

# The Toolbox for Cross-Border Restructurings Post-Brexit – Why, What & Where?\*

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## I. THE QUESTION OF WHY

A modern toolbox for restructurings offers both a legal framework, which does not wait until insolvency occurs, and a legal outcome for a debtor doing business internationally that will be recognised throughout Europe. The legal framework itself should allow the debtor to remain in control of its assets and benefit from a protective stay if creditors who have enforcement rights try to hamper the negotiations. Regarding the development of restructuring plans, the entire process should be out-of-court or contain only a minimum of court involvement. Finally, the outcome needs to bind even the dissenting parties – dissenting creditors and shareholders, or even better all affected parties. From the affected parties' perspective, it goes without saying, that the whole process needs to be fair and reasonable.

It is not very surprising that practitioners in the field of restructuring in Europe have happily worked with English Solvent Schemes of Arrangement.<sup>1</sup> Schemes of Arrangement are regulated by Part 26 of the Companies Act 2006 (CA 2006). It is, in essence, a compromise or arrangement between a company and its creditors and/or members (section 895(1) CA 2006). A definition of members is provided in section 112 CA 2006. The contents of such a compromise or arrangement are highly flexible. In theory, anything can be agreed in a Scheme. The Scheme procedure consists of three stages. Stage one requires an application to the court for an order to call a meeting (section 896(1) CA 2006). In stage two, the meeting takes place. A 75% majority of the creditors or members in a class present and voting must be achieved in order for stage three to be successful (section 899(1) CA 2006). It is important to emphasise that even though there is a cram-down mechanism, no possibilities regarding a cross-class cram-down exist. Stage three then entails the sanctioning by

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<sup>1</sup> Urs Peter Gruber, 'Drei Schritte zu einer deutsch-französischen Annäherung im Bereich Insolvenz und Restrukturierung' [2019] EuZW 181, 183.

the court of the Scheme (section 899(1) CA 2006). This is not a done deal per se, because the courts have discretion to either sanction the Scheme or not.<sup>2</sup>

For as long as the UK has been a Member State of the EU and Schemes of Arrangement have existed there, the second feature of a modern toolbox for restructuring – recognition – has occasionally been disputed, but is now mainly accepted. The court's 'sanctioning decision' could be interpreted as a civil and commercial matter according to the Brussels I Regulation (version 2012)<sup>3</sup> and understood as a judgment given in a Member State, which shall be recognised in the other Member States without any special procedure being required.<sup>4</sup>

Schemes of Arrangement will remain a tool for future restructurings in the UK. However, as a tool for European restructurings post-Brexit, the Schemes will lose efficiency. This is firstly true for genuine UK companies with creditors all over Europe and, secondly, for debtors from EU Members States who hesitate to use the Schemes without a solid level of certainty that the outcome shall be recognised in the EU.<sup>5</sup>

Hence, the mere question of recognition will lead to an adjustment of the toolbox for restructurings. It may be that mutual recognition throughout Europe has so far been

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<sup>2</sup> For short introductions to Schemes of Arrangement, see David Milman, 'Schemes of arrangement and other restructuring regimes under UK company law in context' (2011) 301 Company Law Newsletter 1-4; Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (CUP 2014) 1-7.

