Reflections of the Editors

Abstract:

This part collects reflections of the editors of the book as to the major outcomes of the study. It covers all topics addressed in the book (general aspects, domestic proceedings, recognition of foreign proceedings, concurrent proceedings, overarching issues) and also takes into account the contributions of the (non-EU) authors of the book on regional or national experiences and suggestions. The reflections refrain from direct recommendations, but they certainly show some preferences or suggestions which could be used as as basis for recommendations.

Keywords: summary; EIR, UNCITRAL texts, treaties; national laws; domestic insolvency proceedings; recognition, concurrent proceedings; overarching issues; jurisdiction; conflict of laws, substantive law.

Based on the individual contributions contained in this book the editors are hereby presenting some reflections. They are grounded on the work in this project over about three years, including two project conferences, several workshops and discussions among the editors and with the steering committee. The reflections express only the views of the editors. They do not necessarily come to specific recommendations, sometimes they limit themselves to specify options which the EU legislator might exercise, explaining pros and and cons of such options and possible further consequences. When the editors felt that certain proposals might cause discussions, they also endeavoured to take possible objections into account and give them a voice within the reflectionss.

Certain elements of the conclusions are derived from recommendations formulated in individual contributions, but in some cases the editors have developed conclusions from individual papers on their own understanding of the papers or propose conclusions independently from individual papers.

Although the reflections and conclusions are mainly directed to the European Commission, they are also conceived as an analytical toolbox for UNCITRAL, giving an input into UNCITRAL's highly appreciated work in the field of cross-border insolvency. Should the EU follow the recommendations formulated in these reflections, this would lead to a significant approximation between the European Insolvency Regulation (EIR) and UNCITRAL's model laws[1] dealing with issues of cross-border insolvency. At the same time, UNCITRAL might take account of some of these reflections in its future work on cross-border insolvency regulation on a global scale.

The reflections will follow the same structure as the book in general: general issues, domestic insolvency proceedings, recognition of foreign insolvency proceedings, concurrent proceedings, overarching issues. This basically coincides with the structure of the EIR and the UNCITRAL model laws on cross-border insolvency, with the distinction between 'domestic' and 'foreign' proceedings being expressed more clearly than under the EIR and the UNCITRAL model laws. This does not lead to any basic incompatibility between these reflections and the EIR and the UNCITRAL model laws. Although there may be some overlaps between the issues addressed in different sections of the reflections, the editors have tried to limit them as far as possible.

The editors look forward to a critical analysis and evaluation of these reflections, including conclusions and recommendations.

A. General issues

The reflections distinguish between 'general' and 'overarching' issues. General issues are matters to be decided in advance of specific rules governing cross-border insolvency proceedings. By overarching issues we understand certain matters which typcically arise both in domestic proceedings, in recognition and in concurrent (parallel) proceedings and which deserve, from the editors' view, an overall analysis looking at the topic in a consolidated manner both under the perspective of domestic proceedings and of recognition and in concurrent proceedings. Some overarching issues are separately addressed in Section E. of these reflections.

1 This includes also other texts developed by UNCITRAL.

I. Should third-country relations be addressed systematically and in more detail in future EU legislation?

Insolvency cases, in particular business insolvencies, have today very often and yet growingly, relations with non-EU countries (e.g. creditors from such countries, property situated in such countries etc.). This includes, mainly in large-scale cases, concurrent insolvency proceedings in the EU and in non-EU countries. Only some EU Member States have a well-developed autonomous international insolvency law, which is applied in relation to third countries. Some of these Member States apply the rules of the EIR, though with some exceptions, even in relation to third countries. The rules of other Member States in this regard are not sufficiently clear or they do not have such rules at all. Generally speaking, there are significant differences between the Member States in terms of autonomous international insolvency law.

Therefore, the editors and, from their perception, all members of the research project underlying this publication, share the view that the EU should pass some basic common rules or at least recommendations on cross-border insolvency cooperation[2] with non-EU countries, with the view of promoting, and if necessary guiding the development of this area of the law of its Member States.

II. Which instrument(s) should be used?

It is an open and disputed question whether the EU has the legislative competence, perhaps even an exclusive competence, to regulate matters of cross-border insolvency law relating to non-EU countries. The editors refrain from taking a position on this issue, as this is more an institutional and political question than an issue of the concrete contents of such rules or recommendations. If the EU does have the legislative competence on this matter, it can in principle use all of its legal instrumentarium, in particular regulations, directives, international treaties (with non-EU countries), but it

2 This term is understood here broadly, including all matters of cross-border insolvency law relating to non-EU countries.

might also restrain itself to drafting only soft law such as recommendations, guidance documents etc.[3]

Having discussed this issue among themselves, the editors would like to point to the major options the EU has in this context.

One position would be to add a new Chapter on relations with non-EU countries to the EIR at the occasion of its next revision[4]. The advantage of this would be to have a uniform solution for all EU members rather soon, which would not hinder a reasonable degree of flexibility, e.g. by giving space for legislative action by Member States on defined issues. Another approach would be to pass a directive on this matter, which would complement the EIR and give even more flexibility to Member States. A third option would be to limit EU action to soft law, e.g. a recommendation to Member States to adopt UNCITRAL Model Laws dealing with cross-border insolvency or other recommendations. Also, treaties might be, in addition, a feasible approach in relations with some countries such as Denmark, Switzerland, EEA countries or the UK, taking inspiration from the examples of the Lugano Convention[5] or the EU-Denmark Agreement of 2005 on the extension of the Brussels I (Ia) Regulation.

Due to the importance of international insolvency law for the economy and the proper functioning of the international market, the editors believe that the EU should, even if it would not pass a legislative act on this matter, at least prepare recommendations on minimum standards that the autonomous international insolvency law of each Member State should certainly include. It would be desirable that these minimum standards reflect the most important elements of best practices.

III. The basic regulatory approach

1. EIR or UNCITRAL model laws as starting point?

In determining the content of a future instrument on cross border insolvency, the EU might choose one of two possible starting points: the one is

3 Cf. Serhii Lashyn, Soft Law's Increasing Clout, https://verfassungsblog.de/soft-law-clout/ (accessed 20.08.2025).
4 This approach is proposed by → Block-Lieb/Paulus.
5 See the CJEU's opinion 01/03 of 7 February 2006 in the Lugano Convention case, ECLI:EU:C:2006:81. Views on this issue differ.

extending the rules of the EIR to non-EU countries, and the other adopting one or several of UNCITRAL's model laws on cross-border insolvency[6]. Each approach would require adaptations to take into account specifics of relations with non-EU countries.

The editors favour an approach taking the EIR as a basis, but regulating relations with non-EU countries as far as possible in line with the UNCITRAL model laws. UNCITRAL model laws allow the enacting States to modify or leave out some of their provisions when incorporating the text of the model laws into their systems. However, in order to achieve a satisfactory degree of harmonization and certainty, UNCITRAL recommends that States make as few changes as possible. In any case, a State has a possibility to deviate from certain provisions of the model laws that are not acceptable to it and not in accordance with specific characteristics of its legal systems, legal traditions and needs. The implementation of such an approach will need to be determined when addressing specific rules.

Furthermore, if the content of a future EU instrument were to follow closely that of the UNCITRAL's model laws, differences in terminology and structure between such rules and the rest of the EIR would have to be bridged. Furthermore, some issues which are not dealt with in the UNCITRAL texts, such as direct jurisdiction and (for the time being) conflict of laws, would either have to remain unregulated or would require new, specific regulation in the revised EIR, be it in a new Chapter on relations with non-EU countries or in other Chapters of the EIR.

2. Minimum standards or best practices?

In comparison with the present state of laws, even a common minimum standard of cooperation between EU-based insolvency proceedings and third countries would be a significant progress. This could be done, e.g. by a general clause on cooperation with non-EU insolvency proceedings. However, the editors would recommend a more ambitious approach, incorporating pieces of best practices. This would create more legal security and define the framework for cooperation more concretely. Such a goal could be achieved either by employing the solutions of the EIR or the UNCITRAL model laws on cross-border insolvency as bases of references.

6 The second approach is favoured by → Block-Lieb/Paulus.

3. Sphere of application

A first important general question of any future EU legislation with regard to cross-border insolvency cooperation with non-EU countries concerns the sphere of application of any such new rules.

The editors suggest that the sphere of application should in principle coincide with the EIR in general, i.e. that it should include both business and consumer insolvencies, liquidation-oriented proceedings as well as restructuring proceedings, proceedings in which an insolvency practitioner is appointed as well as debtor-in-possession proceedings and they should include also preliminary proceedings to such proceedings.

However, the approach of the EIR to lay-down such proceedings in a binding and exhaustive annex to the EIR cannot work in relation to the incalculable number of insolvency proceedings worldwide. In order to create a degree of foreseeability, the editors propose to add a non-exhaustive and non-binding (but having presumptive effect) list of proceedings in some countries, which can be expected to be in regular insolvency-related contacts with the EU, e.g. Switzerland, the UK and the U.S. Another possible approach would be to offer an open-ended, broad definition of insolvency proceedings, akin to that of 'foreign proceeding' contained in Article 2 MLCBI, or that contained in Article 1(1) EIR, excluding the reference to Annex A. Both approaches could also be combined, e.g. by giving a broad definition, which could be specified by examples and/or by reference to Annex A of the EIR 'and equivalent proceedings in other countries'.

The editors further suggest to apply such new rules also to banking and insurance insolvencies, in so far as specific EU rules applicable to these sectors do not apply[7]. In doing so, the specific characteristic of insolvency proceedings in which the debtor is a bank or insurance company should be taken into account According to the UNCITRAL model laws such entities may be excluded from the application of these model laws. In regulation of cross-border aspects of bank liquidation, Recommendation 93–105 contained in the UNIDROIT Legislative Guide on Bank Liquidation of 2025[8] may be very useful to national lawmakers.

