqq., with comment by De Cesari/Montella) respectively. The latter is commented below in the text.

The creditor in question lodges her claim with the Italian *curatore* and then immediately resumes the French proceedings under Article L622–22 of the *Code de commerce*. Despite being duly summoned, the *curatore* is unlikely to appear before the French judge. This would result in the French court swiftly awarding the creditor a *jugement*, possibly even before the Italian *giudice delegato* has had the opportunity to examine the claim brought before him by the French claimant. The latter might even arrive at the hearing (*udienza di discussione*) with a certified copy of the *arrêt*; however, the Italian judge will likely not grant a provisional listing in the *stato passivo* based on Article 204(2)(c) CCII, as the judgment was rendered after the opening of the *liquidazione giudiziale* in a lawsuit that, under Italian law, should have been terminated and must therefore be treated as ineffective (*inopponibile*) upon the estate. Hence, the creditor will find herself defending her case again in front of the Italian court, replaying the same scenario as before the *tribunal de commerce*. However, as often happens in litigation, the creditor's fortune might take a different turn. In this case, the policy of concentration underpinning Italian insolvency law is achieved thanks to Article 18 EIR—at the expense of the rationale of Article 18 EIR itself and the expectations of the French creditor, who might have reasonably believed she would be able to complete her lawsuit before the *tribunal de commerce* and have the judgment obtained there recognised in Italy.

D. Possible fixes

I. Article 18 EIR as a conflict and (partly) substantive provision. Critique.

To resolve the conflict arising from the application of two divergent insolvency laws, some commentators argue that Article 18 of the EIR should be interpreted to align either the law of the forum processus or the law of the forum concursus with the relevant foreign law. This can be achieved either by interpreting national law considering the *effet utile* of the foreign provisions applicable under the EIR, or by characterizing Article 18 as a (partly) uniform substantive rule of insolvency law that—by virtue of the principle of *primauté communautaire*—takes precedence over conflicting national provisions.

Let us now examine these arguments in detail.

1. Arguments in favour of the alignment of the lex fori processus to the purposes of the lex fori concursus.

Some commentators argue that the lex fori processus should be applied in a way that does not undermine the objectives of the foreign insolvency proceedings. They point out that, in certain cases, insolvency proceedings that are 'equivalent' in structure and function to those opened abroad do not produce the same effects as those prescribed by the lex fori concursus for foreign insolvency proceedings. While acknowledging that under Article 18 of the EIR the effects of opening insolvency proceedings on a pending trial are determined solely by the lex fori processus, these authors nonetheless maintain that the lex fori concursus should guide its application.

By way of example, consider the interruption of proceedings (*Unterbrechung, interrupción, interruption, interruzione*). The doctrine in question notes that the reorganization of a failing firm can be structured so that divestment either mirrors that of liquidations or is mitigated to varying degrees. Consequently, if reorganization proceedings in each state result in the debtor's total divestment, proceedings pending in that state are typically halted to allow the liquidator to replace the debtor as a party. However, this may not occur under the lex fori processus, which might prescribe a more limited form of dispossession, allowing the debtor to be a party to lawsuits. Proponents of this view conclude that, in such cases, the lex fori processus should be applied with due regard to the requirements of the foreign insolvency proceedings, especially where a strict application could harm the insolvency estate.

Consider a situation in which there is a genuine risk that the debtor—who remains a party to the ongoing proceedings—might collude with a creditor and fail to mount an adequate defense, making it easier for the creditor to obtain a judgment that could then be enforced against the estate during claims' admission. In such a scenario, the preservation of the debtor's standing must be balanced by granting the curator the right to intervene (potentially by interpreting the rules on third-party intervention more flexibly). Furthermore, if proceedings are not formally interrupted, the curator should have the option of requesting a deadline extension (potentially more generously than typically allowed under the lex fori processus) to carry out any defensive actions the debtor may have—intentionally or otherwise—neglected.

Returning to the issue of coordinating pending passive litigation and verification proceedings, the thesis under consideration (taken to its logical extreme) might even suggest that courts in states following a 'single track' model should not formally conclude proceedings pending before them, as they would if insolvency proceedings had been opened in their own jurisdiction. Instead, they should allow the creditor to resume those proceedings (potentially against the liquidator), whenever the *lex fori concursus* permits such proceedings to continue in parallel with the verification of claims.

