Concurrent insolvency proceedings – relations between the EU and third countries – general report

Alexander Trunk

Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws, some other international treaties and national legislation, in particular of EU Member States, with regard to concurrent (parallel) insolvency proceedings. It also develops some recommendations.

Keywords: Concurrent insolvency procedings; parallel insolvency proceedings; MLCBI; EIR; national laws: basic concepts; discretion; recognition; conflict of laws; substantive law

Cross-border business insolvencies often have a global dimension, which may lead to parallel insolvency proceedings regarding the same debtor in several countries including the EU and third countries.

The European Insolvency Regulation (EIR) contains detailed provisions on the relationship between 'concurrent' (or parallel) insolvency proceedings in the EU relating to one debtor. They are put together mainly in Chapter III of the Regulation under the title of 'Secondary insolvency proceedings'. A slightly shorter version existed already in the first version of the EIR (2000). These rules have to a significant degree inspired the provisions on corporate group insolvencies, which are now laid down in Chapter V of the recast EIR. Corporate group insolvencies will be dealt with in other contributions of this book[1].

The MLCBI, which applies to the relationship between concurrent insolvency proceedings without a regional limitation, adresses concurrent proceedings mainly in Chapter V, but handles certain issues of concurrent proceedings also at other places, e.g. in Chapter II Art.11 and 12 MLCBI and Chapter IV Art.25 to 27 MLCBI.

1 See → Panzani/van Galen and → Miguens (groups).

On the international level, both the Council of Europe (in its Istanbul Convention of 1990) and OHADA have developed rules on concurrent insolvency proceedings.

National legislators have also dealt with concurrent insolvency proceedings, often focussing on the relations between a 'main' proceeding and a 'secondary' proceeding. This reflects, to a certain degree, the rules of the EIR and the MLCBI, but some national legislations address concurrent proceedings in a more general manner.

As the main focus of this publication is on future amendments to EU law in cases related to non-EU countries, Chapter III of the EIR as it stands today will not be analysed in detail in this place. After a short overview of the present state of law, core issues of concurrent proceedings will be be discussed on a comparitive bases with a view to possible future steps by the EU.

A. State of the law

The present state of the law needs be taken into account as a basis for future reform, in comparison mainly between the EIR and the MLCBI, but also with examples from national legislations.

I. EIR and MLBCI

To begin with, the rules of the EIR and the MLCBI will be looked-at in an overview. The text commences with the EIR as the starting-point for future reform by the EU.

1. EIR

Concurrent (parallel) insolvency proceedings relating to one debtor are dealt with in the EIR mainly in Chapter III, under the heading of 'Secondary insolvency proceedings'. Chapter III EIR contains various provisions regulating the relationship between 'secondary' proceedings (in the EU) and 'main' proceedings (also in the EU). Other constellations of concurrent proceedings, e.g. relations between concurrent non-main proceedings[2], are left out of this Chapter, but may be covered by other provisions of the EIR.

The EIR – including its Chapter III – applies to a broad range of insolvency proceedings, which are exhaustively enumerated in Annex A of the EIR. In particular, they include also consumer insolvency proceedings and public pre-insolvency restructuring proceedings as foreseen by the EU Restructuring Directive of 2019.

The EIR defines main and non-main insolvency proceedings according to the underlying ground of international jurisdiction. Main proceedings are proceedings opened in the state of the debtor's COMI (Art. 3 (1) EIR). Non-main ('territorial' or 'particular') proceedings are proceedings opened in the state of a debtor's 'establishment' (Art.3 (2) EIR)[3]. Secondary proceedings in the sense of the EIR are non-main proceedings which are conducted concurrently with a foreign main proceeding (Art. 3 (3) and (4) last sentence EIR).

The admissibility and opening of a secondary (non-main) proceeding are regulated in Art.3 (2) and (3) EIR[4] and, complementarily, in Art.34, 37 – 39 EIR[5]. The conduct of secondary proceedings and their relations with the main proceeding are mainly regulated by Art.35, 36 and 41 – 52 EIR, going very much into details. Complementarily, other, more general rules of the EIR or of applicable national law also apply to concurrent proceeding (cf. Art. 35 EIR).

Chapter III applies only if the (foreign) main proceeding is recognized in the state of the secondary proceeding (see Art.34 EIR)[6]. It has to be noted that the EIR does not foresee a particular recognition proceeding (Art.20 (1) EIR).

Arguably, the three most important general provisions in Chapter III are Art. 41 EIR, stating the duty of the insolvency representatives of the concurrent insolvency proceedings to cooperate with each other, Art.42 EIR which lays-down a corresponding duty (and power) of the insolvency

2 The term 'non-main proceedings' is used following the terminology of Art.2 (c) ML-CBI, leaving open the jurisdictional basis of such proceedings.
3 For the definition of establishment in the sense of the EIR see Art.2 (10) EIR.
4 In Chapter I EIR (general provisions).
5 In Chapter III EIR (secondary proceedings).
6 This would seem to apply also mutually between all concurrent proceedings.

courts and Art. 43 EIR on cooperation between the respective insolvency representatives and courts[7].

These three basic rules are complemented by numerous specific provisions, e.g. on mutual communication (Art.41 (2) (a) and Art.42 (2) EIR), on conclusion of agreements ('protocols') between insolvency representatives (Ar.41 (1) sentence 2 EIR), on coordinating the conduct of the proceedings (Art.41 (2) (c) EIR), including the preparation of resctructuring plans (Art.41 (2) (b) EIR) and Art. 47 EIR). Another provision (Art. 45 (2) EIR) obliges the insolvency representatives of the main and secondary proceeding to lodge claims, which have already been lodged by creditors in their proceeding, also in the concurrent proceedings[8]. Art. 45 (3) EIR grants the insolvency representative of each concurrent proceeding the right to participate in the other proceedings 'on the same basis a creditor'.

2. MLCBI

The MLCBI, in contrast with the EIR, does not purport to develop a general framework of cross-border insolvency law, but it focusses on assistance to foreign insolvency proceedings (including their 'recognition'). In this context, it sets also standards for concurring proceedings (Chapter V, Art. 28 – 32 MLCBI). Similar to the EIR, Chapter V MLCBI has to be read in conjunction with the other chapters of the MLCBI: its general provisions (Chapter I), the provisions on 'Access of foreign representatives and creditors to courts in *the recognizing* state' (Chapter II), on 'Recognition of a foreign proceeding' (Chapter III) and on 'Cooperation with foreign courts and foreign representatives' (Chapter IV).

The MLCBI applies to all insolvency proceedings as defined in its Art.2 (a), but allows adopting states to exclude certain types of proceedings (Art.1 (2) MLCBI). The MLCBI resembles the EIR in that it also distinguishes

7 Both the EIR and the MLCBI (and national legislations) use the terms 'cooperation' and 'coordination' rather interchangeably. The present contribution therefore avoids defining and delimitating these terms in any exact manner. 'Cooperation' focuses on the acts of participants, while 'coordination' has a more objective meaning, but both concepts serve to describe a good working relationship between parallel proceedings.

8 This does not exlude the right of creditors to lodge their claims themselves (Art. 45 (1) EIR) or to object to the logding of their claims by the insolvency representative in concurrent proceedings (cf. Art. 45 (2) EIR). As to the positiion of foreign creditors in insolvency proceedings generally (not limited to concurring proceedings), see Chapter V EIR (Art. 53 – 55).

'main' and 'non-main' (territorial) insolvency proceedings, characterizing them by the underlying ground of jurisdiction (main proceedings: COMI; territorial proceedings: establishment)[9]. it differs from the EIR in that it does not provide for direct jurisdiction[10], does not contain explicit conflict of laws rules and gives considerations of discretion larger space than the EIR does. Going beyond its primary focus on assistance to foreign proceedings, the MLCBI contains also some provisions on the conduct of domestic proceedings in general[11], including 'outgoing' requests for assistance by domestic courts[12]. It is also important that the MLCBI understands itself as a minimal standard for cooperation, explicitly opening the way for more liberal cooperation (Art. 7 MLCBI).

In contrast with the EIR, Chapter V MLCBI is not limited to cooperation between a main and a non-main (secondary) proceeding, but addresses all constellations of parallel proceedings relating to one debtor. Only some provisions of Chapter V deal specifically with the relationship between a main proceeding and a secondary proceeding (Art. 28, 29 (a)(ii) and (b)(ii) and Art.31 MLCBI). Also, recognition of the foreign proceeding is not a general prerequisite for mutual cooperation. For example, Art. 28 MLCBI requires recognition of the foreign (main) proceeding for the effect that a secondary proceeding may only be opened under limited circumstances and that such a proceedings may only have territorial effect. Art. 29 (a)(ii) MLCBI gives a foreign recognized (main) proceeding some larger effect in the concurring proceeding than is given without (or before) such recognition. Finally, Art.30 MLCBI provides different specific rules with regard to recognition of several foreign concurrent proceedings.

