Domestic insolvency proceedings and non-EU 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 domestic main and non-main insolvency proceedings. It also develops some recommendations.

Keywords: Domestic insolvency proceedings; MLCBI; EIR; national laws; basic concepts; universality, extraterritorial reach, territoriality, jurisdiction, conflict of laws, substantive law.

The purpose of this general report is to give an overview of rules under the European Insolvency Regulation (Recast) of 2015 in their application to non-EU countries (third countries)[1] from the perspective of insolvency proceedings opened in the EU and to present some ideas how such rules might be further developed in the future. The general report includes also some comparative notes on national approaches, trying to find out whether they provide solutions which might inspire future EU provisions as to relations with non-EU countries.

Although the text of the EU Insolvency Regulation (EIR) does not distinguish between 'domestic' and 'foreign' insolvency proceedings[2], this distinction is generally made in insolvency practice. Insolvency proceedings opened in one EU-country are perceived in this country as 'domestic',

1 The term 'EU countries' refers throughout the whole book to countries bound by the EIR, i.e excluding Denmark.

2 This differs from the UNCITRAL Model Laws on Insolvency, cf. Preamble (b) of the 1997 Model Law on Cross-Border Insolvency: 'this State' = domestic v. 'foreign' (proceeding etc.), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf (accessed 16.06.2025).

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while insolvency proceedings opened in another EU country or outside the EU are perceived as 'foreign'. The fact that the EU Insolvency Regulation contains a chapter entitled 'general provisions' means that these provisions apply both to domestic and foreign proceedings as well as to situations of parallel proceedings. Some of these provisions are of a general nature[3], while others are very specific, even though they are placed under the heading of general provisions[4].

The EIR contains rules on direct jurisdiction, conflict of laws, recognition of foreign proceedings and on coordination of parallel proceedings including the corporate group context. It also includes a number of substantive (procedural or material) rules applying in different procedural contexts (domestic proceedings, foreign proceedings, parallel proceedings).

This report does not, in principle, deal with recognition of foreign proceedings and concurrent (parallel) procedings as these topics are the subject of other contributions of the book[5]. However, such issues may be touched upon briefly in some contexts. The report will deal with domestic proceedings in general, including both main (COMI-based) and non-main proceedings.

The report will mainly focus on direct jurisdiction and conflict of laws from the perspective of a domestic insolvency proceeding, but will also address some issues of substantive law treated in the Regulation.

As far as relations with non-EU countries are concerned, the EIR contains numerous rules whose application is limited to inner-EU cases. As to domestic proceedings, many of the conflict of laws rules of the EIR refer only to the law of other EU countries or require certain circumstances (e.g. acts or location of property) to be present within the EU. Also, the substantive rules of the EIR tend to refer only to property situated in other EU Member States[6] or creditors resident in the EU[7]. In so far as the EIR is not applicable, the cross-border insolvency law of the EU's Member States is governed by autonomous law or (rarely) international treaties[8]. In this

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3 Art.1 EIR (scope) and Art.2 EIR (definitions).

4 See e.Art. 3 – 6 EIR (jurisdiction) and Art.7 – 18 EIR (applicable law and certain substantive provisions).

5 See → Trunk (Concurrent proceedings) and → Trunk/Silvestri (Recognition).

6 See Art.8 EIR (rights in rem), Art.10 EIR (retention of title) and Art.23 EIR (duty to return payments).

7 See Art.1 (11) and (12) EIR, 'local' and 'foreign' creditors.

8 E.g. the Nordic Bankruptcy Treaty (1933), the French-Monaco Bankruptcy Treaty (1950) and – in so far as the EIR does not apply – the Austrian-German Bankruptcy

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respect, some EU countries[9] have adopted the UNCITRAL Model Law on Cross-Border Insolvency (MCBI) of 1997[10], while others have developed models aligned to the EIR[11] or use independent, but rather piecemeal approaches[12]

The report begins with a short overview of the EIR's rules applicable to cross-border cases with a link to non-EU countries. Thereafter follows an overview of national approaches to cross-border insolvency law outside the EIR, focusing on aspects which might be of use for developing future EU rules.

The second part develops the analysis of the the present state of law in more detail.

Throughout the report, national approaches will be referred to if they seem to be of interest for a future unified EU approach. The report will also take into account the model laws of UNCITRAL relating to insolvency for comparative purposes. The basic Model Law of 1997 (MLCBI) and the Model Law on Enterprise Group Insolvency (MLEGI) of 2019 are mainly concerned with the recognition of foreign insolvency proceedings and cooperation of parallel proceedings, which are outside the scope of this report. Recognition of foreign insolvency-related judgments (Model Law of 2018, MLIJ) is treated in a separate contribution in this book. However,

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Treaty (1985). The Council of Europe's Istanbul Bankruptcy Convention of 1990 has not entered into force, but will be taken into account in this report at some places for comparison.

9 Greece, Poland, Slovenia and Romania, cf. Alexander Trunk, FS Smid (2022), pp.453 – 466.

10 MLCBI 1997. The other model laws developed by UNCITRAL in matters of cross-border insolvency (MLIJ and MLEGI) have not yet been adopted by EU Member States.

11 See, e.g. sec.217 – 262 Austrian Insolvency Code. Art.116 – 119 Belgian Code of Private International Law and Art.XX-210 – 223 Belgian Code of Business Law, Arts. 392 – 399 Croatian Bankruptcy Act, (with significant particularities), sec. 335 – 358 German Insolvency Code (Insolvenzordnung, InsO), Art. 7, 275 – 287. 294 - 297 Portuguese Insolvency Code, Art.45 – 56 and Art.721- 741 of the Spanish Insolvency Act.

12 Cf. Art. 2, 20 and 203 – 205 Dutch Bankruptcy Act, sec. 67 and 70 Hungarian Private International Law Act. Sec. 1793 – 175 Slovakian Bankruptcy and Restructuring Act.

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the current UNCITRAL draft Model Law on applicable law in insolvency proceedings[13] will be addressed in more detail in this report[14].

The third part of this report develops some ideas for discussion on future legislative action.

A. Overview of the present state of the law

I. The EIR in its relation to non-EU countries

As is clear from the wording of Art.19 (1) EIR, the Regulation does not deal with recognition of non-EU insolvencies. It also does not address cooperation between concurrent/parallel insolvency proceedings in the EU and in third countries (cf. Art.34 EIR, which refers to proceedings in EU countries only). However, the distinction between 'EU' and 'non-EU' contacts can play a role also in domestic insolvency proceedings, both for direct jurisdiction, for conflict of laws and on a substantive level.

As to jurisdiction, the main jurisdictional criterion of COMI (Art.3 (1) EIR) is determined on an analysis of the debtor's activities and property worldwide, not merely on circumstances located in the EU. On the other hand, the alternative jurisdiction criterion of establishment (Art.3 (2) EIR is limited to cases of establishment within the EU. If COMI is located outside the EU, the EIR is not applicable.

As to conflict of laws, the basic conflicts rule of the lex fori concursus (Art.7 EIR) can lead only to the law of EU Member States, whose direct jurisdiction is established under Art.3 EIR. Also, most special conflicts rules refer only to the law of other EU Member States (Art.11 – 16 EIR), exceptions, however, being Art. 9 EIR (set-off) and Art.17 (EIR (protection of third-party purchasers). This leads to the question whethe Art.11 – 16 EIR should be applied de lega lata or ferenda to relations with non-EU countries.

13 Most recently, see the draft discussed at the session of WG V of UNCITRAL at its session in New York on 13-17 April 2026, https://docs.un.org/en/A/CN.9/WG.V/WP.207.

14 The recent UNCITRAL Toolkit and Background Notes on Asset Tracing and Recovery in Insolvency Proceedings (2025), https://uncitral.un.org/sites/default/files/media-documents/EN/Texts/UNCITRAL/2513250e-uncitralbackgroundnotesatr-ebook-accessible.pdf, are conceived both for domestic insolvency proceedings and in the context of recognition of foreign proceedings. Due to their very specific content and their function only as a toolkit they will not be addressed in detail in this paper.

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As to substantive rules (both of a procedural or material character), the EIR's provisions are often, though not generally, limited to circumstances in the EU. The main examples are Art.8 and 10 EIR (third party rights in rem and reservations of title: assets located in another EU Member State). The term of foreign creditors, which are granted a particular status under Art.53 – 55 EIR, is limited in Art.2 (12) EIR to creditors resident in the EU. As far as the geographical reach of insolvency proceedings is concerned, Art.3 (1) EIR – COMI-based proceedings – does not mention any territorial limitation, and recitals 22 and 23 state as given that such proceedings have 'universal scope'. This expression refers to the 'universality principle' in cross-border insolvency doctrine, under which insolvency proceedings have a global reach, though if this may need (and not alway receive) recognition abroad. In contrast, Art. 3 (2) EIR limits the reach of establishment-based insolvency proceedings to assets situated in the respective forum state.

The Court of Justice of the European Union has decided that the EIR is not limited to cases with links between at least two EU Member States and that it applies also to cases linked with a non-EU country[15]. Thus, the jurisdictional rules of the EIR can be used also for lawsuits against defendants domiciled outside the EU

The EIR distinguishes between 'main' and 'non-main' insolvency proceedings[16]. The distinction is grounded on the underlying head of (international[17]) jurisdiction: main proceedings are based on the 'center of main interests' (COMI) of the debtor in a certain EU Member State[18], non-main proceedings can be based, under the EIR, only on an 'establishment' of

15 ECJ, judgment of 16 Jan. 2014, C-328/12 (Schmid./Hertel), https://lexetius.com/2014,138 (avoidance action against defendant domiciled in Switzerland) and ECJ, judgment of 4 Dec. 2014, C-295/134, H. v N.K. ([Nortel], https://curia.europa.eu/juris/document/document.jsf?text=&docid=160307&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1. (corporate director's liabiilty claim in action against defendant domiciled in Switzerland). For difficulties in this respect from the Swiss recognition perspective see → Staehelin/Kleider.

16 See Art.3 (1) EIR v. Art.3 (2) and Art.34 et seq. EIR ('secondary' proceedings). The EIR does not expressly use the term 'non-main' proceedings, but see Art.2 (c) UNCITRAL MLCBI.

17 In contrast with territorial jurisdiction (venue), subject-matter jurisdiction and other jurisdictional categories.

18 Art.3 (1) EIR.

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the debtor in a EU Member State[19]. The distinction between main and non-main proceedings is relevant, under the EIR, for basically two reasons:

Firstly, main proceedings have an intended universal (extraterritorial) reach[20], while 'the effects [of non-main proceedings] shall be restricted to the assets of the debtor situated in the territory of the latter Member State' (Art.3 (2) sentence 2 EIR). Secondly, the EIR gives main proceedings a function of prevalence or guidance in relation to non-main (secondary) proceedings[21]. This prevalence is, however, limited to the relations between proceedings in the EU. The conflict of laws rules of the EIR (Art.7 – 18 EIR) do not distinguish between main and non-main proceedings.

II. The UNCITRAL Model Laws

The existing UNCITRAL Model Laws on cross-border insolvency deal with 'domestic' insolvency proceedings only marginally or in very specific contexts. This is true both for the MLCBI, the Model Law on Recognition of Foreign Insolvency-Related Judgments (MLIJ) and the Model Law on Enterprise Group Insolvency (MLEGI). The current work on a Model Law on conflict of laws in insolvency[22] will change this picture and have particular relevance for domestic proceedings. The Model Laws do not distinguish between 'Model Law countries' and other countries.

Comparing the MLCBI with the EIR in a general manner, the MLCBI also distinguishes between main and non-main proceedings (Art.2 (b) and 2 (c) MLCBI). Similarly to the EIR, jurisdiction for main proceedings is based on the debtor's COMI[23], jurisdiction for non-main proceedings on an 'establishment' of the debtor[24]. However, the MLCBI defines juri-

19 Art.3 (2) EIR. National legislation often accepts also other heads of jurisdiction, e.g. situation of property, conduct of business activities etc., sometimes providing for court discretion.

20 This is not expressly stated in the EIR, but follows e contrario from the express territorial limitation of non-main proceedings under Art.3 (2) as well as from several provisions of the EIR, excluding assets situated 'in another Member State' (than the forum concursus) from some provisions. There is no indication in the EIR (and would also contradict the functionality of insolvency law), that EU-based main proceeding had an intended territorial limitation to EU countries.

21 See, e.g. Art.34 sentence 2, 36, 37, 46, 47, 49, 51, 52 EIR.

22 Supra note 13.

23 Art.2 (b) MLCBI.

24 Art.2 (c) in conjunction with Art.2 (f) MLCBI.

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sidiction only for recognition or other assistance purposes (indirect jurisdiction), leaving direct jurisdiction to national legislation (with a small limitation in case of secondary proceedings, see Art.28 MLCBI)[25].

The MLIJ applies also to recognition of foreign court decisions in the context of domestic insolvency proceedings, setting common standards for recognition in such cases with some inspiration from the EIR. The same is true for the MLEGI, although there are significant differences from the corresponding rules of the EIR. The planned Model Law on conflict of laws in insolvency is significantly inspired by the EIR, but reduces the number of special conflicts rules deviating from the lex fori concursus.

III. International treaties and uniform laws

There exist only few international treaties or – apart from the EIR – binding uniform laws dealing with cross-border dimension of 'domestic' insolvency proceedings.

An interesting modern example is the OHADA Uniform Insolvency Act (revised version of 2015), which contains – similar to the EIR – one set of rules applicable to cross-border relations between the member states of OHADA, and another set of rules for relations with non-OHADA countries[26]. The first part (on inner-OHADA cases) combines elements of the MLCBI with inspiration from the EIR, butwithout conflict of laws rules. The second part is a largely literal adoption of the MLCBI.

Among relevant international treaties, a relatively recent example is the Council of Europe's European Convention on Certain Aspects of Bankrupty of 1990 (Istanbul Convention)[27], a forerunner of the EIR. This Convention is not without interest for the present study, as it is designed for a broader range of contracting states than EU members and can be a useful tool of comparison in the discussion, how a future EU instrument might be structured and what rules it should contain. The Istanbul Convention applies only to relations between its member states, it does not address cooperation with third countries (see Art.1 (2) of the Convention). Basically the Instanbul Convention is structured into General Provisions, provisions

25 See Guide to Enactment and Interpretation, point 224.
26 For details see → Leno.
27 https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-on-certain-international-aspects-of-bankruptcy-ets-no-136-translations (accessed 05.03.2025). The Convention has not entered into force.

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on certain powers of the insolvency representative ('liquidator'), recognition of foreign proceedings and concurrent proceedings. It also contains a particular substantive chapter on information of creditors and lodgement of claims. The Convention distinguishes, like the EIR and the MLCBI, between main and non-main proceedings (COMI and establishment). It basically applies the COMI test (for recognition purposes only, Art.3 (a) in conjunction with Art.4 (1) of the Convention), but sets also uniform rules on direct jurisdiction for non-main insolvencies, preferring the establishment test, but allowing for other heads of jurisdiction under national law (Art.17 of the Convention). Some of its rules apply, similar to the EIR, both to domestic proceedings and to the recognition perspective, and their content is close to the EIR. However, it does not contain a differentiated system of conflict of laws rules.

The French-Monaco Bankruptcy Treaty of 1950[28] also applies only to relations between the Contracting States, leaving cooperation with third countries outside (cf. Art.1 and 3 of the Treaty). Like – in principle – the EIR, it deals both with domestic insolvency proceedings and recognition containing uniform rules on direct jurisdiction, basic conflict of laws provisions (mainly, lex fori concursus) and some specific substantive rules. In contrast with the EIR, the French-Monaco Treaty is based on the principle of unity of the insolvency proceeding, excluding the opening of concurrent proceedings.

There are also some older treaties relating to insolvency (Montevideo Treaties of 1889/1940, Código Bustamante and others[29]), but they do not reflect modern legislative tendencies and their practical relevance appears limited.