<sup>3</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

<sup>4</sup> Not finally decided by the German Supreme Court 15 February 2012, IV ZR 194/09, [2012] NJW 2113, para 26. Positive, however, LG Potsdam 22 October 2010, 2 O 501/07 (not published); Vivien Tyrell, Philip Heitlinger and Nick Stern, 'Solvent Schemes auch in Deutschland vollstreckbar' [2007] VW 1695, 1697-1698; Peter Mankowski, 'OLG Celle, 8.9.2009 - 8 U 46/09: Keine Anerkennung eines englischen Vergleichsplanverfahrens' [2009] EWiR 711; Peter Mankowski, 'Anerkennung englischer Solvent Schemes of Arrangement in Deutschland' (2011) 65 WM 1201, 1210; Henning Schaloske, 'Abwicklung von Versicherungsbeständen durch Solvent Schemes of Arrangement' [2009] VersR 23, 27-28; Radmilia Petrovic, 'Die rechtliche Anerkennung von Solvent Schemes of Arrangement in Deutschland – Eine Chance für die Restrukturierungspraxis' [2010] ZInsO 265, 267-269; Horst Eidenmüller and Tilmann Frobenius, 'Die internationale Reichweite eines englischen Scheme of Arrangement' (2011) 65 WM 1210, 1219; O Sieg and S Blum, 'Solvent Schemes – Enforceability in Germany' in *Managing Run-off in Europe: Solvent Schemes and Other Aspects* (Global Reinsurance Group 2007) 47, 49 et seq; Gero Fischer, 'Rechtliche Anerkennung eines Scheme of Arrangement, das eine Gesellschaft mit Sitz in Deutschland betrifft' in Marie Luise Graf-Schlicker, Hanns Prütting and Wilhelm Uhlenbruck (eds), *Festschrift für Heinz Vallender* (RWS 2015) 137, 141, 149. Against it Winfried Schnepf and Dorothee Janzen, 'Rückversicherung: Wirken Solvent Schemes auf deutsche Vertragsbestände, Gelten Britische Solvent Schemes auch in Deutschland?' [2007] VW 1057, 1058-1059; Phillip K Schulz, 'Die Anerkennungsfähigkeit eines Solvent Schemes vor deutschen Gerichten' [2011] ZfV 202, 204. Cf Paul Abel and Christoph Herbst, 'Anerkennung präventiver Restrukturierungsrahmen innerhalb Europas' in Christoph Morgen (ed), *Präventive Restrukturierung: Kommentar zur europäischen Richtlinie über präventive Restrukturierungsrahmen* (RWS 2019) paras 30 ("Die in Deutschland h.M. in der Literatur und Rechtsprechung nehmen die Anwendbarkeit der EuGVVO auf das [Scheme of Arrangement] an") and 39.

<sup>5</sup> Wolfgang Sturm and Michael Schulz, 'Brexit – Eine Chance für den Gerichtsstandort Deutschland?' [2019] ZRP 71, 72 point to the German 'Abkommen über die gegenseitige Anerkennung und Vollstreckung von gerichtlichen Entscheidungen in Zivil- und Handelssachen (BGBl. 1961 II 301)' as a potential legal basis.

seen as a more technical issue for the procedural law experts and as a kind of a no-brainer since we are talking about Member States of the EU and therefore trust each other.<sup>6</sup> Post-Brexit, however, the question of recognition will be the decisive prerequisite. A commonly recognised tool is more powerful than a tool with merely national impact, which is only a tiny little hammer where a sledgehammer might be necessary.

Without EU membership, EU regulations, such as the Brussels I Regulation and the European Insolvency Regulation (EIR) no longer apply.<sup>7</sup> In this respect, it is not only the wording of the regulations that is totally unambiguous. Article 288 of the Treaty on the Functioning of the European Union<sup>8</sup> sets forth the regulations' effects only for the Member States. This is for the UK, post-Brexit, obviously no longer the case. Application *mutatis mutandis* of regulations such as the Brussels I Regulation and the EIR may be possible on the legal basis of international treaties<sup>9</sup> between the EU and UK.<sup>10</sup> This is, however, at least in the short run a mere theoretical option and depends on further developments in 10 Downing Street. The more than 31 % vote for the new Brexit party led by Nigel Farage in the election for the European Parliament in May will not have made things any easier.

However, it is not utterly impossible for UK courts' to regain leadership in cross-border cases. Secondly, and more importantly, we have new tools at hand. The new Directive on preventive restructuring frameworks (hereafter: Directive or Directive on preventive restructuring frameworks)<sup>11</sup> will undoubtedly enlarge our toolbox. So, what exactly are these new tools?

## II. THE QUESTION OF WHAT

On March 28, 2019, the European Parliament adopted the aforementioned Directive at first reading. 327 yes-votes versus 34 'naysayers' clearly demonstrate the political

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<sup>6</sup> For mutual trust as the reason for recognition see Peter Mankowski, 'Insolvenznahe Verfahren im Grenzbereich zwischen EuInsVO und EuGVVO - Zur Entscheidung des EuGH in Sachen German Graphics' [2010] NZI 508, 509; Dominik Skauradszun in Bruno M Kübler, Hanns Prütting and Reinhard Bork (eds), *InsO* (80<sup>th</sup> edn, RWS 2019) Art 32 EuInsVO para 1.

<sup>7</sup> Gruber (n 1) 181; Sturm and Schulz (n 5) 71.

<sup>8</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/1.