The Italian *Corte di Cassazione* adopted this approach in a case where an Italian court was asked to terminate a contract for non-performance and order the return of the price, while, at the same time, the defendant was involved in an *Insolvenzverfahren* before the *Amtsgericht* in Munich[30]. To support its decision, the Court argued that aligning the *lex fori processus* with the *lex fori concursus* is mandated by the Regulation itself. In Article 7(2)(f), the Regulation subjects the fate of 'proceedings' to the law of the opening state but qualifies this by adding 'except for pending judicial proceedings' According to the Supreme Court, this qualification is meant to allow pending proceedings to continue in accordance with the *lex fori concursus*, particularly when that law does not provide a procedure within the bankruptcy proceedings to establish claims and leaves that process to be carried out elsewhere. The Court concluded that any alternative interpretation would create a normative loophole, ultimately denying the creditor protection—whether through the concursus court or the litigation court—by preventing either from recognizing his rights due to the constraints imposed by their respective insolvency laws.

2. Theses advocating the adaptation of the lex fori concursus to the ongoing trial under the lex fori processus

Another interpretation holds that Article 18 EIR implicitly contains a rule not so much aimed at bending the *lex fori processus* to the requirements of the *lex fori concursus*, but rather at aligning the application of the latter with the fact that the *lex fori processus* permits the continuation of pending litigation. This view has emerged notably in discussions about the sensitive issues arising from the intersection of arbitration and insolvency proceedings. Two situations have been highlighted where provisions of the *lex concursus* might conflict with those of the *lex loci arbitri*, which allow for the continuation of pending arbitrations.

30 Cass. 21.6.2023, no. 17777.

The first situation concerns the rules of the lex concursus that, by regulating the impact of opening insolvency proceedings on contracts concluded by the solvent debtor, invalidate or render ineffective the arbitration agreement when insolvency proceedings are initiated. For example, this issue arose with Article 142 of the now-repealed Polish insolvency law (*Prawo upadłościowe*) during the notorious Vivendi affair[31]. It has been argued that Article 18 EIR—by referring to a lex fori processus that permits arbitration to continue even when one party is admitted into insolvency proceedings—effectively sanctions a perpetuation of arbitration (perpetuatio arbitratus). In this view, any lex concursus rules that would otherwise deprive arbitrators of their power to decide the merits (potestas iudicandi) should be disapplied[32]. Thus, Article 18 EIR would require arbitrators not to terminate the proceedings under the lex fori concursus, and it would obligate the court in the state where the seat of arbitration has been chosen (and which has jurisdiction over challenges to the award) to recognize the existence of arbitral jurisdiction.

The second situation involves the lex concursus rules that, following a 'one-track' approach, render pending trials procedurally inadmissible and their judgments unenforceable. Although the doctrine discussing these hypotheses focuses on arbitration[33], the reasoning appears applicable to state proceedings as well. According to this perspective, because many lex loci arbitri allow arbitrations to continue, Article 18 EIR would require the insolvency court to consider awards (or judgments) rendered in ongoing foreign arbitrations or trials as recognizable and enforceable against the insolvency estate. This would prevent the lex loci arbitri from being effectively rendered meaningless[34]. Proponents argue that if Article 18 EIR merely stipulated that arbitrators and local judges must conduct proceedings in accordance with their own lex processus, it would be redundant, simply restating the well-established principle that the law of the forum governs its proceedings (lex fori regit processum)[35]. Instead, they contend that the true

31 Widmann, in Int'l Lis, 2010, 135.

32 Garcimartín/ Virgós in Bork/Van Zwieten, EIR art. 18, pp. 340–341; Baccaglini, in Carratta et al.; Boggio, in Giur. it., 407 (415); Widmann, in Int'l Lis, 135 (135).

33 Baccaglini, p. 152 et seqq..; Boggio, in Giur. it., 407 (413).

34 Baccaglini, p. 156; Boggio, in Giur. it., 407 (413).

35 This principle is so well established in private international law that it remains unexpressed in most private international law legislations. Article 12 of Italian Law No. 218/1995 marks a rare exception to this state of things. See generally Garnett in Basedow et al, p. 1667 (1667); Collins, p. 203, mn 7–002.

significance of Article 18 EIR lies in addressing the different ways European jurisdictions apply the principle of formal concurrence—that is, the right of all creditors to challenge both the existence and ranking of claims[36]. In this perspective, Article 18 EIR not only guides parties and arbitrators but also directs the insolvency judge. In applying the lex fori concursus during the verification of claims (as required by Article 7(2)(g) EIR), the judge must ensure that the continuation of the process provided by the lex fori processus is not obstructed.