Within the EU, there is currently a discussion whether certain restructuring frameworks, which are not included in Annex A of the EIR (namely,

7 This is basically the approach proposed by → Pannen/Riedemann.
8 See https://unidroit.org/instruments/legislative-guide-on-bank-liquidation (accessed 26.11.2025).

those which lack the requisite of publicity, thus falling outside the scope of Article 1 EIR), should in the future be covered by the EIR or by other EU legislation[9]. While EU-based public restructuring proceedings, which were established under the EU Restructuring Directive of 2019, have been formally included in Annex A of the EIR, other proceedings with similar purposes, which may exist in the EU, are not included. This also applies to similar proceedings in non-EU countries, such as British schemes of arrangements[10]. The editors propose to wait for the further development of this discussion in the EU. To the degree to which such proceedings are included in Annex A of the EIR, equivalent proceedings in non-EU countries would also be covered by future EU rules on relations with third countries.

In some cases, such proceedings may be covered by other rules, e.g. of international company law, international contract law or rules on recognition of foreign judgments in civil and commercial matters[11]. For example, if the Brussels Ia Regulation were revised to include provisions covering such proceedings (e.g. company restructurings or non-public contractual restructurings), this might be seen as an argument not to cover such proceedings by insolvency rules. On the other hand, the possibility of an overlap of insolvency rules and general rules of judgment recognition might also be acceptable in favour of favor recognitionis. This would be in line with the MLCBI. However, it would seem premature to create specific rules for such cases in the present context.

If more clarity on this issue is wished, EU Member States might be expressly granted the right to cooperate with such foreign proceedings under autonomous rules [see infra point 5].

4. Relation with national legislation (e.g. opt-out/opt-in)

A further important aspect of any new provisions on cross-border insolvency relations with non-EU countries is the relationship between such provisions and the autonomous legislation of EU Member States.

The new provisions could be designed as exclusive or it might be provided that EU Member States retain the right to autonomous regulation if

9 As to this discussion see → Silvestri (in Part A.).

10 The cross-border dimension of the British schemes is extensively explored by → McCormack.

11 → McCormack.

this leads to more liberal cooperation with foreign proceedings than the uniform EU rules. This approach has been chosen by Art.7 MLCBI.

A further argument for this could be that some national legislations may represent a 'higher standard' of cross-border insolvency law than future EU uniform rules and that these rules are well-established in practice. The validity of such an argument depends, of course, on the content of future EU rules. If they were designed as 'minimum standards of cooperation with non-EU countries, additional and more cooperative national legislation might be even welcome. If, on the other side, the future EU rules were closely tailored after the EIR, the need for having additional autonomous rules may decrease.

Technically, the relations between common EU provisions on cross-border insolvency relations with non-EU countries and autonomous cross-border legislation of EU Member States could be regulated in different manners: by a general clause such as under Art.7 MLCBI, by more specific opt-in or opt-out clauses (e.g. Member State might permitted to opt-out of the common rules under certain conditions) or just by leaving the question open.

5. Relation with other subject areas and EU texts

Insolvency law interacts with other areas of the law in many ways. For example, cross-border insolvency law supplements or may be supplemented by more general rules of international civil procedure (including judicial assistance) or conflict of laws. The same is true for legal areas such as contract law, property law, company law, commercial law, IT law, ADR etc. This includes questions of the relation between cross-border insolvency legislation and legislation applicable to other legal areas. A much discussed example for this is the relation between the EIR and the Brussels Ia Regulation, which are understood by the CJEU to be complementary and not overlapping. This topic will also come-up in insolvency cases related to non-EU countries, e.g. when an avoidance judgment is rendered in a non-EU country and is claimed to be recognized in an EU-based insolvency proceeding. Should such recognition be governed by cross-border insolvency rules or by general rules on recognition of foreign judgments?

The editors would recommend to leave this topic in principle open (as it also currently is under the EIR generally), although particular constellations, such as recognition of foreign insolvency-related judgments, might be addressed by specific rules.

6. Role of 'principles of international insolvency law'

Academic discussion on cross-border insolvency law has long centered around so-called principles of international insolvency law[12]. Usually, two supposedly opposite pairs of such principles are mentioned: the principle of universality versus the principle of territoriality (of insolvency proceedings) and the principle of unity versus the principle of plurality (of insolvency proceedings). Though such principles have a value for academic discussion, they leave much room for interpretation and have rarely been used in pure form in legislative and judicial practice. In this context, new terms have been developed such as 'modified universalism', etc.

The EIR does not refer in its provisions or in the preamble to these principles, though some of its provisions can be seen as a concrete form of using them (e.g. the 'universal scope' of COMI-based insolvency proceedings, the 'territorial scope' of non-COMI proceedings, the possible 'plurality' of 'main insolvency proceedings and 'secondary insolvency proceedings within the EU).

The editors do not regard it as necessary to define or use such principles in a general manner in the context of any future EU legislation or recommendations on cross-border insolvency relations with non-EU countries. However, the said principles and their legislative purposes can – also in the context of relations with non-EU countries – be useful for the development of concrete provisions on cross-border insolvencies.

7. Universal/territorial scope

A basic distinction is made both in the EIR and in UNCITRAL's MLCBI between 'universal' and 'territorial' insolvency proceedings (see, e.g. EIR Recital 23 and Art. 3 (2) 2 EIR). The distinction is made according to whether insolvency proceedings should cover only debtor's property[13] situated in the State of the proceeding (*forum concursus*) or also property situated abroad. The distinction plays a role both from the perspective of domestic proceedings and from the perspective of recognition of foreign

12 They are summarized in the contribution of → Elina Moustaira.

13 This can be seen as a *pars pro toto* formula meaning that the effects of the COMI-based proceeding are generally universal/extraterritorial, e.g. prohibitions under the applicable insolvency law extend also to acts done in foreign States, the insolvency practitioner may also act abroad, etc.

proceedings and in the context of concurrent proceedings. However, in all these constellations the legal treatment of issues of universality or territoriality of insolvency proceedings needs a specific analysis[14].

The terms 'universality' and 'territoriality' in cross-border insolvency are not free from ambiguity. Although they are defined both in the EIR and in the MLCBI by reference to the location of assets belonging to the debtor[15], this does not mean that a 'territorial' insolvency proceeding has no extraterritorial (universal) effect at all. For example, even in a territorial insolvency proceeding acts of the debtor committed abroad are covered by the avoidance rules of the territorial proceeding if they relate to 'domestic' assets. Going further, even acts may be covered which do not relate to assets, e.g. sham recognition of certain creditor claim by the insolvent debtor. Although such questions are of theoretical interest, they have not led to significant practical difficulties and therefore do not require specific legislative solution.

Under the EIR, COMI-based proceedings are given universal reach, while non-COMI proceedings are defined as territorial. In contrast, UNCITRAL adopts a neutral stance to this regard. While the MLCBI accepts the distinction between (COMI-based) main proceedings and other (non-main) proceedings, it is basically – with some exceptions[16] – silent as to whether such proceedings have universal or only territorial reach, but instead accepts that some legal systems extend the reach of the non-main proceedings opened under their laws to assets abroad.

The editors propose to adopt a basically flexible position as to the universal or territorial scope of insolvency proceedings in relations with non-EU countries. The current rules of the EIR could insofar be used as a starting-point also in relations with non-EU countries. Thus, EU-based COMI proceedings should cover also property abroad[17], and EU-based non-COMI proceedings should in principle have only territorial reach.

However, in relations with non-EU countries some additional flexibility may be useful.

For example, in cases where COMI is outside the EU, a non-COMI proceeding opened in the EU on a jurisdictional ground such as the registered seat (see below, II.2.a) might be given universal reach under certain cir-

14 This will be addressed in more detail infra in the specific procedural contexts.
15 Art.3 (2) sentence 2 EIR, Art.28 MLCBI.
16 See, in particular, Art.28 (1) MLCBI for concurrent non-main [EIR terminology: secondary] proceedings.
17 This is true already under the present version of the EIR, cf. EIR Recital 23.

cumstances, e.g. if in the COMI-State no insolvency proceeding is opened or if it is not given extraterritorial effects under its own lex concursus.

A similar approach might be chosen for the recognition of foreign insolvencies opened on a jurisdictional ground such as the registered seat which is basically similar to COMI, even if technically COMI is situated in a third country. Details of this need however to be addressed in specific contexts and may sometimes require negotiation between the participants with court approval.

8. Location of assets

An issue which comes up mainly in the context of determining the borderlines of a 'territorial' insolvency proceeding, but can play a role also in other contexts (e.g. jurisdiction, conflict of laws, concurrent proceedings) is the location of assets. For example, in order to delimitate the insolvency estates in various insolvency proceedings simultaneously conducted against the same debtor, it is necessary to provide rules on how to localise objects, things, rights so as to make it easier to determine by which proceeding they are (or should be) covered. Most of the rules on localization of debtor's assets, that are contained in Article 2(9)(i-viii) EIR, could be followed also in autonomous international insolvency law, including any modification that the EU might consider as to the criteria for localizing untangible assets that are presently not listed in Article 2 (such as cryptocurrencies and non-fungible tokens). The MLCBI does not contain such rules.

9. Distinction between main and non-main (insolvency) proceedings with subgroups

Following the approaches both of the EIR and of the UNCITRAL model laws on cross-border insolvency, the editors propose to keep also in relations with non-EU countries the distinction between main and non-main (insolvency) proceedings.