IV. State of autonomous laws

For discussion on whatever future EU regulation with regard to cross-border insolvency cooperation with third countries it is helpful to gain beforehand an oversight of the approaches both on the side of EU countries as

28 Accessible at https://legimonaco.mc/tai/convention/1950/09-13-tai1l000728@1953.01.09/.

29 E.g. Bankruptcy Treaties between some Swiss cantons and som German states dating from the 19th century. The Austrian-German Bankruptcy Treaty of 1985 has been largely superseded by the EIR and will not be scrutinized here more in detail as it does not contain any significant particularities.

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to this topic and on the side of various non-EU countries, partners-to-be in future EU cooperation with them in the insolvency field. At this stage of the report, a brief overview will be given. Thereafter, at B., specific issues will be discussed more in detail, taking account of the present approaches in various national legislations.

1. EU countries

Several EU Member States have adopted detailed provisions on international insolvency law outside the scope of the EIR, adressing also domestic insolvencies: Austria, Belgium, Croatia, Germany, Greece, Poland, Portugal, Romania, Slovenia and Spain. The laws of these countries are of particular interest for the discussion on future EU rules on insolvency relations with non-EU countries.

Some of these countries basically use the EIR as a model for cross-border insolvency law also in relations with non-EU countries (Austria, Belgium, Germany, Portugal and Spain). A few EU Member States have adopted the MLCBI for relations with non-EU countries: Greece, Poland, Romania and Slovenia. Poland combines in its relations with non-EU countries the rules of the MLCBI with some provisions derived from the EIR, addressing also domestic proceedings. Romania also addresses domestic procedings in this context, but very briefly.

The other EU Member States have either not passed any particular legislation on cross-border insolvency proceedings[30] or they have passed only sparse rules[31], e.g. on direct international jurisdiction[32]. Even EU Member States without specific legislation often have judicial practice in cross-border insolvency matters including domestic proceedings, which may be grounded on general rules of insolvency law and private international law[33], in some cases even international treaties[34].

30 Cyprus, Ireland, Latvia, Lithuania, Luxembourg, Malta.
31 Cf. Czechia, France, Netherlands, Portugal, Sweden.
32 Bulgaria, Estonia, Finland, Hungary., Italy.
33 This includes traditional common law rules and concepts such as, e.g., comity. Examples for this are Cyprus, Ireland and Malta.
34 One example is the Nordic Bankruptcy Treaty of 1933/1977 which continues to apply in relations between Finland or Sweden with Denmark, Iceland and Norway.

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2. Non-EU countires (third countries)

Outside the EU, a significant number of countries have adopted the MLCBI[35], which, however, basically does not address domestic insolvency proceedings. One can observe here a certain distinction between countries of the Civil Law and Common Law legal families[36]. In particular Civil Law countries tend to complement the MLCBI with further rules, sometimes inspired by the EIR.

A small group of countries of the Civil Law family have adopted specific rules on cross-border insolvency, which often follow to some degree the EIR, but also develop their own approaches. Examples for this are – in alphabetical order – Georgia[37], Liechtenstein[38], North Macedonia[39], Norway[40], Serbia[41] and Switzerland[42]. In this context, domestic insolvencies are also addressed[43].

Other Civil Law countries have adopted the MLCBI with few changes (e.g. Albania[44], Brazil, Chile, Japan, Kosovo, Mexico, South Africa, South Korea, UAE for the DIFC, Ukraine), but often in combination with at least

35 E.g. Australia, Brazil, Canada, Chile, Colombia, Japan, Kosovo, Saudi Arabia, Singapore, South Africa, South Korea, the UK, Ukraine, the U.S. India is planning to adopt the Model Law.

36 Countries whose legal system cannot be attributed to one of these two groups, usually have specific approaches, but may nevertheless have adopted the MLCBI, e.g. Saudi Arabia.

37 Insolvency Law of 2020, inspired by the EIR.

38 Autonomous approach, see Art.1 and 5 Liechtenstein Insolvency Code.

39 The North Macedonian provisions are largely based on the Croatian model, which itself follows, with some modifications, the EIR.

40 S. 161–177 Norwegian Insolvency Act 1984 as revised in 2016/2021.

41 Insolvency Law of 2009; combination of the MLCBI with elements of the Croatian model.

42 See Daniel Staehelin, Die internationale Zuständigkeit der Schweiz im Schuldbetreibungs- und Konkursrecht, AJP/PPA 1995, pp.259 – 284.

43 An exception is Switzerland, which provides for specific rules on recognition of foreign insolvencies, but does not expressly rule on cross-border dimensions of domestic insolvency proceedings.

44 Having moved to the MLCBI-based approach from a former more EIR-based regulation.

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some rules on domestic insolvencies (e.g. Albania[45], Colombia[46], Japan[47], South Korea). Such rules usually deal with (international) jurisdiction, but sometimes also guarantee the equal treatment of foreign creditors, state the global reach of domestic proceedings or lay down the basis conflict of laws rule of lex fori concursus.

Common Law countries have a tradition of flexibly dealing with cross-border insolvencies. In so far as they have adopted the MLCBI, this usually blends with Common Law traditions such as comity, which apply also to domestic insolvencies. In particular, the UK and the U.S. have both adopted the MLCBI and have developed on the basis of their general insolvency legislation and Common Law principles detailed and pragmatic rules how to handle cross-border insolvencies. Other Common Law countries, in particular Australia, Canada and Singapore, have adopted the MLCBI with specific adaptations and have also a growing practice of domestic insolvencies with cross-border dimensions. This is also true for Hongkong as a Special Administrative Region of China[48].

Some countries, irrespective of a Civil Law of Common Law background, apply within the framework of insolvency legislation general rules of private international law or cross-border civil procedure[49].

B. Specific issues

Turning to specific issues, the following aspects appear to be of principal relevance:

– the sphere of applicaton the the EIR (or any other future legal instrument for cross-border cooperation with non-EU countries) as a general precondition also for the commencement of domestic insolvency proceedings in the EU,

45 The provisions of the new Albanian Insolvency Law of 2016, are based on the UNCITRAL Model Law, however, they touch also upon domestic insolvencies, but only marginally. In contrast, the former Insolvency Law of 2002 followed the German model, also with regard to cross-border insolvencies.

46 Art.2, 6 Colombian Insolvency Act.

47 Art.3 – 5 of the Japanese Bankruptcy Act of 2004. The Japanese law on foreign insolvencies follows the MLCBI.

48 See, e.g., Yung, Kai-hong Patrick, Cross-border Insolvency in Hong Kong: Developments and Updates (2022) International Insolvency Review, pp. 297–323.

49 This is sometimes expressly stated in legislation, sometimes accepted implicitly.

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- the structural distinction between main and non-main proceedings,
- issues of (direct) jurisdiction,
- issues of conflict of laws,
- issues of substantive law in the context of domestic proceedings, in particular the geographical scope of proceedings and the principle of equality of creditors.

I. Sphere of application of EIR: definition of insolvency proceeding + Annex

The subject-matter sphere of application of a legal instrument on cross-border insolvency is, in principle, a general issue relevant both for domestic proceedings and recognition of foreign proceedings or cooperation between concurrent proceedings. Theoretically, the question can be decided differently for each of such constellations, and this is done so in some countries. For example, in the U.S., the provisions of the Bankruptcy Code on cooperation with foreign countries (Chapter 15 BC) apply also to foreign insurance companies, while banks and insurance companies are generally excluded from the provisions of the Bankruptcy Code on domestic proceedings[50]. The issue will be discussed here with a focus on domestic proceedings.

According to Art.1 (1) Sentence 1 EIR, the Regulation applies to 'public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation' and which are characterized by certain legal effects defined in letters a) – c) of this provision, such as appointment of an insolvency administrator and/or subjecting the activities of the debtor to the supervision of a court[51]. Some types of proceedings are explicity exempted from the Regulation according to Art.1 (2) EIR, mainly banking and insurance insolvencies. Proceedings falling under the Regulation are laid-down in an exhaustive and binding list (Annex A of the EIR).

International dimensions of proceedings, which are not covered by the list, continue to be governed by the autonomous laws of the EU Member States, if the EU has not passed special legislation, which it has done for the

50 Cf. § 109 (b) and (d) BC vs. § 1501 (c) (1) BC.
51 For a discussion of modern developments in this respect see → Bornemann.

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banking and insurance sectors[52]. This is true both for domestic proceedings and for recognition of foreign proceedings and coordination of parallel proceedings.

In contrast, some national insolvency laws define their scope of application more broadly, including, for example, also banking and insurance insolvencies. This is true, for example, for Austria, Belgium, Croatia, Czechia, Germany or Poland. Some EU Member States have adopted specific laws for various insolvency proceedings, including insolvency legislation in the context of Commercial Codes or in company laws or for the banking and insurance sectors[53]. Often, specific legislation has been passed for non-business (consumer) insolvencies[54]. If such proceedings are not included in Annex A of the EIR, their international dimensions are governed by autonomous law. Provisions of autonomous cross-border insolvency law may include several national proceedings, or they may be specific for the various sub-types of proceedings. They may also exclude specific groups of economic actors or sectors (e.g. state-owned enterprises) from insolvency proceedings in general.

Thus the definition of debtors, which are covered by the autonomous (domestic and cross-border) insolvency law in the EU Member States, is rather diverse, but there is general agreement that at least typical commercial entities are covered.

It is less clear to which degree pre-insolvency reorganisation procedures are covered by the existing autonomous cross-border insolvency rules. ‘Public’ restructuring procedures, which were created by the EU‘s Restructuring Directive of 2019, have been explicitly included into the EIR’s Annex A. However, this does not yet guarantee that they are also covered by the autonomous cross-border insolvency provisions of EU Member States, if this is not clearly expressed in the respective laws. Only few EU Member States adress this issue, e.g. Spain, which has adopted specific provisions for pre-insolvency proceedings referring with some modifications to the general cross-border insolvency rules (Art.753 – 755 Spanish Insolvency Act).

52 Bank Recovery and Resolution Directive II (BRRD II) of 20 May 2019, Insurance Recovery and Resolution Directive (IRRD) of 27 November 2024.

53 See e.g. Art.612 (2) of the Bulgarian Commercial Code, which refers, however, subsidiarily to the Commercial Code.

54 E.g. Chapter XIX of the Belgian Economic Code.

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A particular phenomen are proceedings under company (corporate) law, which are appreciated by many stakeholders due to their flexibility[55]. If such proceedings are used, they may be qualified as parts of company law, which are governed not by rules of cross-border insolvency law, but of international corporate law. Though the law applicable to the corporation (lex corporationis) may coincide with the lex fori concursus, the characterization can play a role when exceptions to the lex fori corporationis or the lex fori concursus are discussed. Also, recognition of the effects of such proceedings in other countries may depend on whether such proceedings fall – from the perspective of foreign countries – under the concept of cross-border corporate or cross-border insolvency law. Courts have used different approaches when dealing with such issues, and there is no conceptual unity or 'best practice' how to handle such situations. In the context of the present project it can be stated that such questions exist and should be taken into account in a future legal instrument of the EU on cross-border insolvency relations with non-EU countries.

The MLCBI solves this issue by a general definition of (foreign) 'proceeding', which covers both classical bankruptcy proceedings and other proceedings 'pursuant to a law relating to insolvency' (Art.2 (a) MLCBI) and is, arguably, broad enough to cover even restructurings under corporate law. On the other side, the MLCBI leaves it to national legislators to exclude certain types of proceedings, such as in the banking or insurance sector or consumer insolvencies (Art.1 (2) MLCBI). As to domestic proceedings, Art.1 (1) (b) MLCBI foresees that the covered domestic proceedings should be mentioned expressly by the national legislator.

II. The distinction between main and non-main proceedings

Both the EIR and the MLCBI and most national insolvency laws distinguish today between 'main' and 'non-main' insolvency proceedings[56]. The distinction is based on policy considerations such as the most adequate (and internationally acceptable) forum for an insolvency proceeding with global reach (main proceeding) and policy considerations in favour of non-main proceedings in certain cases (efficiency considerations, protection of local creditors etc.). The distinction between main and non-main proceed-

55 See, e.g. → McCormack.

56 See, e.g., Art.3 (1) and Art.3 (2) EIR and Art.2 (b) and (c) MLCBI.

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ings is usually based on the head of (direct) jurisdiction for domestic proceedings, but it is also relevant for other aspects of the domestic proceeding as well as for recognition of foreign proceedings and cooperation between concurrent proceedings.

The distinction between main and non-main proceedings as such does not appear unfit for relations with non-EU countries, it seems even more justified to allow for non-main proceedings in the EU when the main proceeding is conducted in a non-EU country with different legal standards and practices. It is, however, another question whether jurisdiction for non-main proceedings should be same in cases when the debtor‘s COMI is situated in the EU or outside, or whether other rules on the relationship between, e.g., main proceedings and non-main proceedings within the EU or in third countries should be identical or – perhaps slightly – differ.

One aspect in this context is the question which proceeding should take the role of 'main proceeding', implying some guiding role with regard to non-main proceedings. This is linked with the question of jurisdiction, but can also be decided as a separate matter. In common law countries, e.g., it is not uncommon to grant jurisdiction upon discretion: Is there a justified interest to commence an insolvency proceeding in a certain country? In this context, the request of parties plays a role but also other considerations such as the experience of judges or the quality and international renown of the insolvency regime of one or the other jurisdiction. In particular, restructurings of larger enterprises, which often include complex corporate structures and take place within corporate groups, are often brought to particularly experienced courts, although considerations of an expected 'favorable outcome' for influential stakeholders may also be present. This may lead to an agreement between insolvency stakeholders (or courts) that the function of 'main proceeding' should not (or cannot efficiently) be carried-out by the court of the debtor's COMI, but by the court in another country.

III. Direct jurisdiction

In contrast with the MLCBI, the EIR unifies also direct jurisdiction in insolvency matters among the EU Member States. One needs to distinguish between jurisdiction to commence and conduct an insolvency proceedings generally (Art.3 EIR) and jurisdiction to decide specific matters or disputes related to the insolvency proceedings (Art.6 EIR).

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1. Main insolvency proceedings

Direct jurisdiction for commencing insolvency proceedings is today mostly grounded, even outside the EIR, on the debtor's center of main interests (COMI) in a certain country. However, under national legislation, in particular in non-EU countries, often more traditional but similar concepts such as the debtor's place of incorporation or domicile continue to be used.

The concept of COMI has become generally accepted today, also on the global level by UNCITRAL, as a reasonable head of jurisdiction for main proceedings[57]. While modifications of this term or alternative approaches in the context of direct jurisdiction can be discussed, this would go beyond the specific direction of this book. Issues of indirect jurisdiction will be addressed in the context of recognition.

There has been a large number of cases, both on the national level and before the Court of Justice of the EU (CJEU, formerly ECJ), on the interpretation of the term 'COMI' and its application in various situations[58]. There does not appear to be a reason to define COMI under the EIR differently in cases where the debtor's COMI is located in the EU or outside. It is, however, not excluded that COMI is defined differently in a non-EU country than under the EIR, and this may lead to cases of negative or positive jurisdictional conflicts.

Similar considerations apply when, from the EIR's perspective, the debtor's COMI is situated either in the EU or in a non-EU country (e.g. Switzerland or the UK) and national jurisdictional rules in the third country do not use the COMI concept. As of today, even in some EU Member States national (non-EIR) jurisdictional rules have been not completely aligned with the EIR[59] and in others countries they may differ significantly

57 For a comparison of the understanding of COMI under the EIR and the MLCBI (from a U.S. perspective) see Wessels/Kokorin, COMI under European and American Insolvency Law, https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/02/comi-under-european-and-american-insolvency-law (accessed 17.03.2025).