3. Critical considerations

These proposals have the significant merit of offering practically sensitive solutions to the misalignment between the lex fori processus and the lex fori concursus. Their value is especially evident in terms of meeting litigants' expectations, particularly in member states where a 'double track' model prevails. However, several observations are warranted.

The first thesis, which argues for adjusting the lex fori processus to serve the goals of the foreign insolvency proceedings, recognizes the need for some consistency in the effects generated by insolvency proceedings, even if the governing laws differ. Yet it remains unclear how far such adaptation can go. One must ask whether a judge in a 'single-track' forum may allow the pending trial to continue—contrary to a provision in domestic law—as the Supreme Court has suggested, and whether, conversely, a 'double-track' forum judge should close the pending trial solely because the consolidation of disputes over liabilities (as targeted by the lex fori concursus) requires it. If the answer were affirmative, one might be forced to admit that the outcome is governed by the law of the state where the insolvency proceedings were opened, which would contradict Article 18 EIR.

Some uncertainty also arises from the Supreme Court's reliance on the clause in Article 7(2)(f) that exempts 'pending judicial proceedings' from certain effects. This clause appears to link Article 7 with the exceptional provisions of Article 18 EIR—so much so that the legislator intentionally uses the term 'pending judicial proceedings' in both. Moreover, if one were to adopt this interpretation, Article 7(2)(f) would be seen not as a conflict rule but as a rule of substantive competition law, applicable mainly in jurisdictions that follow a 'single-track' method. In jurisdictions with a 'double-track' system, the 'salvation' of pending trials would not justify a

36 Baccaglini, p. 156 and p. 162.

formal closure by the forum processum judge—raising the same objection applicable to the second thesis.

Regarding the latter thesis, it is worth noting that the disapplication of the lex fori concursus rules (which impede the perpetuation of arbitration) can also be achieved by recognizing that the effectiveness of arbitration agreements already in force is governed not by Article 7(2)(e)—which renders the effects on ongoing contracts subject to the lex fori concursus—but by the lex loci arbitri. The continuation of arbitration under the lex loci arbitri implies that the underlying arbitration agreement remains effective[37].

Finally, the reconstruction that Article 18 EIR allows a contesting court to deem a foreign judgment rendered in a pending trial binding on the insolvency proceedings—thereby overriding the rule that such judgments are unenforceable—is, among the proposals considered, the one that most clearly outlines an implicit substantive as well as a conflict rule in Article 18 EIR. While the need to harmonize the differing approaches to assessing liabilities in member states is evident, concluding that Article 18 EIR requires the competition court to depart from its national law seems inconsistent with the overall scheme of the Regulation, which aims not to harmonize insolvency rights per se but to establish a coordination mechanism that permits the coexistence of different insolvency regimes[38]. One must ask whether the differences between the lex fori processus and the lex fori concursus cannot be resolved by other provisions within the Regulation.

II. A case for a narrow interpretation of 'insolvency effects' in Article 18 EIR

It is important to note that both Articles 7 and 18 EIR define only partially and somewhat flexibly the scope of the matters governed by the lex fori concursus and the lex fori processus (or lex loci arbitri), respectively. While Article 7(2) provides a (non-exhaustive) list of aspects subject to regulation by the law of the opening state, Article 18 does not clearly specify what is meant by 'the effects of the insolvency proceedings on pending proceedings.' Moreover, it is well established that conflict rules in European private international law should be interpreted not according to the national law

37 Thus Müller, in Mankowski/Müller/Schmidt, EuInsVO 2015 art. 18, mn 22.

38 See Recital 22: 'This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope throughout the Union'.

of the forum, but by understanding the terms as autonomous concepts of Union law[39].

In attempting to define the boundaries of 'effects of insolvency proceedings on pending trials,' one must consider that the commencement of insolvency proceedings can affect litigation involving the insolvent in several ways:

(a) by suspending them, primarily to allow the liquidator to substitute for the insolvent.
(b) by terminating them altogether, as seen in certain jurisdictions with passive litigation.
(c) by impacting judgments rendered by the insolvent's creditors against third parties to safeguard or restore the integrity of the debtor's assets (for instance, through common law revocatory actions).
(d) by affecting the enforceability of transactions with procedural effects (such as arbitration agreements, forum extension agreements, agreements reversing the burden of proof, or the appointment of representatives), potentially rendering them unenforceable against the insolvency administrator who takes over the insolvent's litigation.