However, the editors propose to give some flexibility to these terms in relations with non-EU countries. In inner-EU relations, it can be well justified that the debtor's COMI is the decisive jurisdictional factor, determining whether a proceeding is a main proceeding, having universal scope and some guiding function also for concurrent proceedings. In relations with non-EU countries, some additional flexibility would be useful. For example, there may be a foreign insolvency proceeding opened at the debtor's place of registration, which is recognized in numerous countries including the debtor's COMI country. It would seem overly dogmatic to recognize such a proceeding in the EU only as a non-main proceeding with territorial effect. Therefore, the notion of 'main proceeding' should (in particular in cases when the debtor's COMI is located outside EU) be given a degree of flexibility. For example, courts of concurrent proceedings or the insolvency practitioners with court approval might agree on which court should take the role of 'main proceeding' and what effects this entails. As this topic will mainly arise in cases of concurrent proceedings, this issue might be addressed only in this context.

1. Role of discretion
   The EIR contains today only clear-cut, non-discretionary rules on jurisdiction, conflict of laws, recognition, concurrent proceedings and and various issues of substantive law. However, its provisions include judicial assessment at different places, e.g. in the determination of COMI. In addition, discretionary elements may come in through subsidiarily applicable autonomous law. Also, insolvency practitioners typically have a broad range of discretion in the exercise of their powers.
   In contrast, the MLCBI, following the Common Law tradition, grants the insolvency courts discretion at several places, including – arguably – the determination of applicable law[18].
   The editors propose that, in relations with non-EU insolvencies, the EU Member States should have the opportunity to decide independently how much discretion they will give their courts when dealing with cross-border insolvency proceedings. The rules on court discretion may resemble the rules of the MLCBI on this issue. Nevertheless, it should be kept in mind that overly broad court discretion may undermine legal predictability and legal certainty. Therefore the court discretion should be specified in concrete rules,e.g. prerequisites of exercise of discretion, content of possible decisions of cooperation. This is especially true when

18 Cf. Art. 21, 22 and 25, 26 MLCBI. Under these rules, the court 'may' (i.e. is not obliged, but has the power to) render a decision on a balancing basis, i.e. grant or deny 'appropriate' relief. In civil law countries, courts only rarely have the power to render decisions on a discretionary basis, the focus is more on clear-cut procedural rules (e.g. on recognition of foreign decisions and legal effects given to such decisions under applicable law using purely legal standards). Exercising discretion in cross-border insolvency cases may sometime be difficult for courts in some countries and can lead to unreasonable results.

the Member State regulating its autonomous insolvency law belongs to the group of Civil Law systems.

B. Domestic proceedings[19]

I. The category of domestic (insolvency) proceedings

Like the book as a whole, these conclusions use the term of 'domestic (insolvency) proceedings' as a category of our analysis. The term is grounded on the existence of national states as organizers of insolvency proceedings, which will then – as the case may be – have to be coordinated or cooperate with 'foreign (insolvency) proceedings. The category of domestic proceedings, and their distinction from foreign proceedings, underlies also the various national insolvency laws. The EIR, in its endeavour to create common rules for EU-based domestic proceedings and recognition of proceedings opened in other EU countries, does not formally use the category of domestic proceeding, but collects provisions on domestic and foreign proceedings in its general Chapter I. For the purposes of this book, and for the conclusions, this pecularity of the EIR is of no relevance.

It is a matter of legislative technicality whether some of the proposed rules on insolvency proceedings in relations with non-EU countries should be included in Chapter I of the EIR or in a separate new Chapter of the EIR, if the EU were to adopt such an approach in recognizing of the legal effects of insolvency proceedings opened in third countries For example, if the EU were to create some specific jurisdictional rules for cases in which the debtor's COMI is located outside the EU, these rules could be implanted in Art.3 EIR or, alternatively, in a separate new Chapter of the EIR.

19 For more on this topic in general see → Trunk (Domestic proceedings).

II. Jurisdiction

1. Main proceedings: COMI or more open?

As the concept of COMI has today come to be accepted globally as a reasonable jurisdictional standard for main[20] (and universal) insolvency proceedings[21], the EIR should keep to this standard also in cases when the debtor's COMI is located outside the EU.

However, even if this standard is used, there may be cases of positive or negative conflicts of jurisdiction.

For example, when both an EU Member State and a third country regard themselves as the place of the debtor's COMI, a positive conflict may arise.

A negative conflict, on the other hand, might arise if (as it is still the case of many legal systems worldwide) diverging criteria are adopted as exclusive direct jurisdictional bases. For example, State A might base its direct international jurisdiction solely on the registered seat of a company, while State B only adopts COMI as jurisdictional criterion. In a case where a company has its registered seat in State B, but its COMI in State A. neither A nor B would be entitled, under their respective laws, to open an insolvency proceeding.

Conflicts of jurisdiction can be tackled in different ways (see infra, at c).

The issue whether insolvency proceedings should be given extraterritorial effects or not is addressed above (I.8).

2. Non-main proceedings

Outside the sphere of application the EIR, there is today a significant divergence between the EU Member States as to the jurisidictional grounds for non-main (non-COMI) insolvency proceedings[22].

20 Strictly speaking, the term 'main' proceeding as opposed to 'non-main' proceedings implies the existence of concurrent proceedings. It is, however, common to use this term also for isolated 'main' proceedings.

21 Even in jurisdictions where legislation do not explicity set out COMI as a jurisdictional basis, caselaw related to COMI is often treated as a reference: see e.g. Russia, as illustrated by → Yarkov/Baldanov.

22 When such proceedings are conducted concurrently with a 'main' proceeding, there are termed by the EIR 'secondary' proceedings. However, non-main proceedings can be opened also as isolated proceedings, without any concurrent proceedings.

The editors recommend insofar to accept as a jurisdictional ground when the debtor's COMI is located outside the EU, the existence of an establishment in the EU (such as under Art.3 (2) EIR) and/or the location of assets, so that different functions, such as supportive, protective and auxiliary function, which non-main proceedings may have, can be realised.[23] If direct international jurisdiction for opening a domestic non-main insolvency proceeding is based solely on the existence of assets of a foreign insolvent debtor, and not on the presence of an establishment in the territory of the Member States, additional conditions could be envisaged for opening such a non-main insolvency proceeding in the Member State, for example, that a creditor, who requests the opening of such proceedings, would not be able to realize its claim in the foreign main insolvency proceeding which has been opened in the third country.

In addition, jurisdiction on the basis of significant contacts of the debtor with the EU should be added. This would contribute to making the EU an attractive forum for corporate restructurings.

3. Specific issue: Positive and negative conflicts of jurisdiction

The EU should address the issue of positive and negative conflicts of jurisdiction in a practical manner, with the purpose of avoiding them, or finding another solution by substantive rules. The EIR does not presently address conflicts of jurisdiction between two main proceedings, as it supposes that there is only one COMI and the first EU proceedings based on COMI is recognized in all other EIR Member States. On the other hand, the rules of the EIR on coordination and cooperation between the main proceeding and secondary proceedings allow for such parallel proceedings, but give the main proceeding a coordinating function.

In relations with non-EU countries this system cannot work properly as EU-based main insolvency proceedings are not necessarily recognized worldwide and there may be proceedings in non-EU countries, which regard themselves as main proceedings (and are perhaps even recognized as such in other countries), although their jurisdiction is not based on

23 In the autonomous International Insolvency Law, the possibility of opening non-main insolvency proceedings based solely on the existence of assets of a foreign debtor in the domestic territory is provided, for example, in Section 354(1) and Section 356(1), first sentence, of the German Insolvency Code (Insolvenzordnung), as well as in Article 393(2) of the Croatian Bankruptcy Act.

COMI as defined under the EIR. In such cases there may be a positive conflict between a EU-based main proceeding and a third country proceeding, which also claims to be the main proceeding. One option would be to try to solve the conflict by rules of jurisdiction and recognition. Another would be to apply the general rule on coordination and cooperation between parallel proceedings also to such situations.

Generally speaking, as positive conflicts will mainly become practical in cases of concurrent proceedings, they should be addressed in that context.

To avoid negative conflicts, granting some flexibility (in cases when COMI is outside the EU) would seem to be a reasonable approach. This should include a cautious enlargement of the basis of jurisdiction for main proceedings beyond COMI (if COMI is not in the EU)[24] and should be complemented with the general rule on coordination and cooperation with foreign proceedings. Negative conflicts involving non-main insolvency proceedings will practically not arise if the grounds for non-main jurisdiction are enlarged in the way proposed supra at 2..

III. Conflict of laws[25]

1. Overarching rules or separate rules for domestic and foreign proceedings?

The EIR regulates conflict of laws in its Chapter I as an overarching issue, applying both to domestic proceedings and to recognition of foreign proceedings. This fits inner-EU relations where all EU Member States have to apply the same conflicts rules. In relations with non-EU countries, however, this approach would not work as courts in non-EU countries apply their own conflicts rules, and it would not be adequate to apply to such foreign proceedings all the very specific EIR's conflict of laws rules. Therefore, in these reflections and the book in general, conflict of laws is dealt with separately in the context of domestic proceedings and recognition of foreign

24 See supra at 1..

25 Issues of conflict of laws arise in all constellations of cross-border insolvency law and will there also be addressed in Part V.1. of these reflections as an overarching matter. Specifics of conflict of laws in the domestic proceeding context will, however, be discussed here.

proceedings. This is also the approach of the planned new UNCITRAL Model Law on applicable law in insolvency proceedings.

2. Basic conflicts rule: lex fori concursus

The basic conflicts rule in cross-border insolvency law (Art. 7 (1) EIR) – applicability of the *lex fori concursus* – is worldwide accepted as adequate and needs no change in relations with non-EU countries. This is also true for the enumeration (characterization) of issues falling under this conflicts rule (Art.7 (2) EIR).

The UNCITRAL Legislative Guide on Insolvency Law also establishes the applicability of the *lex fori concursus* as the basic rule in cases of cross-border insolvency proceedings (Recommendation No. 31).