Speaking generally, the MLCBI provides for a duty of cooperation between concurrent insolvency proceedings (Art. 25 and 26 MLCBI: between insolvency representatives, between courts and between courts and representatives). This covers the same actors as Art. 41 – 43 EIR and provides also the same basic duty – however without the additional requirement of recognition. The difference as to the necessity of recogntion can perhaps be explained. Unter the MLCBI recognition is a particular proceeding, which may take some time, while under the EIR recognition is 'automatic'. Both the approach of the the EIR and of the MLCBI create a possibility for quick

9 See Art. 2 (b) and (c) MLCBI.
10 With a limited exception for assistance purposes, Art.4 MLCBI.
11 E.g. Art.13 and 14 MLCBI on the position of foreign creditors.
12 E.g. Art. 25 – 27 MLCBI. See also the authorization of domestic insolvency representatives to act in a foreign state (Art.5 MLCBI).

cooperation, the EIR through incidental recognition, the MLCBI through cooperation independently from recognition, but with a significant element of discretion on the side of the courts.

Overall, the provisions of the EIR and of the MLCBI on concurrent proceedings resemble each other to a significant degree, but the MLCBI is more open as to the categories of concurrent proceedings covered (main and non-main proceedings) and gives more leeway to the courts.

II. Other international texts

Among the existing or former internatinonal texts dealing with cross-border insolvency law, noteworthy provisions on concurrent proceedings are contained in the Council of Europe's Istanbul Convention of 1990 on Certain International Aspects of Bankruptcy (one of the predecessors of the EIR, but which has not entered into force) and in OHADA's Uniform Insolvency Act of 2015.

1. Istanbul Convention 1990

The Istanbul Convention also addresses, similar to the EIR, concurrent proceedings only in the specific constellation of 'main proceeding – secondary proceeding' (Chapter III of the Convention). It is more 'codificatory' in its regulatory approach towards secondary proceedings than the EIR, as it collects most provisions on secondary proceedings in this chapter (including e.g. direct jurisdiction, position of foreign creditors etc.), while they are more distributed in the EIR (and thus applicable generally, not only in secondary proceedings).

2. OHADA's Uniform Insolvency Act 2015[13]

OHADA's Uniform Insolvency Act (OIA) 2015, which has succeeded to the earlier Uniform Bankruptcy Act 1998 creates a uniform insolvency law regime for the Member States of OHADA, including common rules on cross-border insolvency law (mainly in Title VII, Art.247 – 256–31).

Title VII is divided into two chapters: Chapter I deals with recognition of insolvency proceedings within OHADA, Chapter II with recognition

13 For details see → Leno.

of insolvency proceedings conducted in non-OHADA countries. This approach is particularly interesting for the EU under the perspective that it provides for separate rules about inner-organization cross-border cases and cooperation with third countries.

In its general part (Preliminary Title), the OIA provides for direct jurisdiction rules as to insolvency proceedings[14] in OHADA Member States. 'Main' insolvency proceedings can by opened in the state of the debtor's corporate seat, in the case of natural person in the state of the debtor's 'principal establishment' (Art.3 – 1 sentence 1 OIA). Subsidiarily, (territorial) proceedings[15] can also be opened in the state of a debtor's local 'main center of operations' (Art.3 – 1 sentence 2 OIA). In cross-border matters, the OIA does not contain any specific conflict of laws rules, but is implicitly based on the lex fori concursus principle.

Title VII OIA focusses exclusively on recognition of foreign insolvencies, including the topic of concurrent proceedings. Recognition under the OIA is dogmatically grounded on the civil procedure concept of res judicata of foreign court decisions, in particular the decision opening a foreign insolvency proceeding (cf. Art. 247 OIA).

In the inner-OHADA context (Titel VII OIA Chapter 1), recognition appears to be automatic. Scrutiny of indirect jurisdiction seems to required[16], but there is no explicit public policy exception. Between concurrent proceedings a general duty of cooperation exists between the courts (Art.253 OIA). Cooperation duties between insolvency representatives are not explicitly laid-down, however, one provision (Art. 252 OIA) states an information duty between the insolvency representatives of a main proceeding and a secondary proceeding.

As to recognition of insolvencies conducted in non-OHADA countries, Titel VII OIA Chapter 2 incorporates quasi-literally the MLCBI. Interestingly, according to Art. 247 sentence 2 OIA, non-OHADA insolvencies, which are (formally?) recognized by a court in a OHADA Member State, have thereafter in the OHADA space the effect of an OHADA insolvency as regulated under Chapter 1. Arguably, this does not exclude application of the rules of Chapter 2, in so far as this is compatible with Chapter 1.

14 The OIA applies only to business insolvencies, Art.1 – 1 OIA.
15 Cf. definition 'territorial bankruptcy procedure' in Art.1 – 3 OIA.
16 Cf. Art. 247, 249, 251 OIA.

III. National legislations

The relationship between concurrent insolvency proceedings is also dealt with by national legislators, both EU member countries and third countries. Some countries, also among the EU Member States, have adopted the MLCBI[17], others have passed rules which mirror to a certain degree the rules of the EIR[18] or have developed their own approaches[19].

Characterizing them (in so far as there exists specific legislation) briefly, in alphabetical order, the following may be said[20]:

Austria: Austria has put-together its provisions on cross-border insolvencies mainly in the 8th Part of its Insolvency Code (IO). It consists of four divisions – general provisions, supplementary provisions to the EIR, proceedings not covered by the EIR and special provision for bank and insurance insolvencies. The supplemantary provisions to the EIR do not address relations with non-EU countries. The division on 'proceedings not covered by the EIR' contains three chapters: on applicable law, 'Austrian insolvency proceedings' and 'Recognition of foreign insolvency proceedings'. Concurrent proceedings are addressed only in one provision in the chapter on Austrian insolvcency proceedings (sec.239 InsO). The provision states, under the heading 'Coordination' a general duty of the Austrian insolvency court and the Austrian insolvency representative to inform the foreign insolvency representative about all circumstances relevant for the foreign proceeding (sec.239 (1) IO). Sec.239 (2) sentence 1 IO adds that foreign insolvency representatives must be given the opportunity to make proposals for the sale or other use of the debtor's property in Austria, and sec.239 (2) sentence 2 IO states the foreign insolvency representative must be given the possibility to make a statement upon an insolvency plan, which is prepared in the Austrian proceedings. The Austrian approach can be described as a minimal regulation on concurrent proceedings.

17 In the EU: Greece, Poland, Romania, Slovenia.

18 In the EU mainly in this direction Austria, Germany, Portugal and Spain.

19 Particularly detailed are the provisions of Belgian law, but also Austria, Croatia and Poland have developed a significant number of particular provisions. A specific approach has also been developed in Switzerland ('Mini-Konkurs' as an intermediate form of recognition and concurrent proceeding).

20 The following list contains those EU member countries, which have passed systematically structured sets of rules on cross-border insolvencies. The laws of other EU countries will not be analysed here as this would require an in depth analysis of jurisprudence beyond the limits of this overview.

Belgium: Belgian law regulates cross-border insolvencies, basically, in two laws: in the Belgian Code of Private International Law/Code de droit international privé (Chapter 11) and in the Belgian Code of Business Law/Code de droit èconomique (Chapter XX, mainly Title 7). Formerly, the Code of PIL contained a general provision on concurrent proceedings (Art.120), which laid-down a general duty of Belgian insolvency representatives to cooperate, under the control of the Belgian court, with foreign insolvency representatives and give them information[21]. The provision contained a requirement of reciprocity in the sense that cooperation from the Belgium side was only to granted if the law of the foreign proceedings provided for an an equivalent cooperation with the Belgium proceeding. Art.120 was, however, repealed in 2017 in the context of the adoption of the Code of business law, which introduced detailed provisions also with regard to concurrent insolvency proceedings, but only as to business insolvencies.