<sup>9</sup> It is possible that from the moment Brussels I will no longer apply to the UK, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters will apply once more between the UK and the EU Member States. See Andrew Dickinson, 'Back to the future: the UK's EU exit and the conflict of laws' (2016) 12 *Journal of Private International Law* 195, 204-205.

<sup>10</sup> An implementation of Brussels I and the EIR into UK law will allow the recognition of EU judgments in the UK. However, the UK cannot decide on the recognition of UK judgments in the EU on its own. Cf Sturm and Schulz (n 5) 71. For the impact of Brexit on Brussels I see David Paulus, Evgenia Peiffer and Max Peiffer in David Paulus, Evgenia Peiffer and Max Peiffer, *Europäische Gerichtsstands- und Vollstreckungsverordnung (Brüssel Ia)* (C.H. Beck 2017) Einführung paras 57-59.

<sup>11</sup> Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18.

will to start restructuring earlier than normal and to do this in the most modern manner possible. On June 6, the Council also voted in favour of the new Directive. The title of the Directive says it all. The Directive on preventive restructuring frameworks does not name the frameworks ‘insolvency proceedings’ in its title. The drafters of the Directive wisely named the latest toolbox ‘frameworks’, ‘preventive’ and for ‘restructuring’. Clever and smart, from the market players’ point of view since *preventive restructuring frameworks* do not intimidate the parties as much as *insolvency proceedings* do.

The frameworks offer everything stated above: A very early starting point, the debtor-in-possession-approach, a flexible stay, the restructuring plan’s adoption out-of-court and the cross-class cram-down just in case the debtor needs it. Understandably, these main features have also gathered criticism. A likelihood of insolvency can, under some national laws, already be enough to start insolvency proceedings. Should insolvency proceedings in such a case not be preferred to preventive restructuring proceedings? Is it defensible that a debtor does not have to file for insolvency proceedings while a stay is in effect, even if it becomes illiquid? Is it not too easy to cram down dissenting affected parties by putting them strategically in specific groups? This specifically applies with regard to shareholders. As the debtor is not yet insolvent, their shares still have some value. Finally, is it acceptable that creditors can be forced to become shareholders by way of a debt-to-equity swap?<sup>12</sup> Notwithstanding the criticism, the toolbox given by the new Directive is a promising one. However, all that glitters is not gold: pre- or post-Brexit, it is up to scholars, practitioners and judges in Europe, as well as national legislators to interpret the Directive in the most convincing way, to develop implementation acts<sup>13</sup> which balance the stakeholders’ interests fairly, and to act in concert<sup>14</sup> with all Member States to create common level playing fields.

Therefore, challenges regarding two tools that have not yet been sufficiently reviewed in the legal literature will be discussed next. The first is about the stay, the second about the equity holders’ rights.

### 1. Stay

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<sup>12</sup> For these lines of criticism, see Hans-Friedrich Müller, ‘Sanierung nach der geplanten EU-Restrukturierungs-Richtlinie – Eine Analyse aus gesellschaftsrechtlicher Perspektive –’ [2018] ZGR 56, 62, 66, 68, 71-73, 75.

<sup>13</sup> In July 2019, the Dutch government already sent to Parliament a proposal for a framework which in their view is in line with the Directive. The proposed act is called the Act on the Confirmation of Private Plans (WHOA, *Wet homologatie onderhands akkoord*), which will change the Insolvency Act (Fw, *Failissementswet*). See Kamerstukken II 2018/19, 35 249, nr. 2. RESOR, an Amsterdam based law firm, has published an English translation of the bill and its accompanying explanatory memorandum, which can be found at <<https://eyesoninsolvency.com/documenten/>> accessed 14 July 2019. Quotes in English are taken from the RESOR documents.

<sup>14</sup> In this direction for an alignment of the French and German implementation acts Gruber (n 1).

The purpose and mechanism of a stay is clear, at least from the starting point. This tool can support the negotiations for a restructuring plan in a preventive restructuring framework.