The general applicability of the law of the state opening the insolvency proceedings is also the starting point of the draft Model Law on Applicable Law in Insolvency Proceedings being prepared by UNCITRAL's Working Group V on Insolvency Law (Article 6).[26]

3. Special conflict rules (including mixed conflicts-substantive rules)

The EIR contains a number of specific conflicts rules dealing with third parties' rights in rem, set-off, reservation of title, contracts relating to immoveable property, payment systems and financial markets, contracts of employment, rights subject to registration, European patents with unitary effect and Community trade marks, detrimental acts, protection of third-party purchasers and the effects of insolvency proceedings on pending lawsuits or arbitral proceedings (cf. Art. 8 – 18 EIR). They usually refer only to the law of EU Member States[27], though two provisions (Art.9 EIR on set-off and Art.18 on third-party purchasers) do not contain this limitation being grounded on general considerations of good-faith protection.

The UNCITRAL Legislative Guide on Insolvency Law also contains certain exceptions to the application of the *lex fori concursus*. They relate

26 See UNCITRAL Draft Model Law on Applicable Law in Insolvency Proceedings as prepared by the Secretariat for the WG V session of 13-17 April 2026, https://docs.un.org/en/A/CN.9/WG.V/WP.207 (accessed 27.05.2026).

27 See. Art.11 – 14, 16 and 18 EIR. The underlying idea is mainly to protect inner-EU protection policies (employment contracts the EU real estate market and EU-based payment systems and financial markets).

to numerous aspects such as the effects of insolvency proceedings on the rights and obligations of the participants in a payment or settlement system or in a regulated financial market (Recommendation No. 32) as well as on rejection, continuation and modification of labour contracts (Recommendation No. 33).

A somewhat larger number of derogations from the application of the *lex fori concursus* – though fewer than under the EIR – are set forth in the UNCITRAL draft Model Law on Applicable Law in Insolvency Proceedings. They cover, namely, avoidance actions (Article 6(g) in conjunction with Article 7(1)); set-off (Art.6(i) in conjunction with Article 7(2)); rights in rem (Article 6(j) in conjunction with Article 7(3)); litigation and arbitration (Article 6 in conjunction with Article 7 (3)[28]); labour contracts and relationships (Article 9(1)); rights and obligations of participants in a payment, clearing or settlement systems, and in regulated financial market or multilateral trading facilities (Article 9(2)): the operation of close-out netting arrangements in relation to certain financial operations (Article 9(3)). On the other side, these derogations are 'universal' in the sense that they do not contain a limitation to the lex fori concursus or to particular foreign countries.

As to relations with non-EU countries, one option might be to 'universalise' the special conflicts rules, e.g. apply them also to the law of non-EU countries[29]. Another option would be to leave them as they are. This would give greater weight to the lex fori concursus and leave the defense of certain protective policies to the respective non-EU countries, e.g the forum rei sitae or to non-EU fora for employment disputes. A third option might be to align future EU conflicts rules on insolvency matters with the forthcoming UNCITRAL Model Law on Applicable Law in Insolvency Proceedings, possibly retaining some conflicts rules with a limitation to the law of EU Member States where a particular strong interest to provide for 'local' (inner-EU) protection is seen.

It is not the purpose of this book and its conclusions to discuss whether these rules seem adequate for inner-EU relations.

Some of the EIR's special conflict of laws provisions, e.g. Art.16 EIR on detrimental acts, combine statements on the applicable law with substantive components (e.g. limiting the rules to objects situated in the EU or exclud-

28 Probably to be shifted to the Chapter on Recognition.
29 This is proposed by → Fabriès-Lecea.

ing any effect of insolvency law on certain objects)[30]. Art.8 EIR (third parties‘ rights in rem), Art. 10 (retention of title) and Art.15 (European patents with unitary effect and Community trade marks) do not even contain any explicit conflicts rule. In particular, they do not provide for special conflict of laws rules deviating from the lex fori concursus but limit themselves to a particular substantive solution. However, non-insolvency aspects in these cases (e.g. the existence of a certain right in rem) are implicitly governed by applicable non-insolvency conflicts rules.

In so far as these rules apply only to objects located in the EU (limiting the specific conflicts rules to such objects), they should in any case not be extended in relation with non-EU countries to objects located outside the EU. The specific territorial limitations contained in some provisions of Art.8 – 18 EIR are grounded on particular policies of protection in the EU context. In relations with non-EU countries the general conflicts rule of *lex fori concursus* is preferable, provided that insolvency administrators or other participants may agree that another law should apply, if the lex concursus allows such carve-outs

For the sake of legal predictability and legal certainty, autonomous international insolvency law should contain an explicit (combined conflicts and substantive) rule on whether foreign creditors with public claims (foreign tax and social security claims) may file such claims in domestic insolvency proceedings, and if so, in which order of priority they will be satisfied (payment rank).

Generally, the editors recommend to harmonize the specific conflicts rules of the EIR with the (future) conflict of laws rules, which are currently developed by UNCITRAL in its Draft Model Law on Applicable Law in Insolvency Proceedings

In view of the large diversity of case situations in insolvency matters, the EU should introduce an escape clause on conflict of laws in insolvency similar to Art.4 (3) Rome I Regulation or Art.4 (3) Rome II Regulation, allowing the judge to apply exceptionally the law of the State to which the case is significantly more closely connected instead of the lex fori concursus or any other law indicated as applicable. Escape clauses of this kind are not uncommon in private international law in general. They are particularly helpful where the general conflicts rules are very broad and simple, such as the lex rei sitae, the lex loci delicti or – in the insolvency context – the lex fori concursus. The same may be said, more specifically, for the

30 As to Art.16 EIR see → Mangano.

rule on the law applicable to the avoidance of transactions, where the large variety of situations of avoidance has led the drafters of the EIR to a complicated cumulative rule (Art.16 EIR) which has been criticized by numerous authors and will foreseeably not be adopted by UNCITRAL in its future instrument on conflict of laws in insolvency proceedings. The existence of such an escape clause would align the conflict of laws rules of the EIR with other EU legislation on conflicts of laws. It would not shake legal security as the largely missing practice on the escape clause in the Rome I and Rome II Regulations shows. However, it would fulfil a helpful security function towards very broad general conflicts rules.

Following the general approach of EU conflict of laws regulation, a renvoi should not be admitted.

C. Recognition of foreign insolvency proceedings[31]

I. The category of recognition of foreign insolvency proceedings

Both the EIR and the MLCBI use the category of 'recognition of foreign insolvency proceedings', but they define the concept of recognition differently. The EIR focuses on recognition of foreign court decisions (indirectly also recognition of the foreign proceeding), while the MLCBI relates recognition to foreign 'proceedings' in general. The EIR approach is primarily rules-based (conflict of laws rules, substantive rules etc.), while the MLCBI gives more room to judicial discretion. However, both the EIR and the MLCBI share the same purpose: developing adequate rules for cross-border insolvency including international cooperation in this field. Despite the different dogmatic bases for recognition in the EIR and the MLCBI, the results are (or can be) quite similar.

The fact that some EU Member States have adopted the MLCBI for relations with non-EU countries shows that both approaches can be combined, though certain adaptations may be recommendable[32].

For reasons of internal consistency, the editors propose that the EU should also for recognition of non-EU insolvencies use the dogmatic approach established under the present EIR, but modify it taking into account

31 For more on this topic in general see → Trunk/Silvestri (Recognition).

32 A notable combination of the two approaches is contained in the OHADA Uniform Insolvency Act illustrated by → Leno.

particularities of relations with non-EU countries. In this context, inspiration should also be taken from the MLCBI and the other UNCITRAL texts on cross-border insolvency law.[33]

II. Prerequisites

Both the EIR and the MLCBI list the following prerequisites for recognition of foreign insolvencies[34]: a)the object of recognition must be a foreign insolvency-type court decision (EIR[35]) or a foreign insolvency proceeding (MLCBI[36]); b)the foreign court must have (indirect) jurisdiction[37]; c) recognition must not contradict public policy[38].

1. General remark

The editors are of the view that these criteria also fit for future EU rules on recognition of non-EU insolvencies.

a) Linking recognition for foreign court decisions gives a clear determination of the object of recognition. This approach has proved its functionablity in the EU and also fits for relations with non-EU countries. It does not exclude necessary flexibility.
b) Indirect jurisdiction (jurisdiction for recognition purposes) can be defined either by referring to rules of direct jurisdiction per analogiam ('mirror principle'), or by setting forth an autonomous criterion. The editors would recommend a combined approach: the mirror principle

33 In addition to UNCITRAL Model Law on Cross-Border Insolvency see: UNCITRAL Legislative Guide on Insolvency Law, Part 1 and 2 (2004), Part 3 (2010), Part 4 (2013, 2019) and Part 5 (2021); UNCITRAL Model Law on Enterprise Group Insolvency (2019); UNCITRAL Model law on Recognition and Enforcement of Insolvency-Related Judgments (2018). All of the aforementioned texts are available on the UNCITRAL website: https://uncitral.un.org/en/texts/insolvency (accessed 15.10.2025).
34 For more details → Trunk/Silvestri.
35 Art.19, 20, 32 EIR.
36 Art.15 (1)., 17 (1) (a) MLCBI.
37 Art.19 (1) EIR, Art.17 (2) MLCBI. However, according to the jurisprudence of the CJEU indirect jurisdiction is not scrutinized in the recognition stage in relations between EU Member States.
38 Art. 33 EIR and Art.6 MLCBI.

as a basis (i.e. COMI and/or additional criteria such as establishment, assets, or any significant contact with the foreign forum concursus[39]). In addition, recognition of foreign main proceedings should also be made possible in cases of '[COMI or] equivalent contacts' with the foreign forum concursus[40]. This would typically include foreign proceedings opened on the basis e.g. of the debtor's place of registration, seat or domicile, but would still give the recognizing court a power of assessment about 'equivalence with COMI' in the particular case. This would be particularly relevant in a situation where the law of a non-EU country, whose court has opened the main insolvency proceeding based on the registered seat of the debtor, does not formally contain COMI as a criterion for opening the main insolvency proceeding, although in substance the COMI is actually in the particular case located in that country. It should be borne in mind that only the state with the closest connection to the insolvent debtor should have international jurisdiction to open the main insolvency proceeding.

c) Public policy is a well-established criterion (exception) in cross-border insolvency law, in line with general international civil procedure and private international law (Art. 33 EIR, Art. 6 MLCBI).