The Belgian Code of Business Law contains ten provisions which, either specifically or in the context of more general provisions on domestic insolvency proceedings or recognition of foreign proceedings, address concurrent proceedigs. One provision deals with the opening of (parallel) insolvency proceedings (Art.XX.211[22]), another with one aspect of the coordination of parallel proceedings (Art.XX.221)[23], the others regulate various issues of cooperation between insolvency organs (courts of insolvency represenatives)[24]. The two principal provisions are Art.XX.217 and and Art.XX.219. Art.XX-217 etablishes the competence of the insolvency judge in a Belgian territorial insolvency proceeeding to communicate and otherwise cooperate with the insolvency representative or the insolvency court of a foreign (main or non-main) proceeding, provided that the foreign proceeding is recognized in Belgium. Art.XX-219 etablishes the duty of the Belgian insolvency representative to to inform the foreign insolvency representative or foreign insolvency court (at their request) about all circumstances relevant for the foreign proceeding and provides for a general duty of cooperation. Art.XX-219 seems to apply to all Belgian insolvency

21 See also Art.118 § 3 Code de dip which allows the opening of a Belgian territorial insolvency proceeding even if a foreign main proceeding is recognized in Belgium. This provision remains in force.

22 See also Art.118 § 3 Code de dip.

23 Scrutiny of insolvency grounds in the domestic proceeding when a foreign proceeding has already been opened before.

24 Art.XX.216 – 219, Art.XX.223.

proceedings, not only to territorial (non-main) proceedings, and it does not explicitly require recognition of the foreign proceedings. However the duty to give information is limited by 'any legal duty of confidentiality or other legal limitations to communications'. For example, one might think of data protection rules. In addition, Art.XX-219 § 3 provides for general exception from the duty to inform or otherwise cooperate 'for serious reasons'. The Belgian approach can be described as a 'maximal' regulation of concurrent proceedings as far as the density and differentiated conditions of the rules are con-cerned.

Croatia: Croatia has probably the most differentiated, in various aspects most original autonomous regulation on cross-border insolvency in the EU (Croatian Bankruptcy Act, Chapter XI). It starts with rules on direct jurisdiction of Croatian courts to open and otherwise conduct insolvency proceedings and then continues with 'general provisions'. Thereafter follow separate subchapters on prerequisites and proceedings for recognition of foreign proceedings, legal effects of recognition, opening and conduct of secondary insolvency proceedings, issues of non-recognition of foreign proceedings and, finally, on recognition of foreign insolvency plans (insolvency settlements) or other insolvency-related decisions.

The subchapter on general provisions provides for a general duty of cooperation between the insolvency representative of a Croatian insolvency proceeding and insolvency representatives of concurrent proceedings in foreign countries (Art.399 (1) Bankruptcy Act). The duty of cooperation in Art.399 is not explicitly conditioned on recognition of the foreign insolvency proceedings. A specific duty is laid-down for mutual information between insolvency representatives in concurrent proceedings within applicable legal limits (Art.399 (2) Bankruptcy Act).

Issues of concurrent proceedings are addressed in all subchapters of Chapter XI.: in the context of jurisdiction[25], general provisions[26], prererequisites and proceeding of recognition[27], effects of recognition[28], secondary

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25 Art. 393 (5): non-examination of insolvency in the opening stage of a secondary insolvency proceeding.

26 Art. 399, see supra.

27 Art. 407 (3): recognition of foreign proceeding may provide for opening of secondary proceeding: effect.

28 Art. 410 (Croatian insolvency proceeding does not hinder recognition of foreign proceeding; binding effect of establishing claims in the proceeding) and Art. 417 (rights

proceedings[29], effects of non-recognition[30] and recognitions of foreign plans[31]. The Croatian approach can be also described as a 'maximal' regulation of concurrent proceedings, although with a content differing from Belgium.

<u>Germany:</u> The German Insolvency Code (InsO) distinguishes in its Part 12 on cross-border insolvency law between general provisions, recognition of foreign insolvency proceedings and German non-main proceedings. This follows quite closely the EIR, but focuses on the German perspective only. Concurrent proceedings are adressed in all three subchapters but mainly in the subchapter on non-main proceedings (termed 'particular' proceedings), which covers both isolated non-main proceedings and secondary proceedings. The provisions apply to all insolvency proceedings covered by the Code, including, in particular, both business and consumer insolvencies and applying also to bank and insurance insolvencies.

Sec. 341 InsO in the general provisions states that creditors may lodge their claims in all concurrent proceedings, and German insolvency representatives may lodge creditor claims also in foreign proceeedings. Sec. 342 InsO addresses proceeds received by creditors in foreign (concurrent) proceedings. Sec. 344 InsO in the subchapter on recognition grants the German insolvency court to pass interim measures as requested by a foreign insolvency representative. Sec. 356 InsO deals specifically with the opening of German secondary insolvency proceedings (adding some aspects to the general rules on German non-main proceedings in sec. 354 and 355 InsO). Sec. 357 InsO (heading: cooperation between insolvency representatives) provides for a general duty of information of the German insolvency representative in the secondary proceeding to 'the foreign representative' (probably only of a foreign main proceeding) and adds some specific procedural rights of foreign insolvency representative in German secondary

of foreign insolvency representative in proceeding for recognition of the foreign proceeding).

29 Art. 418 – 423: opening of secondary proceeding in Croatia, avoidance of transactions, order of distribution of assets, proceeds received by creditors in foreign insolvencies, duty of Croatian insolvency representative to lodge claims in foreign insolvencies (see also Art.399 (2) for Croatian main proceeding), additional duty of insolvency representatives to coopererate.

30 Art. 426: opening of Croatian insolvency proceeding independently from recognition of foreign proceeding.

31 Art. 427 (regognition of foreign insolvency plans etc.): relates also to concurrent proceedings, without expressly mentioning this.

proceedings. Sec. 357 InsO makes no particular mention of cooperation between insolvency courts. The German approach can be characterized as an EIR-related medium-size regulation of concurrent proceedings without a general clause on coordination and cooperation.

Greece: Greece is one of the EU Member States, which have adopted the MLCBI for insolvency relations with non-EU countries. Choosing a stand-alone legislative approach on cross-border insolvency law, Greece has passed a special law (Law nr. 3858/2010 of 28 June 2010), which appears to remain in force unchanged, although the underlying Greek Insolvency Code of 2007 has in 2021 been superseded by a new Insolvency Code (Law nr. 4738/2020). One of the consequences of this legislative reform is that the Law nr. 3858/2010 now also applies to consumer insolvencies, while under the Insolvency Code of 2027 it was limited to business insolvencies. The Law nr. 3858/2010 is a nearly literal translation of the MLCBI with the necessary fill-ins required by the MLCBI. The law follows also the discretion approach of the MLCBI, without giving specifications or other guidance to the courts in this respect.

Poland: Poland has also adopted the MLCBI, but integrated it into a more general regulation on (autonomous) cross-border insolvency law. The main legal sources are the Bankruptcy Law of 2003, which was significantly amended in 2015 and the Restructuring Law of 2015. Both laws include rules on direct jurisdiction, but do not contain autonomous rules on conflict of laws for domestic proceedings. The Bankruptcy Law (Part II) distinguishes general provisions, direct jurisdiction, recognition of foreign insolvencies, secondary insolvency proceedings and cooperation with foreign insolvency proceedings (courts and insolvency representatives). The Restructuring Law (Title III) is a bit shorter, not providing for rules on recognition of foreign proceedings. Adopting the MLCBI, Poland has modified its provisions quite significantly, adding specifications and even deviating from some of the provisions of the MLCBI. Taking the general provisions (Title I) as an example, the Bankruptcy Law also contains a list of definitions (Art. 379)[32] and it also provides for prevalence of internation-

32 The definitions by and large coincide with the MLCBI, but contain some important specifications and extensions. E.g. the term insolvency proceedings expressly includes debtor-in-possession cases and pre-insolvency proceedings. Main proceedings are not literally defined by 'COMI', but by the slightly different term of the debtor's

al treaties, adding to this EU law (Art. 378). The scope of the cross-border provisions is not defined specifically, but follows the general scope of application of the Bankruptcy Law (Art. 1), which includes both business and consumer insolvencies. Jurisdiction is regulated in a separate subchapter (Title II), not specifically for recognition or cooperation purposes. The public policy exception is laid down (only) in the recognition context (Art. 392 nr.2), partly also in the Title on secondary proceedings: Art.410a). Authorization of Polish insolvency representatives to act also abroad, e.g. in the context of foreign insolvency proceedings, is not mentioned in the general provisions, but appears to be included in the tasks and duties of Polish insolvency representatives under general rules of the Bankruptcy law[33]. No mention is made in the general provisions (Title I) of more liberal autonomous rules on cooperation and of interpretation in the light of the MLCBI.