58 Cf. Bork/Mangano, European Cross-Border Insolvency Law, 2nd ed. (2022), pp.77 – 109.

59 E.g. in Belgium (art.118 § 1 nr.1 Belgian CDIP: principal establishment or statutory seat in Belgium), Bulgaria (art. 613 Bulgarian Commercial Code: debtor's seat), Croatia (art.392 Croatian Bankruptcy Act: center of business activity in Croatia, which, in practical terms, is understood as the COMI), Germany (sec.3 German InsO: debtor's domicile, but COMI prevails), Greece (art.4 (1) Greek Insolvency Act: COMI), Italy (sec. 11 (1) 1st alt. Italian Code of Business Crisis and Insolvency: COMI), Netherlands (art.2 (1) Dutch Bankruptcy Act: in principle, debtor's domicile), Poland

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from the EIR[60]. This may lead to the result, that in such countries a (self-proclaimed) main proceeding can, for example, be opened at the place of registration of a company, even if the COMI is situated in another country. The creates or increases a risk of possibly conflicting main proceedings within and outside the EU.

It would seem that future EU rules on insolvency relations with non-EU countries should address this issue. Possible approaches might be to approximate national jurisdictional standards without strict limitation to COMI and, in addition, introduce some discretion of courts either not to open an insolvency proceeding in the EU in such situations or to limit it to property located in the EU. Another possibility would be to create a mechanism for agreement between courts or insolvency administrators with the approval of the creditors or the court.

2. Non-main insolvency proceedings

Both under the EIR and (for recognition) under the MLCBI jurisdiction for commencing (opening) a non-main insolvency proceeding is based on the existence of an 'establishment' of the debtor (Art.3 (2) EIR, Art.2 (b) and (f) MLCBI). The term 'establishment' is defined in Art.7 (10) EIR as 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets', which differs in detail – in particular as to the relevant point in time or time-period when the establishiment needs to exist – from the definition of establishment under Art.2 (f) MLCBI.

The existence of an establishment of the insolvent debtor as a jurisdiction-founding criterion is today accepted in most EU member countries[61].

(sec.382 Polish Insolvency Act: main economic activity in Poland). Slightly more distant Austria (sec. 63 (1) Austrian InsO: business or habitual residence in Austria).

60 Examples are Cyprus, Ireland and Malta, which apply traditional company and bankruptcy law provisions in conjunction with Common Law rules. A particular case is France, where in principle, the debtor's corporate seat in France is decisive, but other jurisdictional criteria such as existence of an establishment in France, other business activities, location of assets and even the 'citizienship' of participants may suffice to open an insolvency proceeding with universal reach, see Dammann/Sénéchal, Le droit de l'insolvabilité internationale (2018), pp.677 – 703.

61 However, outside the scope of the EIR, Bulgaria, Estonia, Greece, Lithuania, Portugal and Romania seem not to provide for non-main jurisdiction at all, cf. art. 613 Bulgari-

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However, the unitary focus on an establishment for jurisdictional purposes[62] contrasts with the approaches existing under numerous, if not most autonomous insolvency laws both in the EU and globally. Most states foresee beyond an establishment also other jurisdictional grounds. The most frequent additional ground for non-main jurisdiction is the location of assets of the debtor in the forum state[63]. Another widely spread approach, in particular in Common Law countries, is a balancing test: Is it economically reasonable and fair to commence an insolvency proceeding in a specific country (even if the debtor's place of registration or COMI may be in another country)?[64] This lays of course a significant burden as to the capability of evaluating all circumstances on the court which has to decide on its jurisdiction. It should be mentioned that the balancing test is in some countries not limited to 'non-main' insolvencies, but can also be used with regard to 'main' insolvency proceeding[65].

Taking the EIR in its present form as a starting point, the existence of an establishment of the debtor in the EU would seem to be adequate and acceptable also in cases when the debtor's COMI is located in a non-EU country.

However, the limitation of non-main proceedings to the jurisdictional basis of an establishment may not alway be sufficient in cases with COMI outside the EU. The limitation to the establishment as a ground for non-main jurisdiction is based on the assumption that in such cases a main proceeding can be opened at the debtor's COMI in another EU Member State, and that such a proceeeding is according to all probability in view of mutual trust and legal guarantees under EU law fair and acceptable to all stakeholders. When the COMI is situated outside the EU, a corresponding

an Commercial Code, sec.4 (2) Estonian Insolvency Act, sec.4 Greek Insolvency Act 2007, Art.10 Lithuanian Enterprise Bankruptcy Act, Art.7 Port. Insolvency Act (with slight modifications), Art.120 Romanian Code of Civil Procedure 2010.

62 Only establishment-based jurisdiction is foreseen, e.g., in sec. 118 § 1 No.2 Belgian Code de droit international prive, following closely the EIR. Similar examples are Czechia, Italy and Hungary.

63 E.g under sec. 63 (2) 2nd. alt. of the Austrian Insolvency Code. The same is true, e.g. for Croatia (Art.393 (2) Croatian Bankruptcy Act), Finland (Ch.7 sec.2 2nd alt. Finnish Bankruptcy Act), France, Germany (sec.354 (1) German InsO), Poland, (sec. 382 (2) 3rd alt. Polish Insolvency Act), art. 174 (1) Slovak Insolvency Act.

64 See, e.g. sec. 122 (1)(g) UK Insolvency Act 1985 ('if … the court is of the opinion that it is just and equitable that the company should be wound up').

65 Cf. 11 U.S. Code § 305 and 28 U.S. Code § 1334 (c) – power of court to abstain from hearing a bankruptcy proceeding, e.g. based on considerations of comity.

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degree of trust and legal guarantees in the COMI country may not always exist or be justified to assume.

If the debtor's COMI is located outside the EU and national rules on non-main jurisdiction remain as divergent as they are today, the continuing dissarray of jurisdictional rules in the 27 EU Member States can cause negative effects both for the debtor and the community of creditors, including incentives for forum shopping.

Therefore, in situations when the debtor's COMI is located outside the EU, jurisdiction should – arguably – be defined more broadly to avoid gaps of protection as well as of efficiency. One possibility might be to create two common grounds for jurisdiction in cases when COMI is outside the EU or the EIR is for other reasons not applicable: the existence of an establishment of the debtor or location of assets.

In addition, other tools of insolvency law could be used in such situations, e.g. a priority rule for the first non-main proceeding[66], or a possibilty of transfer of jurisdiction between several non-main procedings in the EU or cooperation between parallel proceedings.

3. Insolvency-related proceedings

The EIR contains not only jurisdictional rules for the insolvency proceeding itself, meaning thereby primarily the 'opening'[67] of such a proceeding by court decision[68], but also for other insolvency-related court proceedings (Art. 6 EIR, cf. also Art.32 EIR)[69].

Such proceedings raise different questions, not only about jurisdiction. They will be discussed more systematically in another contribution in this book[70]. However, direct jurisdiction for such proceedings will be dealt-with briefly also at this place.

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66 Cf. e.g. sec. 63 (3) nr.1 Austrian InsO.
67 Cf. Art.2 (7) EIR.
68 Cf. the wording of Art.3 (1) EIR; but this applies also to some provisional measures, cf. Art.32 (1) subpara.3 EIR (the reference to the Brussels Ia Regulation appears to include implicityl also its provisions on direct jurisdiction, cf. Christoph Thole, in: Münchener Kommentar zur InsO, 4th ed. (2021), Art.32 EIR note 29.
69 The notion of court may include administrative authorities, cf. Art.2 (6) EIR.
70 → Trunk (Insolvency-related proceedings).

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Art.6 (1) EIR establishes, in principle, an exclusive[71] (international) jurisdiction of the forum concursus for insolvency-related court proceedings[72].

The provision applies to 'actions deriving directly from insolvency proceedings and closely linked with them'. This term was originally developed by the ECJ in a case on the insolvency exception of the 1968 Brussels Convention[73]. It includes, for example, proceedings in the insolvency court to impose subsidiary liability on corporate directors[74], lawsuits before general courts for an avoidance of transactions (detrimental acts) under insolvency law[75], lawsuits before general courts for liability of corporate directors under non-insolvency legislation, but initiated by the insolvency representative and serving the purposes of the insolvency proceeding[76]. The borderlines of the covered proceedings are, however, disputed. Views differ, e.g., whether proceedings (and the resulting judgments) on termination of executory contracts by the insolvency representative, on claims to 'separate satisfaction' (German: Aussonderung) as to assets technically not falling into the estate, on 'privileged satisfaction' by secured creditors, on limitations of a right of set-off in insolvency, or proceedings for the admission/non-admission of lodged claims of creditors fall under this category[77].

Only in two limited cases exceptions are made under Art.6 (2) EIR: firstly, the courts of the (EU member) state of the defendant's domicile are also granted jurisdiction, but only when the insolvency representative sues the defendant both on a legal basis under insolvency law and under a legal basis of non-insolvency law, e.g. corporate or general civil law. The second exception relates to specific cases of several defendants.

In relations with non-EU countries, this may lead to a doubling of proceedings and/or conflicting judgments.

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71 See CJEU, Wiemer & Trachte v. Tadzher (ECLI:EU:C:2018:902) (in case against defendant with domicile in EU; interestingly, the Court has limited its ruling to this situation). In intra-EU parallel proceedings, jurisdiction is concurrent, CJEU, Nortel v. Rogeau (ECLI:EU:C:2015:384).

72 This may hinder recognition of foreign judgments, both from other EU countries and from non-EU countries.

73 Case of 22 Feb. 1979, C 133/78, Gourdain v. Nadler, ECLI:EU:C:1979:49.

74 Under French insolvency law; ECJ decision in Gourdain v. Nadler.

75 ECJ cases Seagon v. Deko Martin (ECLI:EU:C:2009:83) and Schmid v. Hertel (ECLI:EU:C:2014:6).

76 Cf. CJEU, Kornhaas v. Dithmar (ECLI:EU:C:2015:806).

77 Each of these constellations is under dispute, cf. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.6 EIR Rz.14 and 15.

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If the debtor's COMI is located in the EU, the courts of the COMI state are, in principle, regarded as exclusively competent for such actions under the EIR, but this is not binding on courts in non-EU countries. Extra-EU courts may nevertheless render a decision in such cases (for or against the insolvency representative). Even if these decisions would probably not be recognized in the EU due to the EIR[78], this does not solve the problem of possibly conflicting judgments.

If the debtor's COMI is located outside the EU, Art.6 EIR – like the Regulation in general – does not apply. On the basis of the ECJ's Gourdain v. Nadler judgment[79], proceedings and judgments covered by Art.6 EIR do not fall into the sphere of application of the Brussels Ia Regulation and in consequence probably also not of the Lugano Convention. Thus they would be governed – if no other international treaties apply[80] – either by the autonomous international insolvency law[81] or autonomous civil procedure law[82] of the EU Member States.

Some autonomous laws – both of EU and non-EU countries – also provide for an (international) forum concursus for such proceedings[83], others tend to apply general rules of jurisdiction under Codes of Civil Procedure[84] or other legislation. The forum for such disputes under autonomous law is usually not exclusive[85], but there are also examples of (internationally) exclusive jurisdiction in such cases[86]. In view of the economic relevance

78 Most probably, on the basis of lacking indirect jurisdiction.
79 Supra note 74.
80 Both the Hague Judgments Convention 2019 (Art.2 (e)) and the Hague Choice of Court Convention 2005 (Art.2 (e)) exclude insolvency matters; but the extent of these exclusions is untested.
81 This may be at least partly true for Austria, cf. sec. 240 (1) InsO (recognition of foreign decisions under the InsO applies both to the foreign 'opening' decree and to decisions passsed 'in' the foreign insolvency proceeding.
82 This is the dominant view in Germany, see Lüer/Knof, in: Uhlenbruck, Insolvenzordnung, 15th ed. (2019), sec. 343 InsO note 27.
83 This is the case, e.g., in Belgium (sec.118 § 2 Code de droit international privé) and in Austria (sec. 63 Austrian InsO: exclusive jurisdiction of Austrian forum concursus).
84 This is the case, e.g., in Germany. However, if the debtor's COMI is located in the EU, art.6 EIR applies.
85 This probaby true under sec.118 § 2 Code de droit international privé of Belgium, and applies also under German law (Code of Civil Procedure).
86 Sec. 63 Austrian InsO (exclusive jurisdiction of Austrian forum concursus), see also sec.52 (3) of the Spanish Insolvency Code (some actions against company shareholders or corporate organs in business insolvencies).

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of such decisions, jurisdictional disorder certainly does not further international cooperation in insolvencies linked with non-EU countries.

In 2018, UNCITRAL passed a special model law dealing with insolvency-related judgments, the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). The MLIJ deals only with recognition of judgments, but it contains provisions on indirect jurisdiction, which give an impresssion about the current international state of discussions with regard to jurisdiction for such disputes. Art. 14 (g) MLIJ lists two cases of specifically worded indirect jurisdiction: choice of forum by the parties to the dispute or submission of the defendant to the proceeding. In addition, it provides for two general clauses on indirect jurisdiction – the first one uses the 'mirror principle' approach well known, e.g. from German international civil procedure law, the second uses a public policy-like formula: the basis of jurisdiction 'was not incompatible with the law of the [recognizing) State. It is worth mentioning that the MLIJ does not provide for cases of exclusive jurisdiction on the side of the recognizing country. It can be seen from Art. 14 (g) MLIJ that the drafters did not regard exclusive direct jurisdiction for such proceedings a convincing approach. Under the MLIJ, at least choice of forum agreements or submission of the defendant to such proceedings should be accepted also in the context of direct jurisdiction.

A more flexible standard for (direct) jurisdiction in such cases can also be expected to widen the procedural options for insolvency representatives to act in the interests of all creditors and would also raise the chances that 'domestic' judgments in such cases are recognized in the non-EU world.

IV. Conflict of laws

After jurisdiction, probably the second most discussed legal issue in domestic insolvency proceedings with an international dimension is the topic of applicable law (conflict of laws). The EIR is one of the first international legal instruments, which contains a detailed set of rules on conflict of laws in the insolvency context (Art.7 – 18 EIR)[87]. It has opened a wide global discussion on conflict of laws in insolvency. This has recently inspired UNCITRAL to start work on a project (now determined to becom a Model

87 Predecessors are the German-Austrian Bankruptcy Treaty of 1985 and the Council of Europe's Istanbul Convention of 1990. Earlier treaties did not contain diversified conflicts rules.

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Law) on conflict of laws in insolvency, which can be expected to be completed soon[88].

The following reflections will focus on conflict of laws in the context of domestic insolvency proceedings, with a particular view to cases linked with non-EU countries. Issues of conflict of laws in the recognition context will be addressed in the general report on recgnition of foreign insolvencies in this book.

The conflict of laws provisions of the EIR are characterized by that they apply both to domestic insolvency proceedings and to the effects of (recognized) foreign proceedings (cf. Art. 7 EIR and Art. 20 EIR). As the EU could in this case regulate conflict of laws for both sides – the perspective of the domestic insolvency proceeding and the perspective of recognizing states –, it largely avoids the problem of divergent decisions within the EU. In relations with non-EU countries, this cannot be guaranteed.

Generally speaking, conflict of laws under the EIR is based on the lex fori concursus principle, i.e. the law of the country conducting the insolvency proceeding (forum concursus) applies to all procedural and material aspects of the proceeding (Art. 7 EIR). This can be described as a particular example of the lex fori processus principle, which is generally accepted in international civil procedure. In the insolvency context, however, this principal rule does not only cover issues of procedure, but governs to a significant degree also issues of material law such as avoidance of transactions, validity of contracts, impact of the insolvency proceeding on property rights or on the corporate structure.

Comparing briefly the conflict of laws rules of the EIR with the projected UNCITRAL Model Law on Applicable Law in Insolvency Proceedings, it can be stated that the UNCITRAL text is closely related to the EIR, but contains fewer exceptions to the lex fori concursus. Furthermore, it has a global perspective, while the EIR to a significant degree provides for particular conflicts rules in the inner-EU context. In contrast with the EIR, the UNCITRAL project will address conflict of laws mainly for the context of domestic insolvency proceedings, providing for conflict of laws rules in

88 See the various materials of UNCITRAL Working Group V (Insolvency Law) at https://uncitral.un.org/en/working_groups/5/insolvency_law (accessed 26.05.2026). The following remarks on the Draft Model Law on applicable law in insolvency proceedingsare based on the Secretariat's Note for the 13–17 April 2026 meeting of Working Group V, accessible at.https://docs.un.org/en/A/CN.9/WG.V/WP.207. The other UNCITRAL Model Laws on insolvency do not deal with conflict of laws issues in a clearly defined, systematic manner.