2. Further considerations

The editors also discussed whether it should be recommended to add another prerequisite for recognition addressing concurrent insolvency proceedings. As there are detailed special rules both in the EIR and the MLCBI dealing with concurrent proceedings[41], it may be argued that there is no need to address this issue explicitly among the prerequisites of recognition[42]. On the other hand, it may be argued that the approach taken by the EIR's provisions on secondary proceedings (concurrent main and non-main proceedings) cannot be taken for granted in relations with non-EU countries and there is a need for clarification at least for the situation of two proceedings which claim to be main (universal) proceedings. If one follows this idea, an obstacle to recognizing a foreign decision to open main

39 See supra at B.II.1 and 2..

40 As to the challenges foreign courts may face even when they use the COMI concept see → Galdino/Garcia.

41 Art.34 – 52 EIR, Art.28 – 32 MLCBI.

42 Art.34 EIR explicitly states that (recognition of) a foreign main proceeding does not hinder the opening of a local non-main (secondary) proceeding.

insolvency proceedings from State A might be the fact that the court of State B, where recognition is sought, has already opened a main insolvency proceeding against the same debtor, or has previously recognized a decision to open a main insolvency proceeding against the same debtor issued in a third state, State C.

To clarify this, the EU legislator might explicitly regulate the situation where the main insolvency proceedings are first opened in a non-EU country, and subsequently main insolvency proceedings against the same debtor are opened in an EU Member State. Namely, if an EU Member State has already recognized a foreign decision to open main insolvency proceedings from a non-EU country, and subsequently main insolvency proceedings against the same debtor are opened in another EU Member State, a problem may arise, given that Member States are obliged to automatically recognize decisions opening insolvency proceedings issued in other Member States (Art. 19 (1) EIR), without being authorized to review the international jurisdiction of the court of the Member State that opened the insolvency proceedings (see Article 5 (1) EIR).[43]

It should also be mentioned that the EIR, in addition, explicitly demands as a prerequisite for recognition that the foreign judgment opening an insolvency proceeding is effective in the State of the opening of proceedings (Art. 19 (1) EIR). The MLCBI does not contain such an explicit requirement. By its very nature, the recognition of a foreign decision in another state may only occur if the decision also has legal effects in the state where it was issued. It may be left to the discretion of EU Member States whether to explicitly refer to the effectiveness of a foreign decision opening insolvency proceedings as a prerequisite for recognition under their autonomous international insolvency law. In any case, in order to protect insolvent assets, it would not be desirable to require the finality (*Rechtskraft, res iudicata*) of a foreign decision opening insolvency proceeding. There is no necessity for adding a requirement of reciprocity, which would only run counter to the purpose of supporting an efficient and fair solution to the insolvency situation[44]. Namely, establishing the existence of reciprocity is not easy; it can require a lot of time and incur additional costs, as the court of

43 See CJEU, judgment of 24.3.2022, case C-723/20, ECLI:EU:C:2022:209 – Galapagos BidCo. Sàrl. See also the contribution by → Piekenbrock.

44 This conclusion can also be drawn from the contribution of → Boraine on the cross-border insolvency law of South Africa.

the recognizing state usually has to engage an expert witness[45]. Moreover, the requirement of reciprocity does not support the principle of equal treatment of all creditors in insolvency proceedings. An increasing number of countries allow the recognition of foreign insolvency proceedings, and openness to cooperation in cases of cross-border insolvency is a much more appropriate legislative solution than formally imposing restrictions through the requirement of reciprocity when recognizing foreign insolvency proceedings.

III. Procedure for recognition

The EIR does not, at present, provide for a particular proceeding for recognition of foreign insolvencies, but is based on the principle of 'automatic recognition' (cf. Art. 19 and 20 EIR). In contrast, the MLCBI requires for 'full' recognition the successful carrying-through of a particular proceeding ('proceeding for recognition').

The principle (or system) of automatic recognition of a foreign decision opening insolvency proceedings may be acceptable between countries whose insolvency law regimes do not differ significantly.[46] However, at the present time, we cannot say that there is harmonization of insolvency law at the global level. Having this in mind as well as the fact that the dominant choice-of-law rule concerning international insolvency is application of the *lex fori concursus*, when regulating autonomous international insolvency law, it seems desirable that the legal effects of a foreign decision opening insolvency proceedings be examined from the standpoint of contrariety to the public policy of the state of recognition. It is also desirable to examine whether the court that opened insolvency proceedings has international jurisdiction, as this has a direct impact on the applicable law, and is thus tied to legal predictability and the legal certainty of an insolvent debtor's creditors. A drawback of the formal recognition system for foreign decisions opening insolvency proceedings is that it potentially allows for abuse by the debtor during the period between the opening of insolvency proceedings in one state and the recognition of that decision in another state. However, this drawback can be mitigated by the possibility for the court

45 As shown by the Chinese practice with Article 5 of the Chinese Entreprise Bankruptcy Law illustrated by → Shi/Yan.

46 Thus → Kodek.

of the recognizing state—where assets belonging to the foreign debtor are located—to impose interim measures for the protection of those assets in the period between the filling of an application for recognition and recognition itself, as well as by the potential retroactive effects of recognition concerning the debtor's dispositions during the period between opening of foreign insolvency proceedings and its recognition by the domestic court. A careful creation of provisions regulating formal recognition proceedings is required.

The rules on the formal recognition of foreign decisions opening insolvency proceedings contained in the UNCITRAL Model Law on Cross-Border Insolvency[47] may serve as a starting point. However, especially in the case of countries belonging to the civil law system, it is desirable that this procedure be further clarified. For example, not only a foreign representative, but also creditors as well as the insolvent debtor should be authorized to file an application for recognition. An application for recognition should be published, in order to inform creditors about the existence of a formal recognition proceeding. Rules should explicitly determine which courts have subject-matter jurisdiction over recognition proceedings. Designated courts should be those which are otherwise competent for domestic insolvency proceedings, and are familiar with the subject. It should be prescribed in advance who is authorised to participate in a recognition proceeding. In principle, this should include all those whose rights are affected by a decision on (non-)recognition. It is sufficient for the participants in the proceedings to be given an opportunity to declare in writing their position regarding recognition. Courts should also be empowered to hear persons who have declared themselves in writing as being against recognition. However, the time limit for a written declaration should be a short one. The authority of the court to grant a relief upon application for recognition of a foreign proceeding in order to protect the insolvency estate (see Art. 19 and 22 MLCBI) and a relief upon its recognition (see Art. 21 and 22 MLCBI) could be regulated in more details, to ensure legal predictability and certainty. It shoud be clear what are the legal consequences of recognition, which can be different, depending on whether, as a result of recognition, secondary insolvency proceedings have been opened in the recognizing state or not. A court decision on recognition or non-recognition of a foreign decision opening insolvency proceedings

47 Art. 15–24 MLCBI.

must have an effect *erga omnes*[48]. At the same time, it should contain an enforceability clause against the insolvent debtor. The recognition of a foreign decision opening insolvency proceedings should not automatically entail opening of a domestic secondary insolvency proceeding. Such a solution is impractical in cases where there are insufficient assets to carry out such proceedings in the state of recognition, or where there are no creditors to be protected by opening such proceedings. Therefore, the opening of domestic secondary insolvency proceedings should depend on the specific circumstances of the case. However, if in a particular case it is necessary to open secondary insolvency proceedings, the request for their opening should be made within the recognition procedure of the foreign decision opening the main insolvency proceedings. The recognizing court should then decide on this matter within the same decision by which it recognizes the foreign decision opening the main insolvency proceeding. Namely, if the rules foresee that secondary insolvency proceedings against the same debtor in the recognizing state may be opened at any time after recognition of the main insolvency proceedings (see Art. 28 MLCBI), a 'change of statutes' (change of applicable law) would occur with respect to the debtor's assets contained in the insolvency estate in the state of recognition, since, instead of the previous *foreign lex fori concursus*, the *domestic lex fori concursus* would now be valid for these assets after the opening of secondary proceedings. The legal possibility of the opening of secondary insolvency proceedings at any time after the recognition of foreign decision opening main insolvency proceedings raises many issues that have so far not been addressed by either the EIR or the MLCBI, nor by national legislators whose legal systems contain such possibility. The decision on recognition or non-recognition of a foreign decision opening an insolvency proceeding should be published. A legal remedy against decisions on recognition or non-recognition should be also prescribed, but it should not have an effect of suspension. The issue of bearing the costs of formal recognition proceedings should also be expressly regulated. In any case the rules regulating formal recognition proceeding should ensure that the procedure can be conducted expeditiously, avoiding undue delays that serve no legitimate purposes.