The Bankruptcy Law is based, like the MLCBI, on the concept of a formal recognition proceeding[34]. Like the MLCBI, it does not formally exclude incidental recognition[35]. In contrast with the MLCBI, recognition is under the Polish Bankruptcy Code basically a non-discretionary concept, but discretionary elements are present in powers given to the court during the recognition proceeding (Art. 390), at or even after recognition (Art.393a – 396). Again in contrast with the MLCBI, but also with the EIR, recognition of a foreign insolvency proceeding leads to the legal effects under Polish law (Art. 397), 'as if' a Polish insolvency proceeding had been opened. This significantly deviates both from the (bilateral ot universal) lex fori concursus principle of the EIR and from the discretionary approach which largely characterizes the MLCBI. A similarity can be seen here with the 'Minikonkurs' under Swiss law[36], but Polish law does not provide in a general manner for a simplified post-recognition insolvency proceeding.

'main econonic activity'. Non-main proceedings are not only establishment-based proceedings, but include also 'main-like' proceedings such as at the debtor's domicile or proceedings based on the location of property.

33 Specific aspects are dealt-with in the context of secondary proceedings (Art.405 – 412) and of cooperation (Art.413 – 417).

34 Cf. also the similar approach of Croatian law, Art.401 – 408 Croatian Bankruptcy Act.

35 This may be grounded, e.g., on general rules of cross-border civil procedure. Art. 381 refers subsidiarily to the Polish Code of Civil Procedure). Contrast this with Art.409 Croatian Bankruptcy Act, which expressly allows incidental recognition.

36 Art.170 Swiss PILA.

However, it mentions at several places the possibility of a secondary insolvency proceeding in Poland after recognition of the foreign proceeding[37].

Concurrent proceedings are dealt with in the Polish Bankruptcy Code mainly at two places: in the subchapter on secondary insolvency proceedings (Title IV) and in the subchapter on cooperation (Title V). Title IV (Art. 405 – 412) follows by and large the lines of the EIR, but applies to relations with non-EU proceedings. It does not impose any duties upon the organs of the foreign main insolvency proceedings, but is implicitly based on the concept of cooperation between the Polish non-main proceeding and the foreign main proceeding, however with caveats from the Polish side[38]. Chapter V of the MLCBI (concurrent proceedings) has not been adopted as such in the Polish Bankruptcy Law, but some of its provisions can be found in the subchapters on recognition and secondary proceedings. However, the Bankruptcy Law contains a general subchapter on cooperation with foreign (insolvency) proceedings (Title V) which follows quite closely Chapter IV of the MLCBI (cooperation with foreign courts and foreign representatives). According to these provisions both Polish insolvency courts and Polish insolvency representatives are empowered and encouraged to cooperate with foreign courts and insolvency representative, including the mutual exchange of information (Art. 416). This includes direct communication by all technical means including e.g. telephone calls or email (Art.413 and Art.414). An original provision is Art. 417, which deals with the case of concurring insolvency proceedings in several foreign countries. Taking some inspiration from Art.30 MLCBI, Art.417 of the Bankruptcy Code grants in such cases the Polish insolvency representative (of a Polish main or non-main proceeding) or Polish courts the power to decide which assets should be attributed to which proceeding.

<u>Portugal:</u> Portugal assembles most of its provisions on concurrent insolvency proceedings in Title XV Chapter 3 ('particular insolvency proceedings') of the Insolvency Code[39]. Art.294 (1) starts defining the term 'particular insolvency proceeding' by the territorial limitation of its effects. Particular proceedings in this sense are, under Art.294 (1), proceedings opened in

37 Cf. Art.397 (1) last sentence and Art.398 Bankruptcy Code.

38 Cf., e.g., Art.410a reognition of foreign insolvency plan and vote on separate insolvency plan in the Polish non-main proceeding.

39 Chapter 1 contains 'general provisions', Chapter 2 deals with recognition of foreign insolvencies.

Portugal whenever the debtor's registered office, domicile or centre of his main interests is situated outside Portugal. According to Art.294 (2), direct jurisdiction for such insolvency proceedings can be grounded either on an establishment of the debtor in Portugal or on Art.62 lit.c) of the Portuguese Code of Civil Procedure, a a flexible rule based on the principle of significant contacts with Portugal. From this follows also that Portuguese insolvency proceedings, which are grounded on the debtor's registered office or domicile[40] (admissible outside the scope of application of the EIR) are not 'particular' proceedings, but have universal reach. Portugal thus recognizes implicitly the possibility of concurrent main proceedings.

Within Title XV Chapter 3 only one provision, Art. 296, deals expressly with secondary proceedings. According to Art.296 (1) the recognition of a foreign main insolvency proceeding[41] does not prevent the opening of a (secondary) insolvency proceeding in Portugal. Art.296 (2) – (8) regulate various technical issues, such as the right of a foreign insolvency representative to request the opening of a secondary proceeding in Portugal and to participate in the secondary proceeding, dispensabilty of the proof of insolvency of the debtor for the opening of a secondary proceeding, isssues of transfer of pending proceedings to a later recognized foreign main proceeding, some details of insolvency plans etc.

<u>Romania:</u> Romania has adopted the MLCBI quasi-literally[42], though with some reordering and a few small changes. Basically, only the necessary fill-ins of the MLCBI were added (Title III of the Insolvency Law of 2014). Perhaps most importantly, Romania appears not to provide for non-main insolvency proceedings in Romania outside the scope of the EIR. Art.41 (1) Insolvency Law grants direct jurisdiction for insolvency proceedings only to the courts of the debtor's seat/professional domicile for at least 6 months

40 Cf. Art.7 (1) and (2) Insolvency Code.

41 The term 'main insolvency proceeding' is not expressly defined in the Insolvency Code, but can be understood to cover foreign proceedings opened under rules corresponding to Art.7 of the Code: registered office, domicile, COMI or last domicile of decedent 'or on an equivalent connection' (see Art.288 (1) (a) of the Code).

42 True, the Insolvency Act starts with a general provision (Art. 273) on the contents of regulation on cross-border insolvencies (conflict of laws in insolvency, procedural aspects of cross-border insolvencies, mutual assistance in cross-border insolvencies). However, thereafter follow, in principle, only the provisions implementing the MLCBI (Art. 273 – 304). It should be mentioned, however, that thereafter follow provisions on cross-border corporate group insolvencies (Art.305 – 311) and cross-border banking and insurance insolvencies (Art.312 – 336).

before the request to open the proceeding. Also, indirect jurisdiction is not mentioned as a ground for non-recognition of foreign insolvencies (see Art. 278). Thus cases of concurrent insolvency proceedings appear to be limited mainly to Romanian main proceedings and foreign non-main proceedings, with some additional space for concurring main proceedings in Romania and abroad and concurring foreign proceedings.

Slovenia: While Slovenia has also adopted the MLCBI, closely following its wording, it has integrated the MLCBI into a general set of rules on cross-border insolvency law. The Slovenian Insolvency Law (ZFPPIPP) – Financial Operations, Insolvency Proceedings and Compulsory Winding-Up Act) regulates cross-border insolvency law its Chapter 8. Chapter 8 distinguishes general provisions (part 8.1.), access of foreign insolvency representatives and creditor to Slovenian courts (part 8.2.), recognition of foreign proceedings (part 8.3.), cooperation with foreign courts and insolvency representatives (part 8.4.), concurrent insolvency proceedings (part 8.5.) and applicable law in domestic insolvency proceedings (part 8.6.). Part 8.7. provides for some special rules complementing the EIR and EU banking and insurance insolvency law. The general provisions in part 8.1. contain, one the one hand, provisions from the MLCBI, on the other hand they lay-down some additional rules, e.g. definitions of location of assets and criteria for the affiliation of persons (e.g. creditors) to one or another country. They do not define the scope of application of these rules differently from the law in general, i.e. they also apply to consumer insolvencies. It is worth noting that the definitions of (foreign) main proceedings and foreign non-main proceedings in the ZFPPIPP follow the MLCBI. Therefore only foreign proceedings conducted on the basis of COMI can be recognized as foreign main proceedings. The same applies to foreign non-main proceedings which are defined by reference to proceedings conducted on the basis of an establishment. From this appears to follow that foreign proceedings conducted, e.g. in the country of their corporate seat (which may not coincide with COMI) cannot be recognized in Slovenia, at least not as foreign main proceedings. Also, rules on cooperation between main and non-main proceedings would not apply to such situations. The ZFPPIPP does not include the provision of the MLCBI opening cooperation for 'additional assistance under other laws' (Art.7 MLCBI), although the reference in Art.459 of the Law may perhaps be read in this sense. On the other hand, not all provisions of the MLCBI (and the implementing provisions of the ZFPPIPP) require formal recognition of the foreign proceeding. This is true, in particular, for the broader rules on access of foreign insolvency representatives to local courts and on cooperation between insolvency courts and insolvency representatives (Parts 8.4. of the Law) including, arguably, some provisions in part 8.5. of the Law (concurrent proceedings). Slovenia also treats recognition of foreign insolvencies as a matter of law, not of discretion, but opens discretionary powers with regard to the determination of concrete effects of recognition. In this respect, Slovenia makes clear references to more general provisions of the ZFPPIPP (cf. e.g. Art.466 (2) of the Law).