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the context of recognition only in a very diluted form (Art.10 and 11 of the current draft).

Autonomous cross-border insolvency law in the EU Member States and beyond has until recently been largely uncodified. Within the EU, however, the EIR has led to a wave of codifications in this field. Several EU Member States have adopted the conflict of laws rules of the EIR also for purposes of their autonomous law, sometimes adapting them with a view to relations with non-EU countries. This is true for Austria, Belgium, Germany, Portugal, Slovenia (otherwise and MLCBI State!) and Spain[89]. Not addressed is conflict of laws in the MLCBI-based cross-border insolvency provisions of Greece, Poland and Romania. As the EIR applies to most EU-based insolvencies as well as inner-EU recognition, the autonomous provisions are relevant mainly for recognition of non-EU insolvencies, but they can also apply to the effects of EU-based insolvency proceedings in third countries, in so far as this does not conflict with the EIR.

Outside the EU, conflict of laws in insolvency is rarely codified. Examples are Georgia, North Macedonia, Norway and Serbia, which have taken inspiration from the EIR[90].

The MLCBI touches upon conflict of laws only in a hidden, sparse manner. Nevertheless, some courts have used conflict of laws considerations also within Model Law-based legislation[91], and such cases also deserve interest in discussions on future further developments of the EIR with regard to non-EU countries.

89 The Netherlands have not adopted express conflict of laws rules for the insolvency context, although they have otherwise passed some provisions on cross-border insolvency law, cf. Art.203 – 205 Dutch Bankruptcy Act.

90 The political background of this appears to be membership in the EEA (case of Norway), the EU accession endeavours of some of these countries (Georgia, Western Balkan countries), but also the continuing contacts between countries in the Balkans region, mainly successor states of Yugoslavia, and the model of cross-border legislation in developed by Croatia. Moldova and Ukraine have, however, not yet taken the EIR as as structural model for their cross-border insolvency law.

91 See, e.g. U.S. District Court for the Eastern District of Virginia, Alexandria Division, decision of 07.05.2012, Jaffe v. Samsung Elecs. Co. (In re Qimonda AG), 470 B.R. 374; or U.S. District Court for the Southern District of New York, decision 08.01.2004, Europe Movieco Partners Ltd. v. United Pan-Europe Communs. N.V. (In re United Pan-Europe Communs N.V.), 2004 U.S. Dist. LEXIS 223.

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1. General rules on conflict of laws applicable?

Firstly, the EIR does not contain any rules which are – at least in civil law countries – regarded as belonging to the general part of conflict of laws, e.g. on the issues of characterization, renvoi or the public policy exception in conflict of laws. It is submitted that such issues can be resolved by interpretation of the EIR, taking inspiration from other EU Regulations dealing with conflict of laws (Rome I Regulation, Rome II Regulation etc.). It does not seem that in this respect EU-related cases should be treated differently from cases linked with non-EU countries.

2. Basic conflicts rule

The basic conflicts rule in cross-border insolvency law, which appears to be accepted almost universally and has also been expressly laid-down in Art.7 EIR, is the lex fori concursus (law of the court administering or supervising the insolvency proceeding)[92]. Art.7 EIR is not limited to inner-EU conflicts of laws, but applies also to legal relationships linked with non-EU countries. This is in line with other EU Regulations on conflict of laws, for example the Rome I and Rome II Regulations.

The autonomous cross-border insolvency laws and the UNCITRAL Model Insolvency Law family follow the same basic approach.

3. Special conflicts rules and related provisions

The EIR contains, however, also several specifications or even exceptions to the lex fori concursus. These specifications and exceptions are laid-down in Art. 8 – 18 EIR. Some of these provisions contain particular conflicts rules: Art. 9 (set-off), Art.11 (contracts relating to immovables), Art.12 (effects of insolvency proceeding on payment systems and financial markets), Art.13 (employment contracts), Art.14 (effects of insolvency proceedings on rights subject to registration), Art.16 (detrimental acts), Art.17 (protection

92 In the U.S. and other Common Law jurisdictions, in theory a more flexible approach is taken, e.g. a most significant relationship or a governmental interests/omparative impairment test, see https://www.abi.org/abi-journal/conflict-of-laws-which-state-rules-govern (accessed 16.06.2025). However, the lex fori concursus principle underlies also this approach. Conflict of lasw is mainly discussed when exceptions from the lex fori concursus are at stake.

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of third-party purchasers in certain cases) and Art.18 (effects of insolvency proceedings on pending law-suits and arbitral proceedings).

Most of the special conflicts rules laid-down in the EIR are limited to inner-EU conflict of laws, referring only to the law of other EU countries. The underlying policy seems to be that particular protective considerations (e.g. for specific categories creditors or trust in business relations or the governmental interest in immovables), which justify a deviation from the lex fori concursus, need to be taken into account within the EU, while the matter can be left open in relations with non-EU countries. This includes an element of privilege for EU-based creditors or business within the EU. In three cases, when (presumably) even EU-based creditors of business may rely on the law of non-EU countries (Art.9 EIR for set-off, Art.12 EIR for payment systems and financial markets and Art.17 for third-party purchasers), the special conflict rules are universal.

Other provisions in this context do not determine the applicable law, but establish particular substantive rules (Art. 8, 10, 15 and 23 EIR). As such, they will be discussed separately below at 5.). However, some autonomous laws contain in these respects special conflicts rules, which will be scrutinized in this section.

In so far at these conflicts rules refer to another law than the lex fori concursus, it is generally acknowledged that they refer also to the insolvency law of the designated country. According to general principles of private international law, it needs to be asccertained how courts in the respective country would apply their law in the respective case. This may lead to difficulties in two cases:

Firstly, courts in the other country might deny application of their own insolvency legislation to a foreign insolvency proceeding[93]. Within the EU, such an approach would hardly be compatible with the legislative purpose of the EIR, but the question can if necessary be clarified by the CJEU. If foreign courts were to take such an approach, the special conflicts rules of the EIR would lead only to foreign 'non-bankruptcy' law and neglect the specifics of the insolvency situation. Within the EU the risk for this may be small, but in relations with non-EU countries it is significant.

Secondly, courts in the other country may (generally or in specific cases) deny recognition to the EU-based insolvency proceeding. Again, within the

93 An interesting express solution to such questions is given (outside the scope of application of the EIR) by Art.175 (1) Slovak. Insolvency Act: Recognition of a foreign insolvency proceeding leads to the effects of a corresponding Slovak proceeding.

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EU this is very improbable and can from a conflict of law perspective be neglected, but the same cannot be assumed in third countries. Is it adequate to apply the insolvency law of a foreign (non-EU) country, if the EU-based proceeding is not recognized in that country? This might serve as an argument for different conflict rules in relations between EU countries and in relations with non-EU countries. This would be in line with the present approach of the EIR, which limits most special conflicts rules to inner-EU situations (application of the law of other EU countries).

Those EU Member States which have aligned their autonomous cross-border insolvency law with the EIR, have 'universalised' the special conflicts rules contained in the EIR, namely with regard to contracts of employment, contracts relating to immovables, set-off and impact on organized markets.[94] The other EU Member States have not transposed the EIR's conflict of laws provisions into autonomous law and have also avoided to develop conflicts rules of their own. The is also true for EU Member States (or non-EU countries) which basically follow the MLCBI[95].

Those non-EU countries which have chosen to approximate their autonomous cross-border insolvency law with the EIR, have adopted only few of the special conflicts rules of the EIR, mainly the lex laboris[96]. In Common Law countries, exceptions to the lex fori concursus tend to be made by courts on a discretionary basis (usually including substantive considerations), while civil courts would be reluctant to deviate from the lex fori concursus if legislation does not provide for particular conflict rules. This does not exclude settlements between parties under applicable insolvency legislation.

The ongoing UNCITRAL project will, foreseeably, adopt the EIR's special conflicts rule on employment contracts (Art. 13 EIR) for global use. It also proposes special conflict rules for the impact of insolvency proceedings on 'payment, clearing and settlement systems, regulated financial markets and other multilateral trading facilities' as well as on 'close-out netting'

94 In the EU: Austria, Belgium, Croatia, Germany, Portugal, Slovenia and Spain. Slovenia has also adopted the MLCBI.

95 In the EU: Greece, Poland and Romania (this is in line with of the approach of the MLCBI to avoid clear conflict of laws rules). As to Slovenia see supra note 88.

96 Georgia (Art.111 – 113 Insolvency Act: contracts relating to immmovables, employment contracts, set-off), North Macedonia (Art.323, 324 Insolvency Act: rights in rem, employment contracts) and Serbia (Art.175 (3) Insolvency Act: employment contracts). Norway has not passed conflict of laws rules for Norwegian insolvencies.

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outside such systems. The EIR contains similar, but not identical rules on these subjects (Art. 9 – set-off, Art.16 payment systems).

The EIR's particular conflicts rule on contracts relating to immovables (Art. 11 EIR), on rights in immovables (Art. 14) and on pending lawsuits (Art. 18) have by now not been adopted by the UNCITRAL Working Group V. Also, the UNCITRAL text does not adopt the cumulative conflicts rule on the avoidance of detrimental acts (see Art. 16 EIR), but gives much broader application to the lex fori concursus, providing only for some limited exceptions in Art. 7 of the current draft.

Further missing in the UNCITRAL text are the EIR's particular provisions on the impact of insolvency proceedings upon third party security rights (Art. 8 and 10), European patents and trademarks (Art. 15) and protection of third-party purchasers (Art.17). As these provisions have, despite being positioned between conflict of laws provisions, a substantive character, they will be discussed below in the respective part of this report.

Subsequently, the special conflicts rules of the EIR (Art.9, 11, 12 – 14, 16, 18 EIR) will be looked at from the perspective of whether they should be extended to relations with non-EU countries. It is not the purpose of this report to discuss whether the EU should keep, modify or even drop some of these provisions for inner-EU relations[97].

a) Set-off (Art.9 EIR)

According to Art. 9 EIR, '(t)he opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.' Art. 9 EIR is a conflict of laws provision, as it designates applicable law to certain aspects of creditors' rights of set-off in the insolvency of the debtor. It deviates from the general rules of lex fori concursus, at it refers to 'the law applicable to the insolvent debtor's claim. It does not, however, oust the lex fori concursus completely, but requires additional scrutiny of the lex causae of the insolvent debtor's claim with a view to a substantive result: protection of a creditor's right of set-off, if either the lex fori or the lex causae of the debtor's claim protect the right of set-off in the insolvency context. Non-insolvency aspects of set-off are

97 Critical from this perspective e.g. Francisco Garcimartin, Is EU Insolvency Law consistent? (2023), http://dx.doi.org/10.2139/ssrn.4756783 (accessed 17.03.2025).

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not covered by this provisions, in the EU context they are determined, as to contractual obligations, by Art.17 Rome I Regulation, which (also[98]) refers to the lex causae of the debtor's claim. Thus, Art. 9 EIR is softly linked with Art.17 Rome I Regulation.

This rather complicated conflicts provision stands between two substantive provisions which also establish protective rules for certain creditors, though only as substantive rules (Art.8 and 11 EIR). Art. 9 is also related to the EIR's provision on avoidance of detrimental acts (Art. 16 EIR), which, similarly to Art. 9 EIR, also provides for additional (cumulative) application of a further legal system to protect third parties from avoidance claims.

The background of Art. 9 EIR lies in the domestic insolvency law of some EU Member States, e.g. Germany, which regard rights of set-off as a kind of security, which should be protected in insolvency similar to other secured creditors[99].

The autonomous cross-border insolvency laws of Austria, Belgium, Germany, Portugal and Spain contain provisions mirroring Art.9 EIR[100]. If one shares this policy decision, there is no reason not to apply Art. 9 EIR also to claims governed by the lex causae of a non-EU country. It should, however, be remarked that Croatia, which otherwise oriented itself in its autonomous cross-border insolvency law along the lines of the EIR, has not adopted this special conflicts rules, but has instead passed a substantive law provision protecting good faith in respect of set-offs executed between the date on which the foreign insolvency proceeding was opened and the date on which the decision recognizing that foreign insolvency proceeding in Croatia was published.[101]). As of the date on which the decision on the recognition of the foreign insolvency proceeding is published in Croatia, the insolvency-law provisions of the *lex fori concursus* govern the permissibility of set-off.Also, the planned UNCITRAL Model Law on applicable law in insolvency proceedings does not currently provide for a general exception for set-off, but limits it to 'close-out netting arrangements', i.e. cases

98 As to set-off against the insolvent debtor. Set-off by the debtor or the insolvency representative is not covered by Art.17 EIR.
99 Cf. sec. 94 – 96 German Insolvency Code.
100 Sec.223 Austrian Insolvency Code, sec. 338 German Insolvency Code.
101 Art.415 Croatian Bankruptcy Act. This illustrates that Croatia has made here legislative choice between a conflicts rule and a substantive rule.

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of contractual netting (set-off in a larger sense) in specific contexts[102]. The proposed UNCITRAL provision refers exclusively to 'the law applicable to that arrangement', i.e. basically the lex contractus, avoiding the complicated combination of applicable laws foreseen by Art. 9 EIR.

b) Effects of insolvency proceedings on contracts relating to immovables (Art.11 EIR)

According to Art.11 (1) EIR[103], the 'effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property [are] governed solely by the law of the Member State within the territory of which the immoveable property is situated'. Art.11 (1) EIR resembles at a first glance the conflicts rule under Art. 4 (c) Rome I Regulation, but is indeed more restrictive as it does not accept – in contrast with the Rome I Regulation – a different choice of law by the contracting parties[104]. The legal policy behind Art.11 (1) EIR is to give the situs state the determining voice which effect the (from its perspective foreign) insolvency proceeding should have on such contracts.

Art.11 EIR applies only to contractual matters. The impact of an insolvency proceeding on property issues, including immovable property, is governed by the separate provision of Art. 14 EIR.

As a mere conflicts rule Art.11 (1) EIR leaves the content of the applicable substantive law open.

The autonomous cross-border insolvency laws of some EU Member States contain equivalent provisions[105] of universal direction, i.e. they refer also to the law of non-EU countries. Germany takes a step beyond Art. 11 EIR as it includes also contracts relating to (registered) ships and airplanes (sec.336 sentence 2 German InsO). This is not followed by Austrian law (sec. 225 Austrian InsO).

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102 See UNCITRAL Working Group V, 65the session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretatiat‘ Note. Applicable Law in Insolvency Proceedings, p.33.

103 Art.11 (2) EIR contains a specific jurisdictional rule with elements of applicable law and substantive law. This provion will not be analysed here.

104 But see Art.11 (2), which refers in the context of a jurisdiction rule to the applicable lex contractus.

105 See, e.g. sec.119 § 3 nr.1 Belgian Code de DIP, sec. 225 Austrian Insolvency Code, sec. 336 sentence 1 German Insolvency Code.

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Sec. 336 of the German Insolvency Code applies outside the scope of the EIR. It shows that the German legislator regards this special conflicts rule as a fair balance of interests in general, not only a motivation of protection of interests within the EU.

Again, the UNCITRAL Working Group on Insolvency takes a different position, not providing for a special conflicts rule on contracts relating to immovables. Thus the UNCITRAL approach is closer to the Rome I Regulation than Art. 11 EIR.

c) Payment systems and financial markets (Art.12 EIR)

The EIR contains in its Art. 12 a further special conflicts rule addressing the effects of insolvency proceedings on a 'payment or settlement system or to a financial market'. According to this provision, 'the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.' The background of Art.12 EIR lies in European Financial Markets regulation and serves the purpose of securing the undisturbed functioning of international payment and clearing systems also in the case of the insolvency of participants in such system[106]. Participants in such systems are usually financial institutions, which are exempted from the scope of application of the EIR. However, some participants in such system may be covered by the EIR and Art.12 EIR establishes an equivalent rule under the EIR with the rules applying to bank insolvencies. The economic relevance of this rule is due to the systemic importance of such financial systems and markets.