48 As to the question whether such formal recognition should be given intra-EU (cross-EU) effect see infra at IV.2.c).

Some EU Member States, e.g. Croatia[49], have developed in their autonomous International Insolvency Law a combined model: a) as a rule formal recognition proceeding with publicity and with *erga omnes* effects and b) possibility of incidental recognition of a foreign decision opening insolvency proceedings with *intra partes* effects, and that in some exceptional cases where such recognition is more suitable in light of procedural economy. This would, for example, be the case where main insolvency proceedings are opened in State A, while in the recognizing State B only a lawsuit before a civil court or an arbitral proceeding is pending in which the insolvent debtor is a party. Among other things, this raises the question of whether the opening of insolvency proceedings leads to the stay of the law suit or arbitral proceeding in State B, and who is authorized to continue that lawsuit i.e. arbitral proceeding and in whose name. If there are no other creditors nor other objects, things or rights belonging to a foreign insolvent debtor, apart from those which are subject to such lawsuit or arbitral proceedings in State B, conducting a formal recognition procedure In such a situation it may be too costly and inappropriate to require a formal and separate recognition proceeding. Therefore, the court conducting the lawsuit as well as the arbitral tribunal should be authorized to decide on the recognition of the foreign decision to open insolvency proceedings incidentally, with legal effect limited to the specific law suit or arbitral proceeding in question. Both in the case of formal recognition proceedings and in the case of incidental recognition of a foreign decision opening insolvency proceedings, the recognizing court orarbitral tribunal have to establish whether the prerequisites for recognition are fulfilled. Incidental recognition of foreign decision opening insolvency proceedings only means that the court or arbitral tribunal decides on the question of recognition of such a decision only as preliminary issue and with *intra partes* effects. The editors would recommend such a combined approach for future common EU rules on relations with non-EU countries.

IV. Legal consequences of recognition

The EIR endeavours to determine the legal consequences of recognition of foreign insolvency decisions mainly through a set of conflicts rules (Art. 20

49 A similar approach has been chosen, outside the EU, by North Macedonia, see → Dordevic-Kostovski.

in conjunction with Art.7 – 18 EIR), which are complemented by some substantive rules (e.g. Art. 8, 10, 15 EIR; Art. 21, 22, 28, 29 EIR[50]). In contrast, the MLCBI determines the effects of recognition primarily through a set of substantive rules and gives the recognizing court considerable discretion as to what legal effects are given to the foreign proceedings.

Following the example of some EU Member States, which have adopted the MLCBI, but adapted it to the general structures of their less discretion-oriented Civil Law system, the editors would recommend to use the EIR approach also for recognition of non-EU insolvencies, but integrate provisions of the MLCBI into this approach. This could include granting the recognizing court some judicial discretion as to the effects of recognition.

1. Aspects of conflict of laws[51]

At present, the EIR contains among its general provisions insolvency-specific conflict of laws rules, which are applicable also to recognition of foreign proceedings. Most of these conflicts rules designate – implicitly or explicitly – only the law of EU Member States[52], but some conflicts rules are of a 'universal' character, i.e. they can also lead to the law of third countries. This is true, for example, for Art.9 EIR (set-off) and Art.17 EIR (protection of good faith purchasers: lex rei sitae or lex registri). If the EU decides to pass rules on recognition of non-EU insolvency proceedings, different options as to conflict of laws are available:

a) The EU could simply extend the existing conflicts of law rules of the EIR to the recognition of non-EU insolvencies. This would lead to the application of the law of non-EU countries, e.g. in particular the lex fori concursus of the non-EU proceeding, but even to the law of other non-EU countries under a 'generalising' (universal) wording of Art.8 – 18 EIR. For example, recognition of an UK insolvency proceeding might entail application of the labour law of a further country, e.g. Chinese or U.S. labour law.

50 Some provisions in Chapter II of the EIR have an overarching character, e.g. Art. 23 and 31 EIR, Art. 24 – 27 EIR, to a certain degree also Art. 28 and 29 EIR.

51 Issues of conflict of laws arise in all constellations of cross-border insolvency law and will there also be addressed in Part V.1. of these reflections as an overarching matter. Specifics of conflict of laws in the recognition context will, however, be discussed here.

52 See Art.7 EIR and Art.8, 10–16, 18 EIR.

b) The EU could in principle extend the existing conflicts of law rules of the EIR to the recognition of non-EU insolvencies, but handle conflict of laws in situations covered by the specific conflicts rules of Art.8 – 18 EIR in a differentiated manner. For example, some of these specific conflicts rules may be excluded in the recognition context or they might remain to applicable only to the law of EU Member States.
c) A third option would be to align conflict of laws in the recognition context with the incoming UNCITRAL instrument on conflicts of laws in insolvvency proceedings, which basically gives the recognizing court discretion as to the use of conflict of laws rules.

The editors propose to use for recognition of foreign non-EU insolvencies in principle the conflict of laws approach of the existing EIR as this contributes to legal security and previsibility of the effects of recognition and is also, due to the foreign lex fori concursus, a solid basis for cooperation with the foreign insolvency proceeding. However, the editors would not propose to simply and fully extend the EIR's conflicts rules to recognized non-EU proceedings, but to choose a more differentiated approach.

The editors would recommend one of the following two options, but encourage further discussion:

One option would be to keep the existing specific conflicts rules of Art.8 – 18 EIR as they are, i.e. continue to limit their application to the law of EU Member States. This would protect particular legislative interests of EU Member States (e.g. as to labour law or the immovables sector), and at the same time avoid an overcomplication of conflict of laws scrutiny at recognition of non-EU insolvencies. Another option would be to limit the number of specific conflicts rules provided for in Art.8 – 18 EIR in aligning them with the specific conflicts rules foreseen in the incoming UNCITRAL instrument on conflict of laws in insolvency proceedings.

Specific consideration is worth to be given in this context to the effects of an insolvency proceeding on pending lawsuits[53] or arbitral proceedings[54] (see Art.18 EIR). The topic arises mainly in the recognition context, impact of a foreign insolvency proceeding on a pending domestic lawsuit i.e. on an arbitral proceeding.). The question arises whether the solution from Article 18 of the EIR should also be applied in the case of insolvency proceedings opened in a third country, or whether it would be better to provide for the solution contained in Article 20 of the MLCBI, thus, for the

53 For details see → Silvestri.
54 For details see → Lazić.

automatic suspension (stay) of domestic pending lawsuits or ongoing arbitration proceedings in which the debtor is a party, as a legal consequence of recognition such an insolvency proceeding opened in that third country.

A substantive rule of suspension of individual actions as proposed by Lazic for arbitration[55] would have the advantage of setting out a clear rule on the effects of insolvency for arbitration, an aspect which most legislations of the Member States, as well as arbitral regulation neglect regulating.

The editors are of the view that the *lex fori concursus* should be the applicable law for the following issues: capacity to be a party in pending arbitral proceedings, the procedural capacity of the insolvent debtor in pending arbitral proceedings, effects on the power of attorney issued by the insolvent debtor before the opening of insolvency proceeding for its representation in pending arbitral proceeding, as well as for the authority/entitlement to initiate the continuation of the stayed/suspended arbitral proceedings.

In the interest of legal certainty and predictability, it should be expressly determined which law governs the effect of the opening and recognition of foreign insolvency proceeding on an arbitration agreement.

2. Aspects of substantive law

Apart from provisions on conflict of laws, the EIR provides also for some substantive rules applying also[56] (or even only[57]) to the effects of recognition of a foreign insolvency proceeding. Several of these provisions contain an element of territorial limitation (location of certain assets in another EU Member State), which raises the general issue of universality and territorialiy in the recognition context.

a) General aspects of universality and territoriality in the recognition context

Depending on the type of indirect jurisdiction, recognition of foreign insolvencies can relate to foreign main proceedings (based on COMI or equivalent jurisdiction)[58] as well as to foreign non-main proceedings.

55 See →Lazić.
56 In particular Art.8, 10, 15 and 16 EIR, but also Art.23 and 28–31 EIR.
57 In particular Art.21 and 22 EIR.
58 See supra C.II.1.

In most cases, recognition of main insolvency proceedings will be sought. Here, from the universality/territoriality perspective general rules on recognition apply. In particular, the foreign insolvency practitioner can, in principle, take assets located in the recognizing country under his or her administration (consequence of the recognized universality of the foreign main proceeding). There may be specifics in cases of non-recognition or partial non-recogntion of the foreign proceeding, or where a domestic secondary proceeding has been opened before or after the recognition of the foreign main proceeding, but this is less an issue of recognition than of concurrent proceedings and will be addressed there[59]

In cases of recognition of forein non-main proceedings, the question may arise whether a foreign non-main proceeding may be given universal (extraterritorial) effect, e.g. in the sense that such a non-main proceeding also encompasses the debtor's assets located abroad if the foreign *lex fori concursus* so provides. The editors recommend to deny this in principle, because the State/country where such a non-main proceeding has been opened does not typically have a broad intensive connection with the debtor. Granting such extraterritorial recognition to non-main insolvency proceedings could destroy legal predictability and legal certainty i.e. expectations of the creditors. If a non-main proceeding with universal effect can be opened solely on the basis of debtor's assets located in the state of opening, regardless e.g. of the existence of an establishment or the debtor's center of main interests, then it is impossible to predict in advance in which countries insolvency proceedings may be initiated against the debtor and the law of which country will be applicable to the legal consequences of the opening of insolvency proceedings. It could be devastating especially for employees and other creditors with small claim, who generally will not have sufficient financial resources to effectively participate in foreign insolvency proceedings. Such participation may require covering travel expenses to attend hearings abroad, hiring legal counsel due to unfamiliarity with the foreign language and legal system, and costs necessary for potential contesting other creditors' claims—all of which impose significant burdens. In most legal systems, there is a rule that creditors bear the costs of their participation in insolvency proceedings, and such costs may have to be reimbursed from the insolvent estate only if the estate is sufficiently large to cover them. In the vast majority of cases, however, the insolvency estate is not even sufficient to satisfy the principal claims of creditors, let alone

59 See infra Part D.

their costs of participating in the proceedings. Moreover, the recognition of a universal effect of non-main insolvency proceedings could also lead to the majority of cross-border insolvency proceedings, regardless of the debtor's COMI, being conducted in the future only in the most developed countries of the world—those that have most advanced their insolvency law.