Spain: Spain's Bankruptcy Law of 2020 contains detailed provisions on (autonomous) cross-border insolvency law, mainly in its Book 4. Book 4 consists of five titles: general provisions (Title 1), applicable law (Title 2), recognition (Title 3), concurrent proceedings (Title 4) and pre-insolvency restructuring proceedings (Title 5). Spain has not adopted the MLCBI, but some provisions of the Bankruptcy Law coincide with the MLCBI. Concurrent insolvency proceedings are, on the one hand, addressed particularly in Title 4 of the Law, but they have to be read together with other provisions of Book 4 or even other Books of the Law.

The Law distinguishes, in the first hand, between 'universal' and 'territorial' (non-main) insolvency proceedings, depending on their intended effect (or not) on assets of the debtor situated outside Spain (cf. Art. 47 (1) and Art. 49 (2) of the Law). On the second level, the Law distinguishes between 'primary' (or main) proceedings[43] and 'secondary' proceedings[44]). Universal proceedings are defined, basically, as proceedings opened at the debtor's COMI (Art.45 in conjunction with Art. 47 of the Law, Art. 742 (2) nr.1 of the Law). However, Spanish law provides also for universal insolvency proceedings on some other other jurisdictional grounds (Art.45 (3) of the Law: debtor's domicile; Art. 46 of the Law: jurisdiction for affiliates in corporate groups). Territorial proceedings in Spain can be grounded (only) on an establishment of the debtor in Spain (Art.49 (1) of the Law), however, in the case of reocogntion of foreign territorial proceeding the standard of indirect jurisdiction is more liberal and accepts also any 'reasonable connection of equivalent character, such a location of assets or an economic activity' (Art. 742 (2) nr.2 of the Law). There remains a regulatory gap as to

43 See Art.47 (1) and Art. 742 (2) nr.1 of the Law.
44 See Art. 735 bis of the Law. Usually, however, this term is avoided, cf. Art. 742 (2) nr.1, Art.749 (3) and Art. 750 (2) of the Law.

recognition of foreign proceedings opened on a jurisdictional basis similar to Art.45 (3) or Art.46 of the Law. They appear to treated, from the Spanish perspective, as foreign territorial proceedings only.

It is important to note that Spanish law conditions recognition of foreign insolvencies, and in some instances, also cooperation between concurrent proceedings, on reciprocity (Art. 721 (2) case 1 of the Law) or, alternatively, lack of systematic failure to cooperate on the side of the foreign proceeding (Art. 721 (2) case 2 of the Law).

The opening of a parallel insolvency proceeding in Spain, when a foreign proceeding has already been commenced, is dealt with in Art. 733 and 734[45] and 742 (3)[46] of the Law. In particular, recognition of a foreign primary insolvency proceeding does not hinder the opening of a concurrent territorial proceeding in Spain (Art.742 (3) of the Law). Art.733 and 734 of the Law stipulate the right of the foreign insolvency representative to request a secondary proceeding in Spain and the dispensability of the insolvency test for the opening of a secondary proceeding.

Coordination of parallel proceedings and cooperation between them are mainly dealt with in Title IV (Art.749 – 752 of the Law), but major aspects are also addresssed in Titles II (domestic proceedings) and III (recognition of foreign proceedings). Title IV uses the heading 'coordination' (of concurrent proceedings), therafter addressing both coordination and cooperation. It covers, in principle, all constellations of concurrent proceedings, however, the specific constelllation of concurrent main and non-main (secondary) proceeding is addressed at some places in this Title (see, e.g. Art. 749 (3) of the Law). The Law stipulates in Art. 749 (1) a basic duty to cooperate between the insolvency representatives of the concurrent proceedings), provided, however, that the foreign proceeding is (formally) recognized[47]. This includes a requirement of mutual cooperation (Art. 749 (1) sentence 2 of the Law). Art. 749 (2) gives a non-exhaustive list of acts of cooperation, e.g. mutual exchange of information, conclusion of protocols or other coordination of the proceedings. Generally speaking, the Spanish approach can also be characterized as a 'maximal' regulation of concurrent proceedings, with significant similarities, but also differences in comparison with the approaches of Belgium, Croatia, Poland and Slovenia.

45 In Title II Chapter 1: Territorial proceedings.
46 In Titel III: Recognition.
47 Spanish law provides, similar to Croatia, for a formal recognition proceeding, using the traditional instrument of exequatur (Art. 742 of the Law). It remains open whether recognition can in same cases also be the object of an incidental decision.

B. General aspects for discussion

Taking the EIR and the MLCBI as a basis for further analysis, it would seem that the following general aspects of concurrent proceedings need to be discussed first:

Firstly, which constellations of concurrent (or parallel) insolvency proceedings should be addressed in future regulation? Secondly, which role should be given to the concept of 'recognition' (of foreign proceedings) in the context of parallel proceedings? Thirdly, should there be any general prerequisites for coordination and cooperation between parallel proceedings and which role should be given to discretion in such cases?

I. Which constellations of concurrent (or parallel) insolvency proceedings should be addressed?

Chapter III EIR provides only for rules on coordination and cooperation between an EU-based main insolvency proceeding and one or several[48] EU-based secondary or even non-secondary territorial proceedings. This includes also, though rather briefly mentioned, coordination and cooperation between several secondary or other territorial proceedings[49]. Coordination and cooperation between several main proceedings is not addressed as the EIR allows only one such proceeding in the EU (unity priniciple as to main proceedings).

However, coordination and cooperation between several main (EU-based) proceedings is foreseen in the Regulation in corporate group cases (see, in particular, Art.56 – 60 EIR), the content being similar to the rules in Chapter II[50].

In contrast, Chapter V MLCBI addresses coordination and cooperation between all categories of insolvency proceedings covered by the Model Law, be they main or non-main proceedings. It even contains a particular provision on coordination and cooperation with several foreign proceedings (Art.30 MLCBI).

48 Cf. Art.41 – 43 EIR.
49 Arguably, this includes coordination and cooperation between several EU-based territorial proceedings (with jurisdiction under Art.3 (2) EIR), when COMI is outside the EU.
50 The particular 'group coordination proceeding' under Art.61 – 77 EIR have no equivalent in Chapter III EIR.

From the perspective of an efficient and fair handling of cross-border insolvency cases it would seem the best solution to define the constellations of coordination and cooperation between parallel proceedings as comprehensively as possible. This does not exclude differentiating according to the concrete context. For example, cooperation may be more liberal between EU-based proceedings or a preponderance in cooperation may be given to one proceeding, e.g. the main proceeding.

II. Which role should in this context be given to the concept of 'recognition' of a foreign insolvency proceeding?

Chapter III EIR seems based on the assumption that coordination and cooperation between parallel EU-based insolvency proceedings is condition on that such proceedings are mutually recognized under Art.19 and 20 EIR. Although, theoretically, recognition may have to be denied, e.g. under the public policy clause of Art.33 EIR, this apparently has never occurred until now in judicial practice and is not dealt with in detail in the Regulation.

In contrast, the MLCBI distinguishes in Chapter V between constellations where recognition of the foreign proceeding(s) is formally required[51] and where no mentioning of recognition is made[52]. It must be taken into account that under the MLCBI, recognition is granted in the context of a formal proceeding (Chapter III Art.15 and 17 MLCBI), except if autonomous law provides for a more liberal approach (Art.7 MLCBI). Basically, (formal) recognition or even the commencement of a recognition proceeding gives a stronger position to the recognized foreign proceeding. This is particularly true if the foreign proceeding is a main proceeding in the sense of Art.2 (b) MLCBI, i.e. a proceeding opened at the debtor's COMI[53].

Under the EIR (as well as under EU international civil procedure law in general), the term 'recognition' relates to foreign judgments (not to proceedings in general, although in the insolvency context recognition of the foreign judgment opening the insolvency proceedings brings with it the recognition of in principle all effects of the foreign insolvency proceeding) and takes places 'automatically', not requiring a formal recognition

51 See, e.g., Art.29 (a) MLCBI, Art.30 (a), (b) and (c).
52 See, e.g., Art.29 MLCBI in general.
53 See, e.g. Art.28 MLCBI.

proceeding[54]. The advantage of this approach is speed and flexibility, but it involves a certain degree of imprevisibility and incompatiblity of decisions on recognition.