While many of these effects can be broadly categorized as impacts 'on ongoing proceedings,' several of them are tied to specific choices made by the lex fori concursus. For example, the discontinuation of trials (point a) is typically linked to the loss of the insolvent's ability to dispose of assets and related procedural relationships—a matter addressed by the insolvency administrator's assumption of control[40]. Similarly, the fate of actions by creditors against third parties (point c) depends on the scope of the insol-

39 Thus Wessels 636; Duursma-Kepplinger in Duursma-Kepplinger/Duursma/Chalupsky EInsVO art. 15, mn 15; Dammann in Pannen EuInsVO art. 15, mn 8. The same applies to the notion of 'pendency' of litigation, a definition of which (given, however, for other purposes) could be found in Article 32 of Regulation (EU) 1215/2012, which refers, alternatively, to the date of filing of the writ of summons with the court seized, or the date of service of the writ itself, if prior to filing: thus Garcimartín/Virgós, in Bork/van Zwieten EIR art. 18, mn 18.07.

40 Fabiani, p. 329; on the subject, more extensively, Ghirga in Chiarloni, p. 7 et seqq.; Califano, p. 44 ss.; Baccaglini, in Fall., 2021, 1123 (1123 et seqq.). On the rationale of § 240 of the German *Zivilprozeßordnung* (*ZPO*), which provides for the interruption (*Unterbrechung*) of lawsuits regarding assets included in the insolvency estate, Smid, *Handbuch*, p. 157 et seqq.; Muthorst, in Bork, Hölzle, p. 405 et seqq. See also Geimer/Garbe, in Geimer/Schütze EIR art. 18 mn 3.

vency administrator's exclusive or non-exclusive authority to bring such actions on behalf of all creditors, as specified in Article 7(2)(c) EIR.

Thus, it is the role of the lex fori concursus to determine the extent to which the administrator is empowered to bring judgments and procedural remedies for the preservation of assets[41]. Meanwhile, the lex fori processus should regulate only the indirect consequences of these events—for example, whether the debtor's divestiture leads to the discontinuation of pending litigation (and, if so, under what terms and conditions the litigation may resume), or how a trial initiated by a creditor (such as an actio pauliana) should be terminated when the insolvency administrator has been granted exclusive rights to initiate actions to protect the estate.

In other words, a clear distinction must be made between the effects of insolvency on the legal status of the parties (i.e., the debtor's dispossession and the consequent rights of the creditors) and the consequences for the

41 The prevailing opinion among German-speaking scholars holds that the *locus standi* (*Prozeßführungsbefugnis*) of the insolvency practitioner is governed by the *lex fori concursus*, both in relation to new lawsuits, as well as to pending ones; as to pending lawsuits, it follows that it is up to the *lex fori concursus* to name the person entitled to resume interrupted lawsuits (i.e., the person endowed with *Wiederaufnahmebefugnis*) complying with forms and time limits set by the *lex fori processus:* Geimer/Garbe, in Geimer/Schütze EuInsVO art. 18*,* mn 3; Rugullis, p. 51–52; Schuster in Bornemann EuInsVO art. 18, mn 12 et seqq.; Eyber, in ZInsO 2009, 1231 et seqq.; Reinhart in in Stürner/Eidenmüller/Schoppmeyer IV, EuInsVO 2015 art. 18, mn 15; Dahl/Kortleben in Brinkmann, EuInsVO art. 18, mn 11; Thole in Vallender EuInsVO art. 18, mn 11. German authors interpret art. 18 EIR in line with § 352 InsO, which stipulates that upon recognition of a foreing insolvency proceeding in Germany, litigation pending in Germany is interrupted and must be resumed by the person entitled according to the foreign *lex concursus* ('*Durch die Eröffnung des ausländischen Insolvenzverfahrens wird ein Rechtsstreit unterbrochen, der zur Zeit der Eröffnung anhängig ist und die Insolvenzmasse betrifft. Die Unterbrechung dauert an, bis der Rechtsstreit von einer Person aufgenommen wird, die* nach dem Recht des Staats der Verfahrenseröffnung *zur Fortführung des Rechtsstreits berechtigt ist, oder bis das Insolvenzverfahren beendet ist*'; emphasis added).
The opinion above is not unanimous, however; a few authors maintain that the lawsuit must be resumed by those having under the *lex fori processus*: thus Wessels, p. 560 (who, however, holds the opinion that the IP's standing is, generally governed by the *lex fori concursus*); Müller, in Mankowski/Müller/Schmidt*,* EuInsVO 2015 art. 18, mn 18–19; Dammann in Pannen EuInsVO art. 15, mn 12; Undritz in Schmidt EuInsVO art. 18, mn 4; Duursma-Kepplinger, in Duursma-Kepplinger, Duursma, Chalupsky, art. 15, mn 35, reaching this conclusion on Article 21(3) (formerly Article 18(3) in Reg. 1346/2000), according to which 'In exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action', and thus the local procedural law.