It might also be explicitly foreseen that Member States have the right to recognize foreign non-main proceedings with universal effect on a discretionary basis, similar to Art. 21 MLCBI.

b) Specific substantive rules

The EIR provides for several substantive rules, some of them intertwined with conflict of laws provisions, which apply (specifically or also) to the recognition context. It should be remarked that some EU Member States provide for specific conflict of laws rules in such cases, instead of using a substantive law solution. Noteworthy examples are Art.8 EIR (third parties' rights in rem are 'not affected' by the insolvency proceeding if their collateral is situated 'in another [EU] Member State'). A similar provision is, which includes also a conflict of laws element, is Art.16 EIR on 'detrimental acts' (meaning mainly avoidance of transactions).

As to recognition of non-EU insolvencies, there are again different options.

One possibility is to extend these provisions also to non-EU countries. Another possibility is to keep these rules in so far as collateral is located in EU Member States or the law of some EU Member State applies to the respective acts. This would mean to let these provisions unchanged, not adapting them to specifics of non-EU insolvency proceedings. Also, solutions between these two poles can be imagined, such as a distinction between some of these provisions or a modification of their content.

One may also raise the question whether the current solution contained in Article 8 of the EIR—which fully exempts those creditors whose collateral is located in another Member State, and not in the State where the insolvency proceedings are opened, from the legal consequences of the opening of foreign insolvency proceedings—is consistent with the principle of equal treatment of all secured creditors of the same debtor, namely those creditors who have secured their claims with a right in rem. Likewise, one may raise the question of whether the solution contained in Article 8 of the EIR is consistent with the modern development of insolvency law, which places emphasis on the restructuring of the debtor rather than the liquidation of his assets. Indeed, without the inclusion of secured creditors in the restructuring plan, including creditors whose collateral is situated in another State, and not solely those creditors whose collateral is situated in the State of the opening of insolvency proceeding, restructuring will generally not be feasible.

There might also be some new substantive provisions addressing particular needs of protection in the case of non-EU insolvency proceedings. For example, it would be possible to provide special protection for the satisfaction of employee claims where the employees have their regular place of work in the recognizing state. This could be done, e.g., in the form of a right for those claims to be settled before the foreign main insolvency proceeding's administrator is permitted to dispose of the debtor's assets located in the recognizing state. A similar protection could be provided for domestic or other EU-based creditors with public claims (domestic tax and social security claims).

c) Intra-EU (cross-EU) consequences of recognition?

An issue which was raised in one of Project conferences and which the editors also discussed, is whether the recognition of court decisions from third countries opening an insolvency proceeding (or passed in the course of the proceedings, or stemming from side-litigation) granted by one or few Member States should be given effects, in some way, in the legal system of other Member States.

Two basic paths might be chosen as starting points.

One approach would be to confine the effects of recognition within the recognizing country only. This approach obliges the debtors, creditors and practitioners from third countries seeking recognition in other Member States as well to seek recognition separately in each Member State where they wish the third country proceeding to take effect.

The other approach would be granting immediate and automatic EU-wide effect to the recognition made in one Member State, leaving non-recognising States the possibility of refusing the recognised proceedings to take effect within their country on speficic grounds (e.g. public policy).

The latter approach could present sizeable practical advantages in cases when the debtor has connections with several EU Member States (e.g. assets or creditors in more than one Member State), as it would streamline the process of recognition of third countries proceedings by channeling recognition through a single 'entry point' (the recognising Member State).

Also, intermediate options can be conceived. For example, such cross-EU recognition of third country insolvencies might be limited to formal recognition proceedings (as foreseen under the MLCBI), and/or Member States might retain a tighter control upon the recognition of third country proceedings in such cases, while still streamlining the process. For example, the ascertainment of certain prerequisites of recognition made by the court of one Member State might relieve courts of other Member States from scrutinising the same prerequisite (e.g. indirect jurisdiction) if they are requested to recognise a proceeding which has already undergone recognition scrutiny in another EU Member State. Such a mechanism would mirror the way in which, under the EIR, insolvency ascertained by the court opening the main proceeding in the COMI Member State shall not be re-examined by the court requested to open a secondary proceeding (art. 34 EIR).

However, having discussed this issue, the editors refrain from specific suggestions at the present time as the topic would require broader discussion.

D. Concurrent proceedings[60]

Parallel (concurrent) proceedings occur in two major variants: concurrent proceedings in several countries with regard to one debtor or concurrents proceedings with regard to several debtors who are part of a group of companies (or enterprise group).

Concurrent proceedings with regard to one creditor are a well-established topic of cross-border insolvency law, which is governed by detailed rules both in the EIR (Chapter III: EU-internal relations only) and in the MLCBI (Chapter V: global relations). Concurrent proceedings with regard to corporate groups are also governed by special rules in the recast EIR (Chapter V) and in UNCITRAL's MLEGI. However, practice as to these provisions is scarce, and the MLEGI has not yet been adopted by any country[61].

The editors would recommend to include some rules on concurrent proceedings in future EU provisions on cooperation with non-EU countries,

60 For more on this topic in general see → Trunk (concurrent proceedings).

61 Further on this topic in → Panzani/Van Galen and →Miguens (MLEGI).

but limit them mainly to concurrent proceedings concerning one debtor[62]. With regard to concurrent proceedings relating to corporate groups, a short provision on 'cooperation as far as possible' would seem to be sufficient at the present time, but nevertheless helpful.

I. Admissibility of concurrent proceedings

The first question as to concurrent proceedings is whether (and under which conditions) concurrent proceedings should be admitted. The EIR admits concurrent proceedings only in the constellation main proceeding (COMI-based) – non-main proceeding (establishment-based).

In relations with non-EU countries, the EU has only limited possibilties to regulate concurrent proceedings, as such regulation can, at least directly, only cover EU proceedings. However, the MLCBI shows that a more global approach is also possible.

The editors propose that the EU should address in provisions on cooperation with non-EU countries all cases of concurrent proceedings including, e.g. concurrent (self-proclaimed) 'main proceedings' (such possibility cannot be excluded) and concurrent 'non-main proceedings'. The editors recommend to allow the opening of a concurrent proceeding in the EU, when the debtor's COMI is located outside the EU, on the basis of regular jurisdictional rules. Coordination and cooperation as general principle

The editors recommend to adopt for relations with non-EU countries the provisions of the MLCBI on cooperation between the insolvency practitioners and courts (MLCBI Chapter V) as literally as possible in order to demonstrate the goodwill on the side of the EU to follow the basic cooperative approach of the MLCBI in relations with third countries. This does not mean that a Member State, in relation to third countries, could not lay down additional rules on cooperation, which would further enhance and clarify cooperation with foreign courts and foreign insolvency practitioners. In this context, reference may be made to Articles 7, 25, 26 and 27 of the MLCBI.

62 → Fabriès-Lecea proposes to introduce rules on lis pendens insprired by the Brussels Ia Regulation.

II. Prerequisites, contents, limits?

Namely, it would serve legal clarity to define the prerequisites and contents of such cooperation somewhat more precisely than in the MLCBI or even the EIR[63].

For example, in concurrent proceedings a limited possibility of choice of applicable insolvency law by insolvency representatives should be introduced in order to facilitate an effective and fair regulation of the insolvency.

A duty of cooperation cannot be unconditional, exceptions should however be limited. Limits under applicable law can be used as a basic rule, but there should be an opening clause for courts.

Grave or repeated non-cooperation by the organs of the other proceeding should also be foreseen as an exception. Public policy can serve as another general exception.

E. Overarching issues

Numerous topics of cross-border insolvency law can arise both in domestic insolvency proceedings and in the recognition context as well as in concurrent proceedings (e.g. conflict of laws issues, position of creditors, insolvency-related publications, data protection). The EIR deals with some of them in its general Chapter I, but it also contains some additional, more specific rules on the same topic or other overarching topics at other places, e.g. in Chapter IV (information for creditors and lodgement of their claims).

Although the book and the reflections basically follow the overall structure of domestic proceedings, recognition of foreign proceedings, concurrent proceedings – some topics turned-out so closely related with each other across the different procedural constellations that the editors decided to deal with them in a general, overarching manner.

The following conclusions take this up and address some issues specifically, bringing together their relevance both in domestic proceedings and in the recognition and the parallel proceedings context.

63 For issues of information exchange in this context see → Năstasie.

I. Conflict of laws

The EIR deals with conflict of laws (mostly) in Chapter I, i.e. the EIR's conflict rules apply both in (or from the perspective of) a domestic insolvency proceeding and to effects of foreign insolvency proceedings. The planned UNCITRAL instrument on conflict of laws in insolvency takes (as the project stands today) a somewhat different approach: its conflicts of laws rules apply in principle only in domestic insolvency proceedings. In the context of recognition of foreign insolvencies, conflict of laws rules apply only in a very mitigated manner, including, in particular, discretion on the side of the recognizing court[64].

The autonomous insolvency laws of EU Member States differ significantly in this regard: some take, in principle the 'bilateral' approach of the EIR, others provide for (at least partly) different conflicts rules for domestic insolvency proceedings and recognized foreign proceedings.

The editors propose, for the purposes of future EU provisions on cross-border insolvency relations with non-EU countries to keep in principle to the 'bilateral' approach of the EIR[65], but add a mitigating (discretionary) clause for the effects of foreign (non-EU) insolvencies. This would align such EU rules with the already mentioned draft UNCITRAL Model Law on Applicable Law in Insolvency Proceedings and avoid contradictions between the effects given to the foreign insovlency proceedings by its own rules and the effects accorded to it by the recognizing court.

II. Universal or territorial scope – discretionary elements?

The issue of the (claimed or accorded) universal or territorial scope of insolvency proceedings or certain of its rule comes-up both in domestic proceedings and in recognition of foreign proceedings as well as in concurrent proceedings[66].