a) Major Flexibility Clauses

Both Articles on the stay, however, contain numerous and complex flexibility clauses. For instance, it would be wise to use the first flexibility clause in such a way that the debtor is required to explain why a stay is necessary and to allow the court to review the necessity of the requested stay (Article 6(1.2) Directive).<sup>15</sup> A general stay without a review of the individual case and without an examination of the necessity can hardly be justified at an early stage where insolvency has not yet occurred. It also would be wise to end a granted stay if illiquidity occurs (Article 7(3) Directive).<sup>16</sup> This is reasoned by the widely accepted principle that the debtor's estate needs to be protected and, therefore, payments shall be prohibited after illiquidity occurs.<sup>17</sup> It would not be logical if a debtor, on the one hand, is protected by a stay and, on the other hand, can dispose of the estate although illiquidity occurred.<sup>18</sup> Moreover, if the stay does not end, creditors will not be able to request the opening of insolvency proceedings (Article 7(2) Directive).<sup>19</sup>

b) Impacts on Existing Contracts

The stay not only temporarily suspends a creditor's right to enforce a claim (Article 2(1)(4) Directive). It also blocks all termination rights and rights to withhold performance by virtue of a contractual clause (Article 7(5) Directive).<sup>20</sup> Imagine an important contract like an energy-supply contract or a commercial-rent contract. Both contracting parties had agreed in the negotiation phase that a right of termination or a right of retention exists if one of the contracting parties faces financial troubles and, therefore, applies for restructuring proceedings. This right of termination is blocked for the term due to the stay (Article 7(5)(d) Directive). One may call it a *termination blocker*. It goes without saying that the termination of an important contract may cause the breakdown of the business. Hence, a temporary suspension of contractual rights can prevent the breakdown and, therefore, support the restructuring. However, the stay has not only effects on enforcement proceedings, but also on

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<sup>15</sup> Dominik Skauradszun, 'Ein Umsetzungskonzept für den präventiven Restrukturierungsrahmen' [2019] KTS 161, 177. Cf proposed Article 376(4)(a) Fw, which stipulates as one of the conditions that there is prima facie evidence proving the necessity of the stay to enable the business to continue during the preparation and negotiation of the plan.

<sup>16</sup> *ibid* 178. As far as can be seen, this is not provided expressis verbis in the WHOA. Nevertheless, proposed Article 376(4)(b) Fw stipulates as a condition for the stay that it must be in the interest of the general body of creditors and that the interests of a creditor who has filed a petition for the opening of insolvency proceedings must not be substantially prejudiced. If this condition is no longer met, proposed Article 376(10) Fw orders the court to lift the stay. This could be the case if illiquidity occurs. Moreover, proposed Article 376(9) Fw allows the court, on request, to make specific provisions regarding the stay. It is not unthinkable that such a provision is that the stay will be lifted in case of illiquidity.

<sup>17</sup> *ibid* 179.

<sup>18</sup> Cf for the risk of frauds against new contractual partners *ibid*.

<sup>19</sup> Proposed Article 376(2)(c) Fw provides that during the stay, petitions by creditors for the opening of insolvency proceedings will be suspended.

<sup>20</sup> Proposed Article 373(3) Fw.

several important contracts.<sup>21</sup> The impact of this tool is much wider than one can see at a first glance.

The point we want to make is a more general one. The stay and especially the termination blocker could turn out to be a mere paper tiger.<sup>22</sup> At this point, Brexit could play a significant role: contractual partners with a strong market power and in-depth knowledge about non-performing contracts could force the debtor to enter into contracts with choice-of-law clauses and prorogation clauses both in favour of non-EU law and non-EU courts. If a contract is governed by the law of a non-EU state and if the parties agreed on a non-EU court in the event of a dispute, it is highly likely that this contractual party can enforce its rights before a non-EU court. Since the contract is governed by non-EU law, the non-EU court does not have to respect the granted stay and, therefore, will not have to allow the termination blocker.

Would it not be an easy option to govern high-volume contracts by English law and agree that a court in London would have jurisdiction to settle any potential disputes? Post-Brexit, London courts will no longer be bound by a stay granted by an EU-court.

Some people might qualify this problem as a mere academic scenario. If so, it should be kept in mind that the same problem already arose for credit institutes under the scope of the Single Resolution Mechanism<sup>23</sup>. From time to time, credit institutes also face restructurings. The termination blocker of the stay was a copy from the Directive establishing a framework for the recovery and resolution of credit institutions and investment firms.<sup>24</sup> Last year, both the European and national resolution authorities realised that choice-of-law clauses and prorogations in favour of non-EU law and non-EU courts give rise to many problems since non-EU courts most likely will