Art.12 is a universal conflicts rule which includes also systems and markets governed by the law of non-EU countries and has a general international background[107].

On the national level, sec. 340 of the German Insolvency Code contains a similar provision, which, however, includes also some other transactions (financial repurchase agreements and novation agreemens and netting arrangements). The corresponding sec. 226 Austrian Insolvency Code is limited to regulated financial markets.

106 Cf. Peter Kindler, in: Münchener Kommentar zum BGB, Bd. 13, 8th ed. (2021), EuInsVO Art.12 Rz.1 – 4 with further references.

107 S. z.B. Alexander Bornemann, in: Graf-Schlicker, InsO, 6th ed. (2022), Art.12 EIR notes 1 – 4.

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In view of this broader international background it is not surprising that the UNCITRAL Working Group on Insolvency proposes in its planned document on applicable law in insolvency an equivalent, though more precisely worded and somewhat broader rule[108].

d) Effects of insolvency proceedings on employment contracts (Art.13 EIR)

Art.13 EIR provides for a specific conflicts rule as to the effect of insolvency proceedings on contracts of employment. In contrast with Art.11 EIR, this provision refers to the law (of another EU Member State) 'applicable to the contract of employment', i.e. to the law applicable under Art.3 in conjunction with Art.8 Rome I Regulation. The main reason behind this provision is the protection of employees and considerations of social policy. Like in the case of Art.13 EIR, application of the applicable labour requires an analysis whether the – recognized – (foreign) insolvency proceeding can be regarded as functionally equivalent to a domestic insolvency proceeding under the laws of the lex contractus laboris.

Under autonomous cross-border insolvency law, usually the same rule is foreseen, but is not limited to EU Member States (see, e.g. sec. 227 Austrian InsO, sec. 119 § 3 no.3 Belgian Code of DIP, Art.397 Croatian Bankruptcy Act, sec. 337 German InsO[109], Art. 729 Spanish Insolvency Act).

The effects of insolvency proceedings on labour contracts (employment contracts) are one of the few examples where the planned UNCITRAL document contains an identical, also universal conflicts rule.[110]

e) Effects on immovables and other registered rights (Art. 14 EIR)

Coming to the effects of insolvency proceedings on property law (rights in rem) Art. 14 EIR contains a special rule on immovables, referring to the 'lex registri' of such immovables, i.e. indirectly to the lex rei sitae. Going

108 See UNCITRAL Working Group V, 65the session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretatiat' Note, Applicable Law in Insolvency Proceedings, p.29.

109 This provision expressly refers to the Rome I Regulation.

110 See UNCITRAL Working Group V, 65the session, 16–20 Dec. 2024, document A/CN.9/WG.V/WP.198 (Secretatiat' Note, Applicable Law in Insolvency Proceedings, p.27.

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beyond immovables in the strict sense, the provision includes also rights in ships or aircraft. The reference in the provision is limited to EU Member States, i.e. effects of EU-based insolvency proceedings on immovables in non-EU countries are determined (from the EIR's perspective) by the lex fori concursus. Whether foreign countries accept this view, depends on the cross-border insolvency law of such countries.

The broad wording of the provision would seem to include all effects of the insolvency proceeding, including, e.g. the power of insolvency representatives to administer such property, stay of execution into such property, insolvency-specific rules on selling-off such property, but also possible limitations to the rights of secured creditors to enforce their security into these categories of property.

The autonomous insolvency laws of Austria, Hungary, Slovenia and Spain contain an equivalent universal conflicts rule (sec. 228 Austrian InsO, Art.77 (2) Hungarian PIL Act, Art. 481 (1) Slovenian Insolvency Act, Art. 723 Spanish Insolvency Act), which is not limited to EU countries. In contrast, German autonomous law does not provide for a universal conflicts rule on this subject; however, it contains a similar, but unilateral rule in the context of recognition of foreign (non-EU) insolvencies (sec. 351 German InsO). This provision is more precisely formulated than Art.14 EIR. According to its first subparagraph it protects the legal position of secured creditors (as provided for by the German lex rei sitae), while the second subparagraph contains a catch-all clause for the legal position of the insolvent debtor in immovables located in Germany.

The planned UNCITRAL text on applicable law in insolvency does not contain any particular provisions in this respect. Under the MLCBI, the recognizing court could make the adequate decison within its discretion, including – but not requiring – a conflict of laws analysis.

f) Detrimental acts (Art. 16 EIR)[111]

A special conflicts rule is also provided in Art. 16 EIR in conjunction with Art.7 (2) (m) EIR with regard to the effects of insolvency proceedings on 'legal acts detrimental to the general body of creditors' (detrimental acts). Under Art.7 (2) (m) EIR, 'the rules relating to the voidness, voidability or unenforceability of [detrimental acts]' are governed by the lex fori concur-

111 For details see → Mangano.

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sus. The core of the provision concerns the avoidance of transactions done by the debtor in a certain time period before the insolvency, but it would cover also other acts, including acts of creditors.

Art.16 EIR modifies the lex fori concursus, adding a cumulative requirement that the lex fori concursus 'shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a)the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b)the law of that Member State does not allow any means of challenging that act in the relevant case.'

This very complicated and much discussed provision combines elements of conflict of laws and substantive law. It is a conflict of laws rule in so far as it adds to the lex fori concursus the lex causae of detrimental acts (Art.16 (a) EIR), e.g. the lex contractus or the lex rei sitae. It contains also a component of substantive law in so far as Art.16 EIR requires a particular material content of the lex causae. The lex causae must 'not allow any means of challenging that act in the relevant case'. 'Any means of challenging' includes also the insolvency law of the lex causae.

Thus, it has first to be examined whether a certain act is void, voidable or unenforceble under the lex fori concursus (arguably, even under its non-insolvency rules such as contracts law). If this is confirmed, on the second stage the lex causae of the respective act (e.g. lex contractus for detrimental contracts or lex rei sitae for detrimental dispositions of property) has to be examined. The act is only void, voidable or unenforcable if such a result is foreseen by both the lex fori concursus and the lex causae. It seems evident that this complicated and restrictive rule, under the guise of protecting good-faith third parties, can protect bad-faith parties as well and significantly restricts the possibility to counter detrimental acts.

As Art.16 EIR applies only if the lex causae is the law of an EU Member State, the lex fori concursus remains solely applicable if the detrimental act is governed by non-EU law – irrespective of other circumstances such as the domicile of participants or the locus actus. In the case of, e.g., detrimental contracts, well-informed parties might choose a law under which the contract is fully valid despite the insolvency.

On the other side, if the debtor's act is not governed by the law of an EU Member State, the lex fori concursus remains solely applicable, even if, for example, the recipient of an illicit benefit resides in the EU.

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Sec. 339 of the German Insolvency Code (like some other autonomous laws[112]) contains an equivalent, universal conflicts rule limiting avoidance also when the lex causae is the law of a non-EU country. The same is true, though with some counter-exceptions, in Austria (sec. 229 Austrian InsO). However, these provisions apply only outside the scope of application of the EIR, i.e. mainly at recognition of non-EU insolvencies.

In contrast, Croatia does not provide for a special conflict of laws provision on detrimental acts, thus leaving it (outside the scope of application of the EIR) with the general rule of lex fori concursus.

g) Protection of third-party purchasers (Art. 17 EIR)

The issue of protection of persons who have acquired from the insolvent debtor after the opening of the insolvency proceeding an immovable or certain other specified goods (registered ships, aircraft and securities), has been regulated in the EIR in a special conflict of laws rule (Art. 17 EIR). Instead of the lex fori concursus, the lex rei sitae or lex registri apply. This is again a provision meant to realize particular protection of certain parties through conflict of laws. In contrast with Art.16 (detrimental acts), the designated law applies even if it protects the third party less than the lex fori concursus.

Austria and Germany (as well as some other EU countries) haven taken-over this rule into their autonomous insolvency law. However, they have done it in different ways. Austria has remained close to the EIR and also passed a universal conflict of laws rule in this respect[113]. Sec. 349 German InsO, in contrast, is a substantive provision, which has been positioned in the chapter on recognition of foreign insolvencies and applies only to dispositions over German immovables and registered ships and aircraft registered in Germany. Croatia has also chosen the way of a substantive rule in respect of debtor's disposal of the assets undertaken between the date on which the foreign insolvency proceeding was opened and the date on which the decision recognizing that foreign insolvency proceeding in Croatia was published for the recognition context (Art. 413 Croatian Bankruptcy Act). Art. 413 of the Croatian Act applies to all dispositions of the debtor, not

112 In the same sense e.g. sec. 119 § 4 no.1 Belgian Code de DIP, Art. 281 Portuguese Insolvency Act and Art. 730 Spanish Insolvency Code.

113 Same approach e.g. sec. 119 § 4 no.2 Belgian Code de DIP, and Art.725 Spanish Insolvency Act.

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only dispositions about immovables. As of the date of publication of the decision recognizing the foreign insolvency proceeding in Croatia, the *lex fori concursus* determines the legal effects of the debtor's disposals of assets forming part of the insolvency estate that the debtor would undertake on that date and after (Art. 411 of the Croatian Bankruptcy Act).

h) Third parties' rights in rem

Art. 17 EIR has to be distinguished from Art.8 and 10 EIR, which also deal with the effects of insolvency proceedings on rights in rem, but develop for this particular substantive rules. Belgium, Croatia, Portugal and Spain have turned Art.8 and 10 EIR into conflicts rules for rights in rem (sec. 119 § 2 no. 1 and no.3 Belgian Code de DIP, Art. 396 Croatian Bankruptcy Act, Art. 280 Portuguese Insolvency Act[114], Art. 724 Spanish Insolvency Code). Somewhat differently, sec. 351 (1) German InsO provides for third party rights in rem a unilateral conflicts rule for the recognition context. Indirectly, all of these provisions appear to accept the critique of Art.8 and 10 EIR as being overprotective.

i) Effect of insolvency proceedings on pending lawsuits or arbitral proceedings (Art.18 EIR)[115]

According to Art.18 EIR the 'effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.'[116] Art.18 EIR is again a conflict of laws provision. Like all conflict of laws provisions of the EIR, it applies both to domestic proceedings and to recognition of foreign (EU-based) insolvency proceedings. In comparison with the EIR 2000, the provision was extended to expressly include also arbitral proceedings.

114 In addition, Art. 280 of the Act provides also for some substantive rules.
115 For details see → Silvestri (court proceedings) and → Lazić (arbitration).
116 For an in-depth analysis of to the various aspects of this provision see, e.g. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.18 EIR.

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The provision is primarily addressed at courts (or arbitral tribunals)[117] in which lawsuits[118] (or arbitral proceedings) are pending at the moment when the insolvency proceeding is opened[119]. This includes courts (and arbitral tribunals) in the state of the forum concursus as well as court proceedings or arbitral proceedings in other EU countries.

Mediation, which has gained ground in insolvency practice in many countries over the last years, is not addressed in Art. 18 EIR[120].

aa) Court proceedings[121]

The typical main impact an insolvency proceeding has on pending court proceedings by or against the insolvent debtor is suspension (or non-suspension) of the court proceeding. Closely related with such a suspension is the question if and how such proceedings can later be resumed. It may also be the case that such proceedings are completely stopped and may not be continued by any of the parties[122].

If the court proceeding takes place in the same state as the insolvency proceeding, the lex fori concursus and the lex fori processus of the pending proceeding coincide. If, however, the court proceeding takes place in another EU Member State, Art. 18 EIR refers for the effect of the insolvency proceeding upon the pending proceeding to the lex fori of that proceeding. From the perspective of that court the insolvency proceeding is a foreign

117 There are few procedural tools available – at least in the EU – to enforce this provision 'from outside' in the insolvency proceeding. Instruments such as contempt of court or other sanctions are not foreseen in most EU countries, in particular when foreign courts (or arbitral tribunals) are concerned. This may however change in the future. Another possibility are 'indirect sanctions' such as non-recognition of a judgment neglecting Art. 18 EIR in the forum concursus or otherwise.

118 Cf. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.18 EIR Rz.3 – 5: classical lawsuits (probably including special proceedings such as for payment orders), but not proceedings of 'voluntary jurisdiction' (questionable); also lawsuits in administrative courts; but not administrative proceedings outside courts.

119 However, it may include also orders of the insolvency court as to such situations.

120 As to this topic see → Taşman. Furthermore e.g. Filip Ionescu, To what extent is mediation an effective mechanism for resolving disputes in cross-border insolvency?, https://lawyersweek.net/24808/to-what-extent-is-mediation-an-effective-mechanism-for-resolving-disputes-in-cross-border-insolvency.html.

121 For details see → Silvestri (proceedings).

122 The exact range of rules covered by Art. 18 EIR is much discussed, see, e.g. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.18 EIR Rz. 11 (broad understanding).

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insolvency, which needs to be recognized in order to have the effect under Art. 18 EIR in conjunction with the lex fori processus (including its rules of the effect of insolvency proceedings on pending court proceedings).

Art. 18 EIR applies to all pending court proceedings, irrespective of the domicile of the parties, which may be located in non-EU countries.

The autonomous law of some EU Member States – Austria, Portugal and Spain – contains in this respect a universal conflict of laws provision (sec. 231 Austrian InsO, sec. 285 Portuguese Insolvency Act, Art. 731 Spanish Insolvency Act). Germany passed a corresponding provision only for the impact of foreign insolvency proceedings upon court proceedings in Germany (sec. 352 German InsO)[123]. With regard to the aspired effects of German (domestic) insolvency proceedings on court proceedings in other countries (outside the scope of application of Art. 18 EIR, i.e. mainly in non-EU countries), the lex fori concursus would apply. Of course it depends on the cross-border insolvency law of the respective foreign country whether the German insolvency proceeding is recognized and which effects this has on local (or other) pending court proceedings. Under the MLCBI this would largely be a matter of discretion of the recognizing court.

bb) Arbitral proceedings[124]

Over the years, arbitral tribunals have developed quite different approaches as to the impact of insolvency proceedings on arbitral proceedings. Some arbitral tribunals have denied any effects of insolvency proceedings upon arbitral proceedings, others have merely given the insolvency representative the possibility to enter the proceeding, again others have suspended the arbitral proceeding with different further consequences[125]. It is therefore

123 Poland has, instead, passed a substantive (unilateral) rule on suspension of court proceedings in Poland for the recognition context, after (formal) recognition of a foreign insolvency proceeding, Art.397 (1) no.1 Polish Insolvency Act.

124 For details see → Lazić.

125 See Jasna Garašić, Effects of Foreign Insolvency Proceedings on Pending Arbitral Proceedings, in: Sander, Gerald G./Pošćić, Ana/Martinović, Adrijana (ed.), Exploring the Social Dimension of Europe (2021), pp. 177 – 191, Simon Vorburger, International Arbitration and Cross-Border Insolvency: Comparative Perspectives (2014), Deyan Draguiev, The Effect of Insolvency on Pending International Arbitration: What is and What Should Not Be, Journal of International Arbitration, Volume 32 (2015), pp. 511–542.

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not surprising that the recast EIR deals also with the impact of insolvency proceedings on arbitration.

Art.18 EIR addresses only a limited number of issues arising in the interplay of insolvency law and arbitration law. It neither deals with the question of the validity of arbitration clauses after the opening of an insolvency proceeding nor with recognition and enforcement of arbitral awards. As to the conduct of arbitral proceedings during insolvency (e.g. when the arbitral tribunal continues the proceeding), Art. 18 deals only with the topic of 'effects of insolvency proceedings on a pending arbitral proceeding'. It does not address, for example, the effects of the insolvency proceedings on 'new' arbitration proceedings. Also, it is not quite clear how broad the notion of 'effects of insolvency proceedings on pending arbitral proceedings' is to be understood: Does it include the 'standing' of the insolvency representative? Does it include the whole further conduct of the arbitral proceeding after the opening of the insolvency proceeding?