procedural order, which merely reflect the changed legal circumstances. About passive litigation, its fate will depend on how creditors are allowed to have their claims verified—whether through an exclusive insolvency procedure or via another forum. The former would require the litigation to end, while the latter might allow it to continue. This distinction—between the impact on the subject matter of the claim and the procedural consequences of the change in status—appears more appropriately governed by the provisions relating to 'lodgment, verification, and admission of claims' (Article 7(2)(h) EIR). Meanwhile, the role of the forum processus judge (or arbitrator) is simply to determine how the litigation should proceed given that the creditor may or may not be able to establish his claim outside the insolvency verification process.

In this way, the coordination problem between the verification of liabilities and the pending trial finds a straightforward solution: both the fate of the pending trial and the enforceability of the substantive judgment rendered therein are governed by the same lex fori concursus, whose fundamental choices can be readily implemented. The forum processus judge's duty, then, is to observe these choices and adjust the conduct of the trial accordingly.

Furthermore, by confining the lex fori processus to the regulation of the *ordinatoria litis*—that is, procedural law alone (and not the forum's conflict law)—the application mechanism of Article 18 EIR can be simplified. Rather than seeking in one's own legal system a procedure identical to that in the foreign system (a task that can be particularly challenging in systems with numerous procedures and instruments), the judge needs only to consider the effects that the opening of insolvency proceedings produces under the lex fori concursus and to characterize those effects in the same manner as the lex fori processus determines its procedural consequences. For instance, if the lex fori concursus results in the debtor's dispossession, that event should be classified under the categories used in forum processus law to determine a party's procedural capacity following a loss of control over the rights in dispute. Examples include the 'transfer' of administrative and disposal powers over the active mass as referenced in § 80 InsO or the suspension of such powers as provided in art. 106, § 2, LC. In Italian law, these events can be readily subsumed under the concept of loss of procedural capacity (as defined, e.g., in art. 75 of the Italian code of civil procedure). This reasoning applies regardless of whether the insolvency proceeding tends toward liquidation or reorganization (via an insolvency plan), or whether the insolvency was triggered by actual or imminent insolvency. It is sufficient that the measure opening the proceedings results in the debtor's dispossession.

Such an interpretation of Article 18 EIR would ultimately narrow its scope, in keeping with the principle of strict interpretation applied to provisions that derogate from the lex fori concursus, as repeatedly emphasized by the Court of Justice. Moreover, this reading ties Article 18 back to the well-established principle that the law of the forum governs its proceedings (lex fori regit processum), thereby explaining its rationale in restating that principle rather than simply invoking the need to safeguard parties' expectations. On this point, the Regulation is somewhat contradictory: on the one hand, it requires courts to consider the expectations of third parties when identifying the debtor's COMI and the applicable lex fori concursus; on the other, it uses those same expectations to justify deviations from the lex fori concursus in specific cases.

E. Conclusions

Should the EU pass new legislation to harmonize the recognition of insolvency proceedings initiated in third countries, addressing the consequences of such recognition—in general, and specifically for lawsuits pending within the EU—will be inevitable. Although various approaches could be considered, for brevity we will focus on the two most plausible ones discussed throughout this book. One approach is to extend Article 18 of the EIR to cover the recognition of third-country insolvency proceedings; the other is to enact Article 20(a) of the MLCBI. In both cases, for reasons explained in detail above, it is advisable to carefully delineate the scope of application of the lex fori processus by distinguishing between substantive and purely procedural effects.

In the case of Article 18 of the EIR, this can be achieved without altering the provision's text, simply by interpreting the notion and scope of the 'effects of the opening of insolvency proceedings'—a concept that is inherently autonomous EU law and thus primarily falls under the jurisdiction of the EU Court of Justice. Conversely, incorporating Article 20(a) of the MLCBI into EU law will likely require some legislative refinement to link the concept of a 'stay' of actions to the appropriate procedural categories under national law. For example, §352 of the InsO refers to the 'stay' more precisely as an 'Unterbrechung.' Consequently, a directive, rather than a regulation, might be the more suitable legislative instrument for implementing the MLCBI.

Moreover, additional effects of recognition on pending lawsuits, beyond the 'stay,' will need to be addressed. As other contributors to this book have argued[42], it may be prudent to await the latest effort from UNCITRAL, that regarding the applicable law in cross-border insolvencies.

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