The editors propose to handle this issue in specific contexts, in particular separately for domestic proceedings and recognition. Each country should

64 Cf. e.g. the different options of Art. 13, 14 and 15 in the presently discussed at UNCITRAL in the draft instrument on applicable law in insolvency proceedings.

65 In contrast → Fabriès-Lecea proposes to 'universalize' the EIR's conflict of laws rules. She also proposed to admit renvoi when the conflicts rules lead to a non-EU country.

66 As to doubts about the claimed universality of EU insolvency proceedings from a Swiss perspective see → Stähelin-Kleider.

decide which of its proceedings should have universal or territorial scope, if it is not based on COMI, and what this means concretely. The EU should grant foreign non-main proceedings only territorial effect, but might give Member States the right to recognize also universal effects of non-main proceedings, e.g. on a discretionary basis, such as forseen by the MLCBI.

This may lead to differentiated solutions. For example, the EU might decide to exempt third parties rights in objects located in the EU from any effects of non-EU insolvencies (as is true presently under Art.8 EIR for inner-EU cases), but may apply general rules of insolvency law to such objects located outside the EU. Such an approach is not uncommon in autonomous laws. It may, however, be regarded as discriminatory from an external perspective. The editors would generally recommend to avoid such substantive carve-outs according the location of object and apply instead a conflict of laws approach.

III. Foreign creditors

In modern cross-border insolvency law, foreign creditors usually get equal treatment with domestic creditor. The EIR, however, deviates partly from this principle, as it defines as foreign creditors only creditors resident or domiciled in the EU (Art. 2 (12 EIR).

The editors recommend including also creditors resident or domiciled outside the EU into this definition. The right to lodge claims in insolvency proceedings against the debtor, as provided for in Article 53 of the EIR, should in fact cover all foreign creditors, regardless of whether they have their habitual residence, domicile, or registered office in a Member State or in some third country. Without the duty of the court or the insolvency practitioner to notify all creditors of the opening of insolvency proceedings, creditors may not be able to exercise their right to participate in the insolvency proceedings[67].

Therefore, the more appropriate solution is contained in Article 14 of the MLCBI, which requires that notice of the opening of insolvency proceedings be given not only to creditors in the State where the proceedings are

67 Unequal, inconsistent treatment between EU-based and non-EU based creditors may lead to non recognition of EU proceedings in third countries on public policy grounds, as shown by → Staehelin/Kleider.

opened, but also to known creditors who do not have an address in that State.[68]

It is another question whether certain creditors are granted (or not) a privileged status in the insolvency proceeding, e.g. as secured creditors, employees, tax creditors or other creditors with public claims. The editors would recommend leaving this to applicable insolvency law provided that the basic EU freedoms or the European Charter of Fundamental Rights are not violated.

IV. Particular subject areas

Apart from the foregoing general issues, there are some more particular matters coming up in all procedural constellations of cross-border insolvency and that need to be addressed here briefly as such in the conclusions.

1. Insolvency-related court proceedings[69]

One such aspect are insolvency-related court proceedings. They raise issues of direct jurisdiction, conflict of laws and recognition of judgments both from the perspective of domestic insolvency proceedings and of recognition of foreign insolvency proceedings, including concurrent proceedings. The EIR deals with this issue rather systematically (though not completely). UNCITRAL has developed a separate Model Law on the specific (yet crucial) aspect of recognition of foreign insolvency-related judgments (MLIJ).

The editors propose to take the EIR's provisions as a starting-point also for relations with non-EU countries and align them with the MLIJ.

This should include a differentiation between 'core' insolvency decisions or sub-proceeedings[70], 'closely insolvency-related' proceedings and 'distantly (or loosely) insolvency-related' proceedings (cf. Art. 6 and 32 EIR), possibly complemented by a legislative definition of each category, which could help sorting out the rules applicable to one or the other category of proceedings in individual cases.

68 For more details see → Garašić.
69 For more details see → Trunk (Insolvency-related disputes).
70 As to specifics of recognition of foreign discharges ('core' insolvency decision) from a third-county perspective (Korea) see → Kim.

Distantly insolvency-related proceedings[71] need no particular regulation, they may remain to be covered by general rules of international civil procedure. Core insolvency sub-proceedings and decisions as well as losely insolvency-related proceedings should be covered by cross-border insolvency rules (as they already are under the EIR for inner-EU constellations).

There should be a concurrent, but not exclusive international jurisdiction for closely insolvency related Gaproceedings in the forum concursus[72]. Other grounds of jurisdiction may be determined by general international civil procedure law, including the Brussels Ia Regulation.Issues of conflict of laws of the EIR arise in the ordinary conduct of insolvency proceedings, but they may also arise in insolvency-related disputes, e.g. in avoidance lawsuits. The specifics of insolvency-related disputes do not appear to require particular conflicts rules for such procedural contexts, but can be handled in a general manner.

Recognition of third country judgments in such proceedings – be it in the framework of the domestic insolvency proceeding or in other procedural contexts – should be designed along the lines of the MLIJ[73]. It should be expressed clearly that recognition of a third country judgment relating to a third country insolvency proceeding requires that the decision opening the foreign insolvency proceeding is recognized in the EU[74]. In contrast with Art.32 EIR, however, indirect jurisdiction should not be limited to the forum concursus, but should include other fora foreseen under the Brussels Ia Regulation, in particular the defendant's domicile.

2. Alternative dispute resolution (arbitration and mediation) in cross-border insolvency law

Practitioners increasingly resort to mediation and arbitration to handle insolvency-related disputes due to their numerous advantages (cost-efficiency, flexibility etc.), and legislators (including the EU) in recent times have included elements of mediation into restructuring frameworks. Yet, the

71 In the sense of Art.32 (2) EIR.

72 See → Mangano, proposing additional fora for avoidance actions nextto the forum concursus.

73 For more details → Trunk (on insolvency-related proceedings). See also → Mangano for judgments rendered in third-countries avoidance actions in conjunction either with domestic or with foreign insolvency proceedings.

74 This is presupposed also in Art.32 EIR.

present state of cross-border insolvency legislation in this regard is still incomplete[75]. Neither the EIR nor the model laws of UNCITRAL ever mention mediation, and only address arbitration under a very specific aspect (namely, that of the law governing the effects of recognition upon pending proceedings). Both instruments still neglect highly significant issues, such as the law governing arbitrability and the effects of insolvency upon arbitration agreements, as well as the recognition of arbitral awards made in insolvency related disputes.

Nontheless, developments in this respect are underway, particularly within UNCITRAL Working Group V on the issue of applicable law.

The editors share the view that it would be premature to address the relationship between ADR and third-countries insolvencies in much detail[76]. The EU should instead follow the aforementioned developments attentively and consider addressing the topic more systematically, also for inner-EU constellations, in the upcoming evalulation of the EIR in general. However, a general encouragement to use ADR in the context of cross-border insolvencies might be helpful. Generally speaking, it would seem advisable to set out consistent rules on arbitration and/or mediation, regardless of their inner- or outer-EU dimension. There does not appear to exist a compelling reason to differentiate between cases in which the insolvency proceeding and the ADR procedure are 'rooted' within the EU, or in which one or the other is connected to a third country.

3. Information technologies in cross-border insolvency law

Modern information and communication technologies (ICT) are today of common use both in domestic and cross-border insolvencies. However, developments continue to be extremely rapid and depend to a large degree on developments of technology and the accompanying general legal framework.

For the purposes of cross-border insolvency law this means that specific rules on the use of ICT in cross-border insolvencies are difficult to design at the present time. Taking the existing provisions of the EIR and other EU insolvency legislation as well as EU international civil procedure legislation as a starting point, the EU should foresee in a future instrument

75 → Lazic (on arbitration); → Tasman (on mediation).

76 For a proposal on introducing a substantive rule on suspending arbitral proceedings in case of insolvency → Lazic.

on relations with non-EU insolvencies the possibility of cooperating also with non-EU countries on a non-discriminatory and proactive basis. This should include the authorization of the European Commission to pass secondary legistlation to this effect.

F. Summary

Summing-up, there is a serious need for the EU to develop common and consistent rules on cross-border insolvency law in cases linked with non-EU countries[77]. This would seem particularly urgent for relations with close economic partners of the EU such as Switzerland, the UK and the U.S., but the need for an adequate legal framework is not limited to these countries. Insolvencies in China, Türkiye, India, Canada, Brasil or offshore jurisdictions play a growing role also for the EU. By creating a balanced and good quality legal basis for such situations, the EU can improve its role in the cross-border insolvency world and influence also discussions within UNCITRAL with a view to further improving the global legislative framework.

The editors propose to create a set of binding rules – if there is EU competence for such legislation – addressing relations with non-EU countries in cross-border insolvency matters. If such rules were to be passed, the editors would favor the solution to add to the EIR a new Chapter on relations with non-EU countries, which should be aligned as far as possible with all UNCITRAL model laws in this field. However, as the UNCITRAL model law family is itself under continuous development, the EIR can also give some further input into UNCITRAL's work and there is also room for specific new approaches developed by the EU. In addition, room should be left for EU Member States to specify EU common rules in certain aspects or to be more cooperation-friendly under autonomous rules than the common standards may require. Even if the EU were not to pass a legislative act on this matter, it should at least prepare recommendations on minimum standards that the autonomous international insolvency law of each Member State in relation with non-EU countries should certainly include.

77 The contributions in this book by authors from non-EU countries have also shown the interest of such countries in legislative developments on the side of the EU and UNCITRAL as possible models for their own legislation or treaty practice, see e.g.→ Babkina and Galdino/Garcia.

Whatever common rules may be passed, they should not exclude developing cooperation-friendly practice further on the basis of recommendations or other soft law instruments, taking into account also UNCITRAL's continuous work.

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