Basically, the approach of Art. 18 EIR to refer to the lex arbitri is certain to be welcomed by the arbitration community. But does this create a convincing balance between the underlying purposes and values of insolvency law and arbitration law? What are the consequences if, for example, an arbitral tribunal were to deny all effects of the insolvency proceeding on the conduct of the arbitral proceeding? Arguably, this might lead to a setting-aside of the arbitral award by the competent state court or to a denial of recognition of the award in the state of the forum concursus and perhaps also in other countries.

The planned UNCITRAL Model Law on applicable law in insolvency proceedings does not presently mention this topic, which is at the intersection mainly between UNCITRAL's Working Groups V (insolvency) and II (dispute settlement).

At present, no EU Member State has, be it within its insolvency or arbitration legislation, passed specific rules on the interplay between insolvency and arbitration law. A recent comparative document in this field is the IBA Toolkit on Insolvency and Arbitration, which was published in 2021 und updated in 2024, and the corresponding work of the Insolvency and Arbitration Sub-Group of the IBA's Arbitration Committee[126].

126 Text available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group#toolkit. For a short overview see https://jusmundi.com/en/document/publication/en-overview-the-iba-toolkit-on-insolvency-and-arbitration. At to the work of this group see https://www.ibanet.org/

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j) Escape clause?

At present, the EIR does not contain an escape clause in insolvency conflict of laws matters. In contrast, such escape clauses exist in several other EU regulations dealing with conflict of laws, e.g. Art.4 (3) of the Rome I Regulation on the law applicable to contractual obligationes or Art.4 (3) of the Rome II Regulation on the law applicable to non-contractual obligations.

The autonomous cross-border insolvency laws of EU Member States also do not provide for specific escape clauses in this field. However, some countries have passed general escape clauses for conflict of laws, which appear to apply also to conflict of laws in the insolvency context (e.g. sec. 24 Czech Private International Law Act, sec. 10 Hungarian Private International Law Act, cf. also sec. 1 (1) of the Austrian Private International Law Act). A similar function is fulfilled by the flexible approach to conflict of laws taken by many U.S. courts[127].

4. Particular aspects of non-main proceedings?

Neither the EIR nor the autonomous cross-border insolvency law of the EU Member States contain any particular conflict of laws provisions for non-main proceedings. The limitation of such proceedings to assets of the debtor situated in the forum state of the non-main proceeding (Art. 3 (2) EIR and most autonomous laws) is a criterion of substantive law, not of conflict of laws. Even in a non-main insolvency proceeding the laws of another country (EU Member State or non-EU country) may have to be applied. For example, it may be necessary even in non-main proceedings to determine property in an asset that has been brought from another country into the forum state of the non-main proceeding. There are, however, no indications in the EIR or in autonomous laws that in such cases particular conflicts rules should apply in non-main insolvencies. Another example would be the effect of a non-main insolvency proceeding on pending lawsuits or arbitral proceedings. If such proceedings relate to property covered by the non-main proceeding, there is no reason to exclude proceedings in

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LPD/Dispute_Resolution_Section/Arbitration/insolvency-and-arbitration-working-group (all accessed 18.03.2025). As to the role of soft law in cross-border insolvency in general see Mevorach, pp.140 – 143.

127 Cf. https://www.abi.org/abi-journal/conflict-of-laws-which-state-rules-govern (accessed 16.06.2025).

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foreign countries from the conflict of laws rule of Art. 18 EIR or to develop a different conflicts rule for such cases.

5. Interim summary

Summing-up, the EU Insolvency Regulation has developed a differentiated set of rules on conflict of laws in insolvency, setting standards for this sector of private international law on the international level. While the basic rule of lex fori concursus is today generally accepted, the exceptions and specifications are more of a European experiment. A global standard might develop in the current UNCITRAL project on applicable law in insolvency. According to the present version of its draft, there will be significantly fewer exceptions from the lex fori concursus than under the EIR. This approach has to be seen in the context of the other UNCITRAL model laws on insolvency, in particular the MLCBI, and might not be fully adequate for the EU, at least not for its inner-EU relations.

When the UNCITRAL text on applicable law in insolvency is completed, it may be an attractive instrument also for the EU, 'universalising' its basic conflicts rules in insolvency on a global level. However, there will also be a need to discuss whether and to which degree the existing special conflict of laws provisions in the EIR should be kept for inner-EU situations, or whether they should be dropped or modified to avoid different sets of rules for inner-EU and 'external' relations. One possiblity would be to limit some of these rules to the recognition context, following the example of the autonomous insolvency law of some EU member countries, at least with regard to non-EU insolvencies.

V. Substantive law

Apart from conflict of laws, the EIR contains numerous rules of a substantive (procedural or material) content for cross-border cases. In the context of domestic insolvency proceedings these are – apart from classical international civil procedure issues such as jurisdiction and recognition – mainly provisions specifying the general geographical reach (scope) of insolvency proceedings, secondly particular provisions containing limits of their territorial reach, thirdly some provisions distinguishing between creditors or other stakeholders according to their geographical location. These three groups of substantive provisions will be addressed below in

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some detail. Other provisions of a substantive character will be dealt-with more summarily.

1. Geographical reach of insolvency proceedings in general and non-main proceedings in particular

The EIR does not expressly specify the intended geographical reach of COMI-based (main) proceedings.

a) Main insolvency proceedings

It seems to be unanimously accepted in the EU that COMI-based proceedings apply to all assets of the debtor, whether they are situated within the EU or in non-EU countries, as well as to acts done (or omitted) in other countries than the forum concursus. This is sometimes deduced from general policy considerations, which are seen as underlying the EIR, in particular the 'universal' vocation of main proceedings as a globally accepted and reasonable approach in cross-border insolvency law[128]. Other voices prefer an argument e contrario from the express territorial limitation of non-main (establishment-based) proceedings under Art.3 (2) EIR.

If the EIR is not applicable, the legal situation may differ under autonomous cross-border insolvency law. In most EU countries main proceedings are expressly or implicitly accorded (intended) universal effect, thereby including also assets in non-EU countries. This is often expressed through the formula that the insolvency proceeding (or the estate) includes property 'wherever situated'[129]. The same is true for most non-EU countries[130]. However, this issue may be arguable in some jurisdictions, in particular in Common Law countries, where courts may have discretion to decide on this question.

Even if main insolvency proceedings have a universal (global) reach, this does not mean that they can be enforced globally. Some non-EU countries

128 See recitals 22 and 23 of the EIR. At the same time, authors mention that foreign countries can decide themselves whether they recognize the effects of EU insolvency proceedings with regard to assets outside the EU, e.g. by granting recognition under the MLCBI.

129 Cf., e.g., sec. 237 Austrian Insolvency Act (with some limitations), sec. 20 of the Dutch Bankruptcy Act or sec. 174 (2) of the Slovak Insolvency Act.

130 See, e.g. sec.34 of the Japanese Bankruptcy Act or sec. 174a (6) of the Serbian Insolvency Act.

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may recognize a EU-based main proceeding and cooperate with it, others may deny such recognition. In such a situation the insolvency court of the main proceeding has – at least in the EU – only limited means to react to such non-recognition. Procedural tools such as contempt of court sanctions or injunctions against particpants are rarely available in the courts of EU Member States, and they may be problematic as they tend to cause tensions with other jurisdictions. However, the EIR contains some limited substantive rules, which may be applied (also) in such cases, in particular Art. 23 EIR (duty of creditors to return or impute proceeds received abroad).

b) Non-main insolvency proceeding

According to Art.3 (2) sentence 2 EIR, the effects of proceedings opened on the basis of an 'establishment' of the debtor, i.e. non-main proceedings under the Regulation, 'shall be restricted to the assets of the debtor situated in the territory of the latter Member State.' This means that in principle only assets situated within the territory of this State are covered by the administrative powers of an insolvency representative, are protected against execution by individual creditors or by other protective rules of domestic insolvency law. On the other side, Art.3 (2) sentence 2 EIR does not provide for a general territorial limitation of the rules governing such insolvency proceedings. For example, the insolvency representative appointed in a non-main proceeding is entitled to sue abroad to recover assets removed from the territory of the State of the territorial proceeding.

Under autonomous law, non-main proceedings are usually regarded as having only territorial reach as to the assets covered by the proceeding. This is explicitly stated in Belgium, Croatia, Germany, Poland, Portugal, Slovenia and Spain (sec. 118 § 1 no.2 in conjunction with sec.117 no.3 Belgian Code de DIP, Art. 393 (4) Croatian Bankruptcy Act, sec. 354 (1) German InsO, Art.380 (4) Polish Bankruptcy Act, sec. 294 (1) Portuguese Insolvency Act, Art. 474 (2) no.1 Slovenian Insolvency Act, Art.49 (2) Spanish Insolvency Act)[131].

However, this approach is not taken everywhere. In France, for example, all insolvency proceedings, including non-main proceedings, have in prin-

131 Same approach: Art.251 sent. 3 and 4 and Art.256 – 27 OHADA Uniform Insolvency Act.

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ciple universal reach.[132] The same seems to be true in the Netherlands according to the wording of sec.20 of the Dutch Bankruptcy Act, and for Slovakia according to Art.174 (2) Slovak Insolvency Act. Outside the EU, e.g. the UK and the U.S. follow a similar approach, granting the insolvency court, however, discretion to limit the geographical reach of the proceeding in a general manner or with regard to certain assets or circumstances[133].

An interesting particular approach has been developed by the Austrian legislator, stating in sec. 237 (1) Austrian InsO that the effects of any Austrian insolvency proceeding (i.e. including non-main proceedings) covers also foreign assets, 'except if 1. The debtor's COMI is located in foreign country, 2. In this country a [main] insolvency proceeding has been opened and 3. that proceeding includes also foreign assets.' Thus, sec. 237 (1) Austrian InsO gives also non-main proceedings a universal reach under certain conditions. The legislative purpose appears to be that conflicts with a foreign main proceeding should be avoided, but if no such conflicts can be expected, also non-main proceedings have a global reach and can in fact serve like a main proceeding. In contrast with the U.S. and UK approach (and perhaps France), the Austrian model does not foresee discretionary powers of the insolvency court in this respect.

A differentiating approach has also been adopted by the MLCBI, though mainly for purposes of cooperation between parallel proceedings (see Art. 28 MLCBI). Even if a (secondary) non-main proceeding is meant to cover only property situated in the forum state, this does not exclude that the proceeding is extended to property situated abroad, if this serves the purposes of cooperation between the parallel proceedings.

132 See see Dammann/Sénéchal, Le droit de l'insolvabilité internationale (2018), pp.700 – 703.

133 Cf. Note, Extraterritorial avoidance actions under the U.S. Bankruptcy Code, 135 Harv.L.Rev. (2022), pp.2173 – 2193, https://harvardlawreview.org/print/vol-135/extraterritorial-avoidance-actions-under-the-u-s-bankruptcy-code/ (accessed 16.06.2025), David P. Stromes, The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice, 33 Brook. J. Int'l L. (2007), pp,.277- 307, https://brooklynworks.brooklaw.edu/bjil/vol33/iss1/6 (accessed 16.06.2025).

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2. Geographical reach of specific provisions

a) Art. 8 and 10 EIR

Two provisions of the EIR, which in principle apply both in main and non-main proceedings[134], contain a geographical limitation to assets located in the State of the forum concursus (Art. 8 and 10 EIR). Art.8 EIR (third parties‘ rights in rem) and Art.10 EIR (retention of title) state that assets located in the territory of a Member State other than the State of the insolvency forum ‘are not affected’ by the insolvency rules of the State of the insolvency proceeding. Although there has been some discussion whether these provisions could be interpreted as conflict of laws rules[135], it seems to be generally accepted today that they exclude specifically the application of substantive insolvency rules to assets situated abroad[136]. For example, if the insolvency law of EU Member State 1 provides for rules limiting the right of a seller under a retention of title agreement to withdraw his property from the insolvent estate, these rules do not apply to assets situated in EU Member State 2. This can complicate endeavours for restructuring and at least weakens the negotiating power of insolvency representatives.

Art.8 and 10 EIR have been justified with the argument that retention of title sellers and owners of in rem security right deserve particular protection notably in cross-border insolvencies. Other voices in literature regard the solution laid-down in these provisions, however, as an overprotection of some economic players[137]. In any case, Art.8 and 10 do not protect such participants as to assets situated in non-EU countries.

The territorial limitations in Art.8 and 10 EIR are founded on specific considerations to protect expectations within the EU internal market. If the legislator had intended to create either a general legal regime or open the way to national approaches, this should have been stated expressly. Whether such rules should be extended to relations with non-EU countries is a matter of legal policy and future regulation.

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134 However, in non-main proceedings they may have no practical relevance to the geographical limitation of these proceedings to assets located in the State of the establishment.

135 Cf. Bork/Mangano, European Cross-border Insolvency Law (2022), p.142 et seq.

136 This has been confirmed by the CJEU in the German Graphics case, ECLI:EU:C:2009:544.

137 Bork/Mangano, European Cross-border Insolvency Law (2022), p.146.

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Nearly none of the EU Member States extends these provisions to non-EU countries, the only exception being Austria (sec. 222 and 224 Austrian InsO). Most of those EU Member States, which have passed special legislation on this issue, have created a universal conflict of laws rule referring to the lex rei sitae (Belgium, Croatia, Portugal and Spain).[138] Germany takes a slightly different position at this place limiting its conflicts rule to the recognition context and assets situated in Germany (sec. 351 German InsO).

b) Art. 9 EIR

A peculiar position in this context has the provision of Art.9 EIR on rights of set-off in cross-border insolvency. Art.9 EIR states that creditors‘ rights of set-off are 'not affected' by insolvency, 'where such a set-off is permitted by the law applicable to the insolvent debtor's claim.' On the one hand, the formula 'not affected' corresponds to the wording of Art.8 and 10 EIR which except foreign assets from certain substantive rules of the lex fori concursus. In contrast, Art.9 EIR contains a conflict of laws rule, referring to 'the law applicable to the insolvent debtor's claim'. Thus, Art.9 EIR stands between conflict of laws and substantive law, somewhat similarly to Art.16 EIR on detrimental acts. Whether Art.9 EIR reflects a sound policy in the context of cross-border insolvency is disputed, in particular as national laws differ significantly as to set-off in insolvency. Similarly to Art.16 EIR, Art.9 sort of maximises the protection of creditors with regard to set-off. Differently from Art.16 EIR, Art.9 is not limited to debts or claims governed by the law of EU Member States, neither does it foresee a distinction between local or foreign creditor or the (fictional) location of debts. Art.9 EIR applies universally, thus excluding possible critiques of discrimination – however at the disadvantage of the other creditors.

138 Belgium: sec. 119 § 2 no.1 and 3 Code de DIP, Croatia: Art.396 Bankruptcy Act (for 'exemption' and rights in rem, Aus- und Absonderung), Portugal: Art. 280 Portuguese Insolvency Act (in addition, Art. 280 provides also for some substantive rules, but without geographic limitation), Spain: Art. 723 Spanish Insolvency Act (accompanied by one substantive rule, but no geographical limitation). See also supra at subpoint 3, footnotes 107 and 108). This illustrates how member states switch between conflict of laws rules and substantive rules in cross-border insolvency law.

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3. Distinction between creditors and other stakeholders or their debts/ claims along lines of location or other 'closeness'

The history of insolvency law as well as comparative observations show that insolvency laws sometimes distinguish(ed) between 'local' and 'foreign' stakeholders (debtors, creditors, other persons). The EIR also uses such distinctions (see e.g. the definitions of 'local' and 'foreign' creditors in Art. 2 (11) and (12 EIR), but gives them within the EIR's rules relatively small weight.

a) Debtor

Jurisdiction is based on the COMI (Art.3 (1) EIR), a concept based on rather 'objective' factors (place of business, property etc.). The debtor's domicile or habitual residence plays a certain role in the context of COMI, but only as one of many factors. Also, jurisdiction based on an establishment (Art.3 (3) EIR) can be seen as an objective category, available to debtors from all over the globe.