In the EU, however, there is also the practice of judicial assistance to foreign proceedings (under EU regulations as well as under, e.g., the Hague Conventions on judicial assistance), which does not require a scrutiny of recognition criteria.

Which approach would seem preferable in future legislative action by the EU with regard to concurrent proceedings opened in non-EU countries?

As the present solution under the EIR with regard to coordination and cooperation between parallel EU-based proceedings does not seem to have led to problems, there is probably no need for changes. As to coordination and cooperation with non-EU insolvency proceedings, the approach should, arguably, be different. Generally speaking, the complete lack of Union rules creates legal uncertainty about cooperation with insolvencies in countries of great economic importance for the EU, such as Switzerland, the UK, the U.S., China and others. One option would be to apply with regard to third countries the provisions of the MLCBI, another would be to extend the provisions of the EIR, perhaps with some modifications, or develop other rules.

Under the insolvency laws of the EU Member States, different approaches are used: for example, Germany and Croatia apply, in essence, the provisions of the EIR by analogy[55]. The Austrian Insolvency Code contains only one short provision on concurrent provisions in non-EU countries, which provides for a general duty of information and other cooperation for insolvency representatives, partly also for courts[56]. Greece, Poland[57], Romania and Slovenia apply to relations with non-EU countries the provisions of the MLCBI, though with significant differences. A third group of countries have no specific provision in this regard or even no provisions on cross-border insolvency at all[58].

Applying the rules of the MLCBI would include moving to the principle of formal recognition[59]. This could by modified, e.g. by opening some

54 Art. 20 (1) EIR.
55 See sec. 354–358 German InsO, Art.418 – 423 of the Croatian Bankruptcy Act.
56 Sec. 239 Austrian InsO.
57 With numerous particularities.
58 E.g. the law of the Netherlands.
59 This approach has been chosen by Spain.

space for incidental recognition[60] or even automatic recognition, either as a common EU standard or by leaving this to national legislation. Another option might be to create a general approach (e.g. not requiring a scrutiny of recognition as a general rule) and varying this for particular issues. This would be in line with the approach taken by the MLCBI, but would include some modifications by the EU.

Arguably, the last approach would seem the most adequate one: A general duty of non-formalized cooperation with foreign proceedings (e.g. between insolvency practitioners of both sides) would avoid unnecessary costs (e.g. for a formal recognition proceeding), while giving the insolvency representatives or other participants the possibility to turn to other insolvency organs or courts for approval of specific actions in cases of doubt. Beyond this, liberating cooperation from a necessity to scrutinize recognition criteria (but keeping public policy as a general security instrument) would be both in line with the MLCBI and the usual approach in cross-border judicial assistance. Cooperation between parallel insolvency proceedings is, principally, only one specific case of of cross-border judicial assistance, which even appears to be directly covered by the Hague Conventions on Judicial Assistance.

It may also be reasonable to provide for specific rules for some issues, e.g. when legal clarity seems particularly important. This would seem to apply, for example, to the question of whether a – domestic or foreign – proceeding has universal or territorial effects (cf. Art.28 MLCBI, which links this to formal recognition of a foreign main proceeding). On the other side, coordination (as distinguished from cooperation) transcends the limits of judicial assistance and would therefore seem to require a recognition scrutiny. However, even here, a formal recognition proceeding would not seem to be necessary in all cases. It can be left to the insolvency representatives and other insolvency organs to determine when a formal proceeding of recognition seems necessary for clarity's sake or in order to be safe from liability risks.

The provisional result of the analysis is therefore that the provisions of the MLCBI on concurrent proceedings can well be used by the EU as as starting-point for regulation of coordination and cooperation with non-EU countries, but the provisions of the Model Law should be adapted to the particular legal approaches developed in the EU. This may include, for example, transferring some provisions of the MLCBI, which cover concurrent

60 Such an approach has been developed by Croatia.

proceedings, but are contained in other chapters of the Model Law, into a particular part of future EU law on concurrent proceedings.

III. Should there be general prerequisites for coordination and cooperation between parallel proceedings involving non-EU countries?

Both the MLCBI (in general) and the EIR (for inner-EU cases) provide for a duty of cooperation addressed both to insolvency representatives and courts. Coordination[61] tends to be regulated more specifically, sometimes requiring recognition of the foreign proceeding – which indirectly requires the scrutiny of prerequisites for recognition –, sometimes not mentioning such a requirement. Under the MLCBI (Art.6), and implicitly also under the EIR[62], public policy limits also the granting of cooperation and coordination between concurrent proceedings. It needs to be remarked that public policy does not necessarily lead to a yes-or-no outcome, it allows also for partial recognition and partial cooperation or coordination.

If a future EU legislative act were to deal with concurrent proceedings (including, but not limited to procedings in third countries) in a more systematic manner, it would be welcome to give legal definitions of the terms 'coordination' and 'cooperation' and give the rather inconsequential use of these terms in the EIR a more systematic structure. Another possibility would be to leave the use of the terms unchanged, which would just continue to leave interpretation for courts and academics.

If the purpose were to define (and distinguish) the meaning of theses terms, it may be proposed to define cooperation as referring to mutually agreed acts of insolvency organs. On the other side, coordination could be defined as legal rules or acts other than cooperation, which serve the purpose to optimize the conduct of concurrent insolvency proceedings for the participants.

Basically, public policy can be seen (and this could be made explicit in future legislation) as a common limit to both coordination and cooperation. In so far as recognition of a foreign proceeding is (implicity or explicity) required, there is no need for a particular definition of requirements for

61 As to the meaning of this term see supra note 7.

62 Art.33 EIR (public policy exception); the provision is situated in the Chapter on recognition of foreign proceeding. As cooperation and coordination of concurrent proceedings within the EU seems to implicitly require recognition of the foreign proceeding, Art.33 EIR also applies in the concurrent proceedings context.

recognition in the concurrent proceedings context. In so far as recognition is not required, the public policy clause would seem to suffice as a general requirement, thus following the MLCBI.

IV. Which role should be given to discretion in such cases?

The EIR, in principle, does not explicity provide for discretion in cross-border insolvency. One exception is Art.36 EIR for the specific case of certain assurances given by the insolvency representative in concurrent proceedings. However, within national insolvency law discretion is foreseen in different contexts. For example, insolvency representatives typically have a large degree of discretion in the exercise of their duties, though this is subject to control by other insolvency organs or risks of liability. On the other hand, the MLCBI provides for discretion (by courts or insolvency representatives) in numerous provisions, e.g. in Art.21 (relief that 'may' be granted upon recognition of a foreign proceeding). In Chapter V MLCBI, which deals with concurrent proceedings, the existence of discretion on the side of courts or insolvency representatives is not explicit, but would appear to be included in the references made, e.g.to Art.19 – 21 MLCBI[63].

Basically, both the EIR and the MLCBI establish a duty to cooperate with foreign proceedings. Details of cooperation, however, typically include numerous discretionary or evaluation elements under national law. Coordination outside such cooperation is also foreseen on a legally compulsory basis (see, e.g., Art.28 MLCBI, Art.3 (3) EIR)[64], but may also include discretionary or evaluation elements under applicable national law.

For future legislative action, it would seem that the present approach under the MLCBI or the EIR (for inner-EU cases) which avoids specific mention of discretion, but foresees a legal duty to cooperation and seek coordination if feasible, seems adequate also in cases related to insolvency proceedings in third countries. The details of cooperation (including the denial of cooperation if there are serious reasons to do so in the interest of the creditors or the debtor) can be decided on the level of applicable insolvency law.

63 Cf. Art.29 MLCBI.

64 In so far as the wording of e.g. Art.34 EIR use the term 'can', this probably does not open discretion of the court, but only refers to its power (jurisdiction) to render a decision.

V. Particular rules on conflict of laws?

The EIR contains very detailed rules on conflict of laws in insolvency, while the MLCBI is largely silent on this topic. However, UNCITRAL has started work on a particular legal instrument on this subject. Art.35 EIR states expressly that 'secondary insolvency proceedings' (non-main proceedings based on an establishment) are governed by the same conflict of laws rules as other insolvency proceedings. The proviso in Art.35 EIR that the Regulation might provide for particular rules for secondary proceedings has by now not yet been used ast to conflict of laws in the Regulation.

There is no reason to modify this approach in relations with concurrent proceedings in third countries. One can imagine situations in which e.g. agreements between insolvency representatives of concurrent proceedings include choice of law clauses. Opening conflict of law rules to some degree of party autonomy should, however, not be limited to EU-third country constellations, but should be foreseen – if regarded as practically relevant – in a general manner.