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<sup>21</sup> Godehard Kayser, 'Eingriffe des Richtlinienvorschlags der Europäischen Union in das deutsche Vertrags-, Insolvenz- und Gesellschaftsrecht' [2017] ZIP 1393, 1397 ("Massive impact"); critical statement by the German Association of Insolvency Administrators (VID), 'Stellungnahme des Verbandes Insolvenzverwalter Deutschlands (VID) zur allgemeinen Ausrichtung des Rates der Europäischen Union zum Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über präventive Restrukturierungsrahmen, die zweite Chance und Maßnahmen zur Steigerung der Effizienz von Restrukturierungs-, Insolvenz- und Entschuldungsverfahren und zur Änderung der Richtlinie 2012/30/EU' (2 November 2018) 7, <<https://www.vid.de/wp-content/uploads/2018/11/vid-stellungnahme-zur-allg-ausrichtung-des-rates-zum-rle-eu-com-2016-723-final.pdf>> accessed 19 June 2019.

<sup>22</sup> Skauradszun (n 15) 175.

<sup>23</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 [2014] OJ L225/1.

<sup>24</sup> Cf, inter alia, Article 71 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council [2014] OJ L173/190.

not respect a termination blocker based on European law.<sup>25</sup> Hence, the message is as follows.

The stay can be used as a key tool of restructuring. On the one hand, we need to restrict the stay wherever possible since this affects contractual rights at a very early stage.<sup>26</sup> On the other hand, where a stay is needed and granted, we have to think about efficiency. Therefore, choice-of-law clauses and prorogations post-Brexit give rise to new challenges.

## 2. Equity Holders

Undoubtedly, a restructuring pushed and at least partially financed by the equity holders is the best and most desired starting point. Creditors will appreciate the new financing by the equity holders and get the feeling of a joint restructuring project in which all affected parties are in the same boat.

Notwithstanding, what about restructuring *against the will* of the equity holders? First, it is safe to say that restructuring measures based on the Directive cover all kinds of corporate measures such as capital decreases and increases, and furthermore a debt-to-equity-swap (Article 2(1)(1) and Recital 96).<sup>27</sup>

A restructuring based on the preventive restructuring frameworks can be separated into three<sup>28</sup> phases: first, the preparation of the concept, initial negotiations with affected parties and the drafting of the restructuring plan. Second, the adoption and confirmation of the plan and third the plan's implementation. A conflict between the debtor's directors and the equity holders is a realistic scenario in all phases. The easiest way to illustrate this showdown is to give an example:

Imagine a limited liability company. The board of directors has prepared a restructuring plan that meets the requirements of the Directive. The plan provides for a capital decrease and a debt-to-equity-swap in favour of the main supplier. Concerned about the outcome of the adoption, the shareholders' meeting instructs the board of directors *not* to present the draft to the affected parties and therefore *not* to move on with the adoption of the restructuring plan.

This example can be easily modified:

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<sup>25</sup> Cf the consultation by the German Financial Supervisory Authority (BaFin) regarding section 60a of the German Sanierungs- und Abwicklungsgesetz ('Vertragliche Anerkennung der vorübergehenden Aussetzung von Beendigungsrechten'), BaFin Konsultation 11/2018, 1, <[https://www.bafin.de/Shared-Docs/Veroeffentlichungen/DE/Konsultation/2018/kon\\_1118\\_a\\_vertragliche\\_anerkennung\\_aussetzung\\_beendigungsrechte.html](https://www.bafin.de/Shared-Docs/Veroeffentlichungen/DE/Konsultation/2018/kon_1118_a_vertragliche_anerkennung_aussetzung_beendigungsrechte.html)>, accessed 29 June 2019. See also Skauradszun (n 14) 176.

<sup>26</sup> Similarly critical Frank Grell and Ulrich Klockenbrink, 'Auswirkungen der Richtlinie über präventive Restrukturierungsrahmen auf Fremdkapitalgeber: Ausgewählte Themen von Cram Down bis Lender Liability' [2019] Der Betrieb 1489, 1490.

<sup>27</sup> Christoph H Seibt and Antonia von Treuenfeld, 'Gesellschafts- und kapitalmarktrechtliche Aspekte der EU-Restrukturierungsrichtlinie' [2019] Der Betrieb 1190, 1196; Grell and Klockenbrink (n 26) 1491; Dominik Skauradszun, 'Anteilsinhaberrechte im präventiven Restrukturierungsrahmen' [2019] NZG 761, 762.

<sup>28</sup> Seibt and von Treuenfeld (n 27) 1191 count the moment of the application according to Article 4(7) as a separate phase, which hardly convinces.