There are no other rules in the EIR, distinguishing between insolvent debtors according to their nationality or domicile, although it is not excluded that national insolvency laws (or insolvency-related laws) might use these concepts in certain contexts[139]. As the case may be, this can lead in the future to disputes about possible discriminations under EU law or constitutional law.

The autonomous laws of Germany and Austria take basically the same position as the EIR, not distinguishing (taking aside jurisdiction, which follows basically the COMI approach) between 'local' or 'foreign' debtors. The same appears to be true, in principle, for the other EU countries, but exceptional rules cannot be excluded, e.g. on the basis of provisions on reciprocity or retorsion contained in some acts on private international law or cross-border civil procedure[140].

139 For example, autonomous French law gives the citizenship of creditors and debtors a certain role in establishing jurisdiction also in insolvency cases, see Dammann/ Sénéchal, Le droit de l'insolvabilité internationale (2018), pp.692 – 695.

140 See, e.g. Art.31 Hungarian Private International Law Act, Art. 2.561 Romanian Civil Code.

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b) Creditors and other stakeholders[141]

As to creditors, the situation is somewhat different. In principle, the EIR does not distinguish between 'domestic' and 'foreign' creditors[142]. It also does not distinguish between domestic and foreign 'claims', in whichever way they might be defined. For example, any creditors, whether domiciled in other EU Member States or in non-EU countries, may participate in main as well as in non-main proceedings under the Regulation[143]. The same is true for other stakeholders, e.g. shareholders of the debtor, commercial partners of the debtor, even public entities.

However, this basic observation needs to be qualified. Some provisions in the Regulation do distinguish between 'local' and 'foreign' creditors. In the context of non-main proceedings 'local' creditors are accorded some specific (mostly procedural) rights (see Art. 3 (4) EIR for isolated non-main proceedings, Art.36 EIR for undertakings to avoid a secondary proceeding, Art 38 (2) and (3) for secondary proceedings). In a general context 'foreign' creditors are sometimes mentioned specifically as having certain procedural rights (see Art.54 and 55 EIR).[144]

With this, the definition of 'foreign' creditor in Art.2 (12) EIR is limited to creditors domiciled[145] in EU Member States, i.e. it excludes creditors domiciled in non-EU States[146]. This might be regarded as disciminatory from a non-EU perspective, but the applicable national insolvency law regularly steps in and grants equal status to all creditors inrrespective of their domicile. Also, in so far as provisions of the EIR do not distinguish between local and foreign creditors, it can be argued that non-EU creditors are included therein (see, e.g. Art.45 EIR: 'any' creditor). Another aspect of the definition of foreign creditors in Art. 12 (2) EIR ist that it expressly includes 'tax authorities and social security authorities of Member States'. This opens the way for foreign public entities from other EU Member States

141 For details see → Garašić.
142 See, e.g. Art. 46 EIR: 'any' creditor may lodge claims in secondary proceedings.
143 Cf. Art.54 EIR.
144 See Art.2 (12) EIR: term 'foreign creditor' is limited to creditors domiciled (etc.) in another EU Member State, excluding creditors domiciled in non-EU countries.
145 In detail more open, see Art.2 (12): habitual residence, domicile or registered office In addition special provision is made for 'tax authorities and social security authorities of Member States'.
146 Anothes aspect of this definition is that it expressly includes foreign public entities such as tax authorities and.

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to lodge claims (and exercise other creditor rights[147]) in all EU-based proceedings, but it excludes – or at least does not include – public authorities from non-EU countries.

'Local' creditors, on the other hand, are not defined by domicile, but by the local link of their 'claim' (Art. 12 (11) EIR). Claims are local if they 'arose from or in connection with the operation of an establishment situated in a Member State other than the Member State in which the centre of the debtor's main interests is located.' Under this definition, the term 'local creditors' is limited to the context of non-main proceedings. There are, strictly speaking, under the EIR no 'local' creditors in main proceedings, all rules apply basically to creditors in general.

According to the jurisprudence of the Court of Justice of the EU in civil procedure law, discrimination according to nationality can also exist in an indirect form, e.g. by using domicile or other seemingly neutral criteria[148]. Developing this approach further, distinctions based on the 'location' of claims or assets or on the law applicable to claims also risk to be regarded as a form of indirect direct discrimination.

The autonomous insolvency laws of the EU Member States in principle also do not distinguish between 'local' or 'foreign' creditors or other stakeholders, and this is sometimes even expressly stated in provisions on cross-border insolvencies.[149] However, in certain cases, domestic creditors continue to enjoy some preferential treatment or foreign creditors are treated less favorably under autonomous insolvency laws in the EU even today[150]. In exceptional cases, negative treatment of some creditors on the basis of provisions on reciprocity or retorsion contained in some private in-

147 However, as Art.45 EIR does not mention other rights in the proceeding expressly, there is some ambiguity which other rights a foreign public entity may have. Arguably, this is left for autonomous legislation to decide, e.g. whether foreign tax authorities are on an equal footing with domestic authorities as to privileges in satisfaction of their claims. Traditionally, this is denied.

148 Cf. https://curia.europa.eu/jcms/jcms/p1_3287489/en/ (accessed 18.03.2025).

149 See, e.g. sec. 236 Austrian InsO, Art.XX-212 Belgian Economic Code, Art.13 Greek Insolvency Act (and Art14 of the expressly states that foreign creditors must also be informed about the proceeding), Art. 380 (1) Polish Bankruptcy Act, Art. 339 Polish Restructuring Law, Art. 284 (1) Portuguese Insolvency Act, Art.285 (1) and 286 Romanian Insolvency Act, Art.46 Slovenian Insolvency Act (general provision of Slovenian insolvency law), Art.739 Spanish Insolvency Act.

150 See, e.g. sec. 182a Czech Insolvency Act (security for costs in domestic proceedings may be imposed on non-EU foreign creditors), Art.380 (2) Polish Bankruptcy Act and Art.340 Polish Restructuring Law (foreign creditors have to appoint representative in Poland), Art. 285 (2) and (4) Romanian Insolvency Act (foreign creditors

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ternational law acts cannot be excluded. Outside the EU, such practices also exist, e.g. with regard to recognition of foreign (e.g. EU-based) insolvencies. The problems in this respect are, however, sometimes more of a factual than legal nature.

As to foreign public entities, e.g. foreign tax authorities and foreign social security authorities, the legal situation seems at best unclear. Most probably, their participation in domestic insolvency proceedings tends usually to be denied[151].

4. Other provisions

There is a considerable number of other substantive provisions in the EIR, which have not yet been mentioned or were only briefly touched in this report.

One example is – in the 'General Provisions' of the EIR – Art.15, which states that European patents with unitary effect, Community trade marks and 'any other similar rights established by Union' may only be included in EU-based main proceedings. This avoids complicated distribution problems between concurrent proceedings in the EU. Most of the substantive provisions in the EIR deal with procedural issues such as lodging claims, information to be given to participants, cooperation between insolvency representatives or courts in parallel proceedings etc. Issues of parallel proceedings will be addressed in another contribution in this book.

Another, more general provision is Art. 31 EIR. Although it is positioned in the EIR's chapter on recognition of foreign proceeding, it is also applicable in the context of domestic proceedings. The provision protects good faith payments (or other performance of obligation) made in EU Member States to a debtor who would under insolvency rules not be entitled to receive such payments. Due to this provision, the third party is liberated and does not have to pay again to the insolvency representative. Art. 31 EIR is based on similar provisions in some EU member countries.

German autonomous insolvency law repeats this provision in sec. 350 German InsO, but limits it to payments made in Germany. Sec. 235 Austrian InsO contains a similar provision, but does not limit it to payments in Austria.

'not ranked lower than ordinary creditors' i.e. perhaps implicitly denying privileged status). As to such aspects in non-main proceedings see below at e).

151 See, e.g., Art. 380 (3) Polish Bankruptcy Act.

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The substantive provision in Art. 23 EIR on return or imputation of proceeds received in other EU Member States has already been mentioned. It has been taken-over with some additions into automous cross-border insolvency law in Germany, applying both to receipts in Germany and abroad (sec. 342 German InsO). Austria has not passed a similar provision.

With regard to non-EU countries, uniform technical rules, which have been developed in the EIR, could be useful – in a modified form – also in relations with non-EU countries, but this would require a detailed analysis of each of these provisions. One example are the provisions of the EIR about the use of information technologies in cross-border insolvencies (in particular Art. 24 – 30 and 53 – 55 EIR) and insolvency law is included in the EU‘s more general e-Codex working program[152]. Also, the EU Restructuring and Insolvency Directive of 2019[153] contains several 'enabling' rules as to the use of information technologies in EU-based insolvency proceedings, expressly 'including in cross-border situations' (Art.28 of the Directive)[154]. The EIR has created innovative rules on the establishment, interconnection and access to insolvency registers between EU Member States (Art. 24 – 30 EIR). Some kind of cooperation in this field would be of use also in relations with non-EU countries. The respective EIR provisions could be a good starting-point for such discussion.

On the national level, information technologies are more and more used in national insolvency proceedings, but cooperation in this respect with non-EU countries is little developed.

A further area of practical importance which would deserve attention also in the context of the EIR from a perspective of (mostly) substantive law, is the use of mediation in cross-border insolvencies. The EIR does not presently contain rules on this subject, and the European Mediation Directive of 2008[155] does not directly address mediation in the insolveny context. However, the mediation is increasingly used in the insolvency context and promises significant efficiencies. In the EU, e.g. Slovenia has

152 See https://eur-lex.europa.eu/EN/legal-content/summary/e-codex-computerised-system-for-the-cross-border-electronic-exchange-of-data-in-the-area-of-judicial-cooperation-in-civil-and-criminal-matters.html (accessed 18.03.2025).

153 https://eur-lex.europa.eu/eli/dir/2019/1023/oj/eng (accessed on 20.3.2025).

154 According to this provision 'at least the following actions' must be open to the use of IT: filing of claims, submission of restructuring or repayment plans, notifications to creditors, lodging of challenges and appeal.

155 Text available at https://eur-lex.europa.eu/eli/dir/2008/52/oj/eng (accessed on 18.03.2025).

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passed specific rules on mediation in insolvency[156], and in the United States and many other countries worldwide mediation is frequently used, also in cross-border insolvencies[157].

5. Particular aspects of non-main proceedings

Many of the substantive provisions of the EIR concern non-main proceedings and will now be addressed together in context. Issues of jurisdiction and conflict of laws have already been discussed above and need not be repeated at this place. Recognition of foreign non-main proceedings will be dealt with in the general report on recognition, as will particular aspects of concurrent proceedings, i.e. mainly the relationship between main proceedings and secondary (non-main) proceedings.

a) Opening of non-main proceeding

The opening stage of an insolvency proceeding includes a number of conditions, some of which tend to be modified in the case of non-main proceedings.

aa) Availability

Under the EIR, non-main insolvency proceedings are available for all categories of insolvency proceedings covered by the EIR in general. However, international jurisdiction must exist under Art. 3 (2) EIR (establishment in a EU Member State, with COMI in the EU).

On the national level, non-main proceedings may sometimes not be available for certain groups of debtors, e.g. banks or insurances. Non-main proceedings may also not be available (or may have to be suspended or terminated), if a foreign main proceeding has been opened. This is not the case, however, under the EIR.

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156 See Art. 49 and 50 of the Slovenian Insolvency Act. Example: US, others.
157 See, e.g., Scott Atkins/Kai Luck, Mediation as a bankruptcy and insolvency game changer, https://ccla.smu.edu.sg/sgri/blog/2023/11/15/mediation-bankruptcy-and-in solvency-game-changer (accessed on 18.03.2025).

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bb) Right to apply ('standing') for non-main proceeding

The right to apply for (request the opening of) a non-main proceeding may be clarified or modified in comparison with a regular (main) proceeding. For example, a particular right to apply for a non-main proceeding may be granted to the insolvency practitioner of the main proceeding or other non-main proceedings concerning the same debtor[158]. Some creditors may be excluded from applying for a non-main proceeding. For example, only 'local' creditors or 'local secured or privileged' creditors may be entitled to apply for a non-main proceeding. There may also be special rules for a debtor applying for a non-main insolvency. For example, debtor's standing might be specifically granted (or denied) if a main proceeding has already been opened.

The EIR contains in this respect different rules for non-main proceedings which are commenced before a foreign main proceeding (in the following: 'isolated' non-main proceedings) and non-main proceedings, which are requested when a foreign main proceeding is already underway. In the first situation, Art. 3 (4) EIR tries to reduce the opening of non-main proceedings by limiting the right to apply to local creditors (having claims relating to the establishmen) and local public authorites. If, however, a main proceeding is not available in the respective case in the COMI state, general (national) rules of the right to request a proceeding continue to apply. The reason behind this is the policy to further the conduct of insolvency proceedings in the COMI state. If, on the other hand, an EU-based main proceeding already exists, the insolvency representative in the main proceeding has a right to request a secondary proceeding of his own, but all other persons with standing to apply for such a proceeding under national law may also do so (Art. 37 (1) EIR).

Taking a look at the autonomous laws in EU Member States, a significant difference exists between countries, which have adopted the MLCBI (Greece, Poland, Romania, Slovenia) and other countries, which have developed their own system, more in line with the EIR, but also with independent characteristics.

Austria does not provide for a particular subchapter on domestic non-main insolvency proceedings, but deals with such proceedings in distribut-

158 The insolvency practioner of another proceeding (not concerning the same debtor) may be entitled to apply for an insolvency proceeding as part of the recognition of such other proceeding.

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ed provisions (jurisdiction in sec. 63 (2) Austrian InsO, geographical scope in sec. 237 Austrian InsO as well as procedural and conflict of laws provisions of a general character). Austria does not provide for specific standing of a foreign insolvency representative to apply for a domestic non-main proceeding, but seems to recognize his standing if foreseen under the foreign lex fori concursus (sec. 241 (1) Austrian InsO). In contrast with the EIR, Austria does not provide for particular rules on the right of creditors to apply for an Austrian non-main insolvency proceeding.

Croatia provides for a particular subchapter on domestic non-main secondary insolvency proceedings (Arts. 418 – 423 Croatian Bankruptcy Act), which mainly contains provisions on cooperation between parallel proceedings. Further aspects of non-main proceedings, in particular 'isolated' non-main proceedings, are addressed under the heading of 'non-recognition' of a foreign proceeding (Art. 424 – 426 Croatian Bankruptcy Act) and at other places in the Act (e.g. jurisdiction in Art. 393 Croatian Bankruptcy Act). In the first case (existence of a foreign recognized proceeding), Croatia limits the standing to apply for a secondary proceeding in Croatia in principle to a small number of domestic public creditors and to the debtor's employees with a regular place of work in the Republic of Croatia (Art.418 (1) of the Act). Only in case of 'particular difficulties' other creditors may apply for the opening of a secondary proceeding. In case of isolated non-main proceedings (including the case when the foreign proceeding is not recognized) the standing of creditors is not limited (cf. Art. 426 of the Act). On the other hand, the insolvency representative of the recognized foreign (main) proceeding has standing to apply for a secondary proceeding in his own right (Art. 417 of the Act), which corresponds to the solution under the MLCBI. Interestingly, Art. 418 (3) of the Act gives the insolvency court the power 'not to open' the secondary proceeding, 'if it assesses that the opening of such proceedings would be economically inappropriate'. This appears quite similar to the power of abstention under U.S. Bankruptcy Law and the discretionary power of courts under the MLCBI.