VI. Particular rules on universality/territoriality?

Both the EIR and the MLCBI contain some provisions on the intended extraterritorial (or only territorial) effect of insolvency proceedings. As to non-main proceedings, Art.3 (2) sentence 2 EIR expressly states that 'the effects' of such proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State'. This territorial auto-restriction is confirmed by the denomination of such proceedings as 'territorial proceedings' e.g. in Art.3 (4) EIR. This rule is repeated with particular regard to secondary insolvency proceedings in Art.34 sentence 3 EIR.

In contrast, no such mention is made as to main proceedings, and the general view is that such proceedings have 'universal effect', i.e. that they extend also to foreign assets of the debtor, including assets situated in non-EU countries[65].

The MLCBI approaches this issue in a slightly different way. It does not define the territorial or extraterritorial effect of non-main proceedings

65 This is also stated in Recitals 22 and 23 of the EIR.

in a general manner, but it contains a specific provision on the effect of (domestic) concurrent non-main proceedings in Art.28 MLCBI[66]. Art.28 MLCBI states that 'the effects of that proceeding shall be restricted to the assets of the debtor that are located in this State'. Thus Art.28 MLCBI starts with the principle of territoriality for such proceedings. However, it adds that such proceedings extend also 'to the extent necessary to implement cooperation and coordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of this State, should be administered in that proceeding.' This is in line with the generally flexible approach of the MLBCI – based on the corresponding legal traditions in Common Law countries – as to cross-border insolvency.

While it may be justified to keep to this rule in inner-EU constellations, thus giving particular weight to the main proceeding of another EU Member State, a more flexible approach would seem preferable in relations with non-EU countries.

Common Law countries typically do not use the head of jurisdiction (e.g. COMI, domicile, establishment, property) as a decisive criterion for the intended extraterritoial or merely territorial effet of the proceeding. Instead, they tend to focus on balancing interests or determining 'reasonableness', granting courts a significant degree of discretion. The consequence can be that a non-main proceeding can be seen to have exterritorial effects, at least in some respects. This opens the way for insolvency representatives and courts to find flexible solutions to complicated cross-border insolvencies. The EU should take this into account and not exclude its proceedings (i.e. courts, insolvency representatives etc.) from negotiations coming up in such insolvencies. Therefore, as to relations with non-EU countries, Art.28 MLBCI seems to be a more adequate approach than the strictly territorial approach of Art.34 sentence 2 EIR. This would not exclude to keep the strict territoriality principle in Art.3 (2) EIR for reasons of clarity and would give the revised Art.35 sentence 2 EIR an independent role in concurrent proceedings related to non-EU countries. Perhaps even better, Art.35 sentence 2 EIR should be opened in this way also for inner-EU cases, in case a practical need arises.

66 See also Art.29 (c) MLCBI and, implicitly, other provisions. The Chapter on recognition of foreign proceedings (Art.15 et seq. MLCBI) also draws some distinctions between foreign main and non-main proceedings, but does not expressly refer to aspects of territoriality/extraterritoriality.

C. Specific issues for discussion

Both the EIR (for inner-EU proceedings) and the MLCBI contain specific rules on coordination and cooperation of concurrent proceeding for the different stages of the involved proceedings. Some of these rules will now be looked at-more closely with a view to the specifics of EU – third country relations.

I. Opening of proceeding

The opening of concurrent proceedings raises mainly questions of general admissibility of the concurrent proceeding, of jurisdiction and of the existence of 'insolvency' if this is a formal requirement under the applicable lex fori concursus.

1. Admissibility of a concurrent proceeding

Neither the EIR nor the MLCBI exclude the opening of concurrent proceedings completely. However, both the EIR and the MLCBI give the proceeding commenced in the state of the debtor's center of main interests (COMI) a preponderant role in the coordination of the proceedings.

It seems that a future EU legislation dealing with concurrent proceedings in EU and non-EU countries would have to take the same basic approach. EU law cannot limit the opening of concurrent proceedings in other countries anyway and should not exclude the opening of concurrent proceedings in the EU just because of the existance (or opening) of an insolvency proceeding in a third country. To which degree the opening of an insolvency proceeding in a non-EU country should limit the opening of a concurrent proceeding in the EU or have an impact on the conduct of such proceedings, needs to be discussed in details for the various stages of the proceeding.

2. Jurisdiction

Neither the EIR nor the MLCBI establish particular rules on jurisdiction for concurrent proceedings. The general jurisdictional rule of the EIR on main proceedings is based on the COMI (Art.3 (1) EIR), the general jurisdictional rule on non-main proceedings is based on an 'establishment' of the debtor (Art.3 (2) EIR). However, if the debtor's COMI is situated outside the EU, the EIR at present does not apply, and applicable national law may foresee other grounds for jurisdiction, e.g. domicile, location of assets or even citizenship.

The MLCBI does not deal with direct jurisdiction for main proceedings, it addresses only indirect jurisdiction for main proceedings in the recognition context, also taking COMI as the relevant connecting factor (Art.2 (b) MLCBI). As to jurisdiction for non-main proceedings, the MLCBI is more liberal than the EIR: It does not limit direct jurisdiction for non-main proceedings[67], even though its rules on recognition of forein non-main proceedings and on coordination or cooperation with such proceedings are limited to non-main proceedings opened on the jurisdictional basis of an establishment of the debtor ('foreign non-main proceding' as defined by Art.2 (c) MLCBI). The provisions of the MLCBI on recognition of foreign proceedings (e.g. Art.15 et seq. MLCBI) are limited to main and non-main proceedings in the sense of Art.2 (b) and (c) MLCBI[68], although it may be possible to recognize other non-main proceedings (e.g. proceedings on the jurisdictional basis of property situated in the state of the forum concursus) under autonomous national law (Art.7 MLCBI). The rules of the MLCBI on access to court of 'foreign representatives' are less explicit. They might be read as accepting also foreign representatives appointed in 'non-establishment' non-main proceedings (cf. Art.9 – 14 MLCBI). The same would seem to be true for the MLCBI Chapter on cooperation with foreign courts and representatives (Art.25 -27 MLCBI). One the other hand, the Chapter on concurrent proceedings (Art.28 – 32 MLCBI), uses – at different places – both the (broad) term of foreign proceedings and the more specific terms of 'foreign main' and 'foreign non-main' proceeding as defined in Art.2 MLCBI. Taking the wording seriously, the MLCBI would seem not to generally exclude coordination and cooperation with 'non-establishment' non-main proceedings, anyway not under otherwise applicable national law (Art.4 MLCBI).

67 Art.28 MLBCI, which requires for the opening of concurrent non-main proceeding the existence of assets in the forum states, does not seem to be a rule on jurisdiction, but only a rule limiting the jurisdiction extant under other rules (e.g. based on establishment).

68 Cf. Art.17 (1) MLCBI.

From a legal policy perspective with regard to non-EU countries, the approach chosen by the EIR as to direct jurisdiction would seem to fit also cases of concurrent proceedings in EU countries. In particular, it would hardly convince to establish different rules for jurisdiction in dependency of whether COMI is situated in the EU or in a third country as COMI is now globally accepted as an adequate head of jurisdiction for (main) insolvency proceedings. If there is a situation when two or more countries claim to be the main proceeding, the solution of such conflicts must be found on the substantive level, if possible through coordination and cooperation, not on the jurisdictional level[69].

The evaluation may be different as to non-main proceedings. The limitation of EU-based non-main proceedings to (direct) jurisdiction based on an establishment, serves the purpose to give a significant preference to a COMI-based main proceeding in another EU country. In the case of a main proceeding (COMI-based or possibly other acceptable jurisdiction) outside the EU, the balance of interests may be different as third country proceedings may not be fully compatible with EU standards. In such situations, the autonomous cross-border insolvency law of numerous EU Member States provides for a broader scale of rules on jurisdiction than merely the existence of an establishmen. In such cases, the existence of assets of the debtor in the non-main proceeding country should suffice. This head of jurisdiction seems adequate for an insolvency proceeding, which is based in most countries – even today – on a broad concept of levying (general) execution into property. Whether a concurrent proceeding based on assets is indeed requested and can be opened, depends on considerations of convenience and other legal provisions, which can well co-exist with broad jurisdiction.

One could imagine to vary this jurisdiction if the debtor has an establishment in another EU country, giving establishment-based jurisdiction within the EU (or at least an EU proceeding on this jurisdictional basis) priority over a mere 'asset-based' proceeding. This would, of course, imply that in such cases the establishment-based EU proceeding would have effect in all EU Member States. In view of the supposed rarity of such cases it will probably not be necessary to regulate this variant expressly.