The German Insolvency Code provides for a special subchapter on non-main proceedings (sec. 354 – 358 German InsO), but limits itself to a few basic provisions. In particular, it does not provide for a special right of a foreign insolvency representative to apply for a non-main proceeding in Germany, but the foreign representative may act for the debtor under rules of recognition of foreign insolvencies (sec. 343 German InsO). Creditors are granted the right to apply for a non-main proceding in Germany under regular national rules, if there exists a debtor's establishment in Germany,

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otherwise only when they can show a particular interest in the non-main establishment (sec. 354 (2) German InsO).

EU Member States which have adopted the MLCBI, have extensive detailed rules on (mainly secondary) non-main proceedings (cf. e.g sec. 405 – 412 Polish Bankruptcy Act). Taking the example of Polish law, only specifically defined 'local' creditors have standing to apply for a secondary proceeding (Art. 407 (1) of the Act), which appears to conflict with Art. 13 MLCBI, but is in line with Art.3 (4) b) EIR. On the other hand, the insolvency representative of a recognized foreign main proceeding has standing to apply for a secondary proceeding (sec. 402 Polish Bankruptcy Act, in line with Art. 11 MLCBI). Formerly, Polish law also provided for the possibility to open a secondary proceeding ex officio 'if required by the interests of a resident in the Republic of Poland of creditors from labor relations and creditors, the amount of compensation for causing the disease, inability to work, disability, or death, as well as maintenance creditors (older version of Art.407 (2) Polish Bankruptcy Act), but this rule was dropped in 2015.

cc) Grounds for opening non-main proceedings (e.g. insolvency, acts of bankruptcy etc.)

Specific attention is sometimes given to the grounds for opening a non-main proceeding. In legal systems which require for the opening of insolvency proceedings the proof of insolvency of the debtor, insolvency may for example be presumed if a main proceeding has already been opened. It may also be specifically stated, for example, whether the comparison of debts and assets or the finding of 'acts of bankruptcy' needs a specific approach in non-main proceedings (e.g. including only local assets and local creditors or referring only to acts in the forum state). Another approach can be to give the court a broad power to evaluate whether the opening of a non-main insolvency proceedings is in the best interest of the creditors (or some creditors) and the debtor.

Art.34 sentence 2 EIR states that 'Where the main insolvency proceedings required that the debtor be insolvent, the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened.' A similar provision is foreseen as a global rule by Art. 31 MLCBI. Neither the Austrian nor the German cross-border insolvency laws contain a similar provision, but it exists in several other

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EU Member States, mostly countries which have adopted the MLCBI like Poland and Slovenia[159], but also other countries, e.g. Spain[160]. In detail, these rules differ: Some laws provide, like the MLCBI, only for a presumption of insolvency (Poland and Slovenia), others do not require in such cases the insolvency test (Spain).

dd) Role of discretion of the court

A more general question regards the role of discretion of the insolvency court, here in the context of non-main proceedings[161]. Is the court given a broad discretion to open a non-main proceeding or does the court have other more limited discretionary or evaluative powers in this context?

This question can also arise at a later stage, after the opening of the proceeding.

The EIR does not contain particular provisions in this respect. In contrast, the MLCBI generally gives great weight to discretion of the court in cross-border cooperation, though it does not deal specifically with the role of discretion at commencing a non-main proceeding (cf. Art. 28 MLCBI).

The example of Croatia shows, that discretionary elements may be foreseen also in non-MLCBI countries (e.g. in Art. 418 (3) Croatian Bankruptcy Act). MLCBI-based laws give significantly more discretionary powers to the insolvency court.

b) Legal consequences of (opened) non-main proceeding

In principle, non-main proceedings can be said to have the same legal consequences as main proceedings, with the exception that they are usually given only territorial effect. However, there may be some modifications. In particular, the right of creditors to particpate[162] in non-main proceedings is sometimes regulated differently from main proceedings.

159 See sec. 408 Polish Insolvency Act, sec. 477 Slovenian Insolvency Act.
160 See sec. 433 Spanish Insolvency Act: insolvency test not required in such a case).
161 Cf. IMF, Orderly & Effective Insolvency Procedures – Key Issues (1999), https://www.imf.org/external/pubs/ft/orderly/ (at General Features, Common Issues, Exercise of Discretion).
162 This has to be distinguished from the right ('standing') of a creditor or other applicants to apply for an insolvency proceeding, see supra at a)bb).

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Under the EIR, both in main and non-main proceedings in principle all creditors are entitled to participate in the proceeding[163], although their legal status in the proceedings may be different (e.g. secured creditors, privileged creditors, ordinary creditors) and some creditors may be completely excluded ('new creditors' of the debtor since the opening of the proceeding[164], foreign tax creditors etc.). Under autonomous laws, the circle of participation-entitled creditors in non-main proceedings may sometimes be limited or there may be various forms of open or hidden discrimination of foreign creditors[165]. However, the worldwide trend as expressed in the MLCBI and also in the EIR runs agains such discriminations and in the autonomous laws of the EU member countries, privileges for local creditors and formal discrimination of foreign creditors are rather rare exceptions[166].

6. Interim summary

The overview has shown that the geographical reach of main proceedings in all EU Member States under the EIR is universal, with slight reservations under autonomous law. Non-main proceedings are usually given only territorial reach, following the EIR. However, some countries take a different approach, giving non-main proceedings at least in principle or under certain conditions also universal reach. In such systems conflicts with foreign proceedings are avoided through other tools, e.g. limitation of the universal reach of the proceeding by discretion of the court.

The provisions of the EIR on geographic limitations of some substantive provisions (Art.8 and 10 EIR) are not repeated by all but one EU Member State. However, some countries have adopted for these situation special conflict rules. A different approach, which is also to be found in some EU countries, is to pass unilateral substantive rules for the effect of foreign recognized proceedings on assets, acts or proceedings in the recognizing country. Generally speaking, it can be observed that the autonomous insol-

163 Cf. (as to the position of foreign creditors) Kurt H. Nadelmann, Foreign and domestic creditors in bankruptcy proceedings. Remnants of discrimination? https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9314&context=penn_law_review (accessed 18.03.2025).

164 See CJEU Air Berlin case (ECLI:EU:C:2024:331).

165 See, e.g. Art.50 (1) of the Swiss Civil Execution and Bankruptcy Act ('creditors of the establishment'; such creditors may be domestic or foreign).

166 On example is, arguably, Art. 285 (2) and (4) Romanian Insolvency Act (foreign creditors 'not ranked lower than ordinary creditors').

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vency laws in the EU Member States have taken the EIR as an instrument for reflection whether in relations with non-EU countries the EIR can be used as a model or whether different rules seem more adquate, including the MLCBI.

C. Suggestions for future action

I would now like to present some suggestions for future action on the side of the EU as to domestic insolvency proceedings linked with non-EU countries.

I. General structure

It seems to me that the basic structure of the European Insolvency Regulation does not need fundamental changes in view of contacts with non-EU countries.

The approach of the EIR to have common provisions, which apply both to domestic proceedings and to recognition, assembled in Chapter I, may be unusual on an international scale, but it is not unreasonable and has become familiar to legal practitioners and scholars. Also, the distinction between main and non-main proceedings (though with a somewhat peculiar terminology) is reasonable and need not be changed with a view to relations with non-EU countries.

The main general question, which permeates all aspects of EIR and affects, of course, also the domestic proceedings perspective, is whether the Regulation (or some other instrument) should adress also relations with non EU countries. My answer is decidedly yes, and I will now discuss this as to subtopics where action seems to me particularly desirable. I will first address jurisdiction, then conflict of laws and, thereafter, substantive issues.

I will try to focus on particular rules or considerations regarding EU-third country relations, but as some of these considerations also have an impact on inner-EU cases, the inner-EU dimension will always have to be taken into account.

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II. Scope of application

A general aspect, which relates to all constellations of cross-border insolvency (domestic proceedings, effects of foreign proceedings, parallel proceeding), concerns the subject-matter scope of any future rules on relations with non-EU countries. The approach of the EIR to put-together the covered proceedings in an exhaustive and binding separate annex, is not feasible in relations with an basically unlimited number of foreign countries. It could be useful, however, to create a non-exhaustive annex, which might contain examples of foreign proceedings that should be clearly covered by the future rules.

More generally speaking, the general definition of insolvency proceedings should also cover pre-insolvency or restructuring proceedings of the kind, which is already included in Annex A of the EIR today. The definition should also be kept flexible enough to include other proceedings such as company restructurings if this serves cross-border restructuring with an insolvency dimension. This could be conditioned on an agreement between stakeholders and subject to court approval.

III. Jurisdiction

1. Main proceedings: COMI

The concept of COMI has come to be broadly accepted and used today globally, not the least by the MLCBI, and it is used in legal practice in an overall convincing manner. There is to my view no need to give up COMI as head of direct jurisdiction for EU-based proceedings. Refinements of the definition of COMI may be imaginable, but they are not urgent.

Indirect jurisdiction in the recognition context can be defined differently, if recognition of non-EU insolvencies were to include an indirect jurisdiction test.

2. Non-main proceedings

The basic decision to admit non-main insolvency proceedings (in the sense of proceedings not grounded on COMI or COMI-equivalent jurisdictional rules) in the inner-EU context is also convincing – and even more justified – in relations with non-EU countries.

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However, in relations with non-EU countries – when the debtor's COMI is situated in a non-EU country – jurisdiction for non-main insolvency proceedings in the EU should be enlarged in order to create a possibility for orderly insolvency-based liquidation and reorganisation and even defined cases of pre-insolvent reorganisation.

Broadly acceptable grounds for non-main jurisdiction would seem to be the existence of an establishment in the EU (like under the EIR) and/or location of assets. In addition, jurisdiction on a discretionary basis (with significant contacts with the EU to justify an insolvency proceeding) might be added. This would contribute to making the EU an attractive and internationally accepted forum for corporate restructurings.

IV. Conflict of laws

1. The two basic structural questions on conflict of laws in this context are, firstly, whether there should uniform or separate rules on conflict of laws for domestic insolvency proceedings and for recognition of foreign proceedings (as is the case under the EIR today) and, secondly, whether there should be uniform or separate conflict of laws rules for inner-EU cases and cases linked with third countries.
   a) The conflict of laws rules of the EIR apply presently both to domestic proceedings (i.e. the perspective of the country of the domestic proceeding) and to foreign proceedings. Whether this parallelity should be given up or at least modified with regard to foreign non-EU insolvencies, will be addressed in the report on recognition in this book.
   b) At present, the EIR contains some universal conflict of laws rules and some conflicts rules, which are limited only to the law of EU Member States (most of the special conflicts rules in Art.8 – 18 EIR). In another subject area, international company law, different conflict of laws rules apply to companies established in the EU and non-EU companies. This can create frictions, but they may be justified when there are different policy considerations in inner-EU or third country-related constellations

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My view is that we should keep the present conflict of laws rules of the EIR[167], in so far as they are either generally convincing or address particular aspects of inner-EU relations (mutual trust etc.).
On the other hand, with regard to relations with non-EU countries, the EU should follow common global approaches as to conflict of law, aligning itself to the present UNCITRAL work project on applicable law in insolvency. This means that the existing special conflicts rules of the EIR, which are limited to the law of other EU Member States, should not be extended to the law of non-EU countries. Only those special conflicts norms, which are accepted also in the UNCITRAL project, should be adopted by the EU in relations with third countries. This mainly relates to effects of the insolvency proceeding on employment contracts and regulated markets.
Whether there should be particular conflicts rules or substantive rules as to the effects of foreign non-EU insolvencies, will be discussed in the report on recognition.

2. The basic conflict of laws rule of lex fori concursus is justified and needs no changes.
3. Art.7 – 18 EIR contain both conflict of laws provisions and substantive provisions. The autonomous cross-border insolvency laws of the EU Member States diverge as to whether they apply these rules also to relations with non-EU countries. Practice shows that some EU Member States have transformed substantive provisions established under Art. 8 – 18 EIR into conflict of laws provisions and vice versa. This illustrates that the use of conflict of laws or substantive law is a matter of legislative evaluation and decision.
4. The special conflict of laws provisions, which are presently foreseen in Art.8 – 18 EIR, should remain – if they continue to appear adequate – to be limited to the law of other EU Member States[168]. In relations with non-EU countries, conflict of laws in matters covered by Art.8 – 18 EIR should be solved according to the (future) rules developed by UNCITRAL in its project on applicable law in insolvency.
5. In view of the large diversity of case situations in insolvency matters, the EU should consider introducing an escape clause on conflict of laws in

167 I do not take a position here on whether these rules should be modified in the future at possible broader evaluation of the EIR in general. The focus in this book is only on EU-third country relations.

168 The only 'universal' conflicts rule in this context is Art.9 EIR on set-off. This general justification of this rule is not discussed here.

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insolvency, which could be inspired by, e.g., Art.4 (3) Rome I Regulation or Art.4 (3) Rome II Regulation, but would have to take into account the particular context and purposes of insolvency proceedings including the particularities of concurrent proceedings.

V. Substantive law

1. The EIR contains numerous provisions of a substantive (procedural or material) character. Some of such provisions may be tailored to inner-EU constellations, where EU law creates a common legal and factual ground and there is a higher degree of mutual trust than (typically) in relations with non-EU countries. Other provisions may not require a relation of particular trust, but can be useful and adequate also in relations with non-EU countries. If such provisions are at present limited to inner-EU constellations, they should opened – as the case may be with some modification – also to relations with non-EU countries. This is done already now by numerous EU Member States under their autonomous cross-border insolvency law.
   Adaptations as to substantive law must be scrutinized for each of the classical constellation of cross-border insolvency law: domestiv proceedings, recognition of foreign proceedings, parallel proceedings.
2. In so far as procedural rules in domestic proceedings are concerned and as they are limited to participants domiciled or resident in other EU Member States or to insolvency or other proceedings in other EU Member States, they should be – if necessary, with adaptations – extended also to participants or proceedings in non-EU countries. In this respect the EU should as far as possible also coordinate its rules with the UNCITRAL MLCBI.
3. More specifically, the notion of foreign creditors in Art.2 (12) EIR should be extended to include creditors domiciled in non-EU countries. The provisions of the EIR on rights and duties of foreign creditors (e.g. Art.53 – 55 EIR) should be reconsidered with a view to whether creditors domciled in non-EU countries should be given some special treatment equalizing their specific difficulties in participating in EU-based insolvency proceedings.
4. In so far as material rules are concerned, e.g. the particular territorial limitations foreseen in Art. 8 and 10 EIR or the specific reference to EU

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patents and Community trademarks in Art. 15 EIR, they should remain limited to EU Member States and the respective EU-based IP rights.

It may also be considered to develop particular substantive rules for such matters in the context of recognition of foreign non-EU insolvencies. Examples for this exist in the automous cross-border insolvency laws of some EU Member States.

5. Non-main proceedings should in cases, in which the debtor's COMI is situated outside the EU, include all assets of the debtor within the EU[169]. In addition, a legal base should be created (e.g. granting judicial discretion) to include assets located in non-EU countries into the reach of such proceedings. This would, in particular, make the EU attractive to become a forum for cross-border restructurings, even if the technical COMI of the the debtor is not in the EU. Conflicts with other insolvency proceedings can be avoided by special ruies, following either the UNCITRAL MLCBI or the examples given by the autonomous cross-border insolvency law of some EU Member States.
6. Some substantive rules of the EIR, which apply in all constellations of cross-border insolvency law (domestic proceedings, recognition of foreign proceeding, parallel proceedings) appear to be particularly topical and relevant and should be addressed in the EIR or other legal instrument, not only with a view to inner-EU cases, but also with a view to relations with non-EU countries:
   a) The use of information technologies in cross-border insolvencies should be addressed at least in a general manner, but some specific rules would be helpful, e.g. on establishing procedures to open publication tools for relations with third countries on the basis of special agreements.
   b) The use of mediation in cross-border insolvencies should be addressed and encouraged at least in a general manner.

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169 A similar rule (e.g. extension possibilty under certain conditions) might also be helpful in inner-EU cases, but this is beyond the scope of this book.

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