69 It may be slightly different if the EU accepted in the future the institute of forum non conveniens.

3. Determination of insolvency

The definition of 'insolvency proceeding', both under the EIR and the MLCBI, presupposes insolvency of the debtor. Technically, insolvency can be understood in different ways[70], and some countries even allow for insolvency proceedings without a formal test of insolvency.

Both the EIR and the MLBCI take into account these differences, and, in view of the sometimes complicated examinations and costs of a formal test of insolvency, state that recognition of a foreign main proceeding is, for the purpose of opening a domestic non-main insolvency proceeding, (rebuttable) proof that the debtor is insolvent (Art.28 MLCBI). Art.34 EIR contains a similar rule, but requires in addition that the foreign proceeding required a formal test of insolvency. Some national laws dispense completely with the requirement of insolvency in secondary insolvencies.

As the parallelism between Art.28 MLCBI) and Art.34 EIR shows, this rule is not based on specifics of inner-EU cooperation, but serves general purposes of efficient conduct of parallel insolvencies in different countries. Art.34 EIR could therefore be 'extended' to non-EU insolvency proceedings, but, arguably, the requirement of a formal test of insolvency in the foreign proceedings does not seem to be necessary. Abuse of insolvency proceedings by solvent debtors can in evident cases be countered by non-recognition or non-cooperation, and abolishing this requirement would significantly facilitate cooperation with insolvencies in Common Law countries, which often do not require a formal insolvency test, but have have other legal instruments to avoid abuse of insolvency law by solvent debtors.

II. Conduct of proceedings

Both the EIR and the MLCBI contain numerous, very detailed provisions on the conduct (including termination) of concurrent proceedings. The EIR concentrates most of these provisions in Chapter III with under the heading 'Secondary insolvency proceedings', which is limited to intra-EU relations (Art.34 – 52 EIR). Other, more general provisions of the EIR also apply in the parallel proceedings context, e.g. rules on conflict of laws, on recognition of foreign insolvency judgments, or substantive provisions such

70 Typical differences are between balance sheet insolvency and cash-flow insolvency, but the differences include also the concept of 'acts of bankruptcy' and growing use of the concept of 'prospective insolvency' etc.

as the right of foreign creditors to lodge claims (Art.53 – 55 EIR) or the right of an insolvency representative to exercise his powers in other EU Member States (Art.21 EIR) or the establishment and interconnection of insolvency registers (Art.24 -27 EIR).

The Chapter of the MLCBI on concurrent proceedings (Art.28 – 31) is much shorter than the corresponding Chapter of the EIR, but some of its provisions address the same issues as the EIR: Art.28 MLCBI on the opening of a non-main proceedings corresponds to Art.34 EIR. Art.29 MLCBI (coordination of concurrent proceedings by courts) corresponds, roughly speaking, to Art.42 EIR (cooperation between courts). Art.30 MLCBI, which has no direct parallel in the EIR, deals with coordination of more than one foreign proceedings. Art.31 MLCBI (presumption of insolvency in the opening stage of parallel proceedings) corresponds to Art.34 sentence 2 EIR. Art.33 MLCBI (effects of payments in concurrent proceeding), roughly speaking, corresponds to Art.23 EIR (return or imputation of foreign payments). Some substantive provisions of the EIR, which also apply to secondary proceedings, are regulated in the MLCBI in a Chapter on 'Access of foreign representatives and creditors to courts …', which as such does not exist in the EIR.

Differently from the MLBCI, the Chapter of the EIR on secondary proceedings provides for separate provisions on cooperation between insolvency representatives (Art.41), between courts (Art.42) and between insolvency practitioners and courts (Art.43). The MLBCI adresses basically the same issues, but in differently structured contexts: The powers and duties of courts in concurrent proceedings are specifically addressed in Art.29 MLCBI, but they at this place not limited to cooperation with other courts. Furthermore, Art.29 MLCBI refers on the one hand to a particular Chapter of the MLCBI on general provisions on cooperation between courts and insolvency representatives in cross-border insolvency cases, which is no limited to concurrent proceedings (Art.25 – 27 MLCBI), on the other hand to powers and duties of courts in the Chapter on recognition of foreign proceedings (Art.19 – 21 MLCBI). Both Art.19 – 21 MLCBI and Art.25 – 27 MLCBI are ostensibly influenced by the cross-border insolvency practice (and underlying legislation) in Common Law countries, which makes them somewhat difficult to compare with the EIR.

The basic idea is, however, the same: All insolvency organs, in particular insolvency representatives and insolvency courts, should as far as possible cooperate (and be empowered to do so) with corresponding organs or other institutions abroad with a view to optimize the economic outcome of the insolvency proceeding for all participants. The EIR develops this concept mainly in the Chapter on secondary proceedings, which is supplemented by a particular, more general Chapter on the rights of foreign creditors. Duties and powers of cooperation with foreign courts outside the parallel proceedings context are not specifically addressed in the EIR, but are left to autonomous law.

There does not seem to be any fundamental imcompatibility between the EIR and the MLCBI with regard to cooperation and coordination of concurrent proceedings, though the legislative technique of both texts differs. In particular, the approach of the MLCBI to refer in the Chapter on concurrent proceedings to general provisions on cooperation as well as on recognition, which are based on a significant freedom of discretion and evaluation of court, makes the MLCBI probably difficult to apply in countries where courts are not accustomed and prepared to use such broad powers of discretion.

From the EU's perspective, there might be two basic solutions if concurrent proceedings with participation of non-EU countries were to be addressed: One option would be to use the MLCBI as a model, which would have to be adapted to the structural specifics of the EIR and the experiences of EU countries. The other option would be to use the EIR, in particular its Chapter on parallel proceedings, as a starting point, and integrate it with elements taken from the MLCBI.

Probably, the second approach fits better the legal thinking of the EU, but the second approach may be more effective for international cooperation in insolvency matters on a global scale.

Perhaps it is not even necessary to draw a fundamental line between the two approaches. Not all of the detailed provisions in Chapter III EIR may be necessary for coooperation with third countries. A general duty and power of insolvency courts and insolvency representatives to seek and grant cooperation with foreign courts or insolvency representatives (within the limits of applicable law and on the basis of cooperation on both sides) would seem to be fully compatible with the spirit of the EIR and European insolvency law in general. Such a duty and power could, for example, be included in Chapter I (general provisions) of the EIR, and would be compatible with Chapter IV MLCBI.

Details such as discretion by courts would not necessarily have to be foreseen explicitly in the EIR, although some of the respective provisions of the MLCBI could be 'translated' into wordings common to the EIR.

Also, EU Member States might be granted the right to provide for more cooperation-friendly or, generally speaking, more detailed rules, perhaps even the right to adopt the MLCBI as such if they so prefer and it fits into their legal systems. This might be an attractive option e.g. for EU Member States with a common law background such as Ireland, Cyprus or Malta, or countries which have already adopted the MLCBI for relations with non-EU countries.

D. Theses and suggestions for future action

1. Cross-border insolvencies, in particular in larger business cases, often lead to concurrent (parallel) insolvency proceedings on a global scale. Though many of such parallel proceedings take place in a corporate group context, concurrent proceedings relating to one debtor do exist and need an adequate legal framework. This framework may also be useful for corporate group situations.
2. Jurisdiction for non-main proceedings is not a specific topic for concurrent proceedings, but should be decided for non-main proceedings generally. When the debtor's COMI is located in the EU, the existing rules need no change. When the debtor's COMI is located outside the EU, a widening of jurisdictional grounds should be considered.
3. In case of concurrent proceedings, the EU should amend Art.34 sentence 3 EIR, aligning it with Art.28 MLCBI: possible extension of the effect of the non-main proceeding to foreign assets if this supports coordination and cooperation between the proceedings.
4. The provisions of the EIR on secondary insolvency proceedings (Chapter III EIR), which are presently limited to inner-EU coordination and cooperation, should be used as a starting-point for regulation of relations also with third countries. They should for this purpose, however, be aligned with the MLCBI, which is founded on the same spirit of effective and fair regulation of cross-border insolvencies.
5. Such alignment should include a general duty and power of courts and insolvency representatives to cooperate with foreign courts and insolvency representatives with a view to optimize the results of the insolvency proceedings.
6. Such a duty 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-coopera-

tion by the organs of the other proceeding could also be a reasonable exception. Public policy can serve as another general exception.

7. In concurrent proceedings a limited possibilty of choice of applicable insolvency law by insolvency representatives should be introduced in order to facilitate an effective and fair regulation of the insolvency.