The restructuring plan has nevertheless been accepted by the affected parties and confirmed by the court. Acting on the assumption that registration in the commercial register is required for the effectiveness of a capital decrease, however, the shareholders' meeting instructs the board of directors *not to register* the capital measures with the commercial register. The only goal of the shareholders is to prevent the plan's implementation.

Of course, experts on the new Directive will immediately point to Article 12, which deals with the equity holders' rights. However, Article 12, as the only provision of the Directive that explicitly considers equity holder rights, is a very unclear provision and difficult to understand.

Article 12(1) covers the adoption and confirmation of restructuring plans, therefore phase no 2, and Article 12(2) the implementation, thus phase no 3. Unfortunately, Article 12(1) starts with an exception without stating the basic principles. It sets forth:

"Where Member States exclude equity holders from the application of Articles 9 to 11, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the adoption and confirmation of a restructuring plan."

Article 12(2) stipulates exactly the same for the implementation phase and states:

"Member States shall also ensure that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan."

The first example given deals with phase no 2, the adoption of the plan. The variation of the example is about the implementation phase. Having said that, Article 12 does not clearly stipulate how to deal with equity holder rights in the normal case. Therefore, Article 12 needs to be interpreted.

#### a) Equity Holder Rights during the Plan's Adoption and Confirmation

If the European legislator sets forth in Article 12 that Member States can *exclude* equity holders from the application of the Articles about the adoption (Article 9), the confirmation (Article 10), and the cross-class cram-down (Article 11), then the *wording* states implicitly that Member States should normally apply those Articles.<sup>29</sup> This is understandable, as the European legislator views Articles 9 to 11 as a means to ensure that equity holders do not unreasonably prevent phase no 2 from being successful. Only in the event of an exclusion is a Member State obligated to ensure the protection of the restructuring plans "by other means". In other words, in the normal case equity holder rights are concentrated in Articles 9 to 11.<sup>30</sup>

This result is in line with the method of *systematic* interpretation, as Article 12 belongs to Chapter 3. This chapter regulates everything relating to restructuring plans.

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<sup>29</sup> Skaudszun (n 27) 762.

<sup>30</sup> *ibid* 763.



It, therefore, seems that Chapter 3 is to be understood systematically as a closed and final system.

The *historical* interpretation is even clearer since in the original<sup>31</sup> proposal Article 12 clearly described the normal path for the equity holders: the participation in the adoption, the vote in the adoption and the potential cross-class cram-down. It appears to be clear that there was never any doubt that equity holder rights were restricted to voting.<sup>32</sup>

For those who are still hesitant despite the wording, the systematic, and the historical interpretation, it can be pointed out that the European legislator clearly described corporate law as a counterpart to restructuring law in Recital 96.<sup>33</sup> Commission, Parliament, and Council imagined that the danger caused by equity holder rights could be best handled with a closed and final system. To really bring the point home: this system only contains the adoption (Article 9), the plan's confirmation (Article 10), and the potential cross-class cram-down (Article 11).<sup>34</sup>

These things considered, the solution to the example is quite clear: instructions by the shareholders' meeting for the purpose of a *non-adoption*, a *non-confirmation* or a *non-implementation* may be lawful *outside* the preventive restructuring frameworks. However, these corporate measures are ineffective in the adoption and implementation phase of the restructuring plan in case equity holders were not excluded from Articles 9 to 11.<sup>35</sup>

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<sup>31</sup> The Commission's proposal stated in paragraph 1: "Member States shall ensure that, where there is a likelihood of insolvency, shareholders and other equity holders with interests in a debtor may not unreasonably prevent the adoption or implementation of a restructuring plan which would restore the viability of the business." Paragraph 2 stated: "To achieve the objective in paragraph 1, Member States may provide that equity holders are to form one or more distinct classes by themselves and be given a right to vote on the adoption of restructuring plans. In this case, the adoption and confirmation of restructuring plans shall be subject to the cross-class cram-down mechanism provided for in Article 11." See Commission, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' COM(2016) 723 final. The Parliament even tightened the wording in its version dated 21 August 2018 since it not only mentioned the *prevention* but also the *creation of obstacles*. See European Parliament Committee on Legal Affairs, 'Report on the proposal for a directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU' A8-0269/2018. First time in the Council's draft dated 1 October 2018, Article 12 was formulated with the mentioned exception. See Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU – General approach' 12536/18.

<sup>32</sup> Skauradszun (n 27) 763.

<sup>33</sup> Recital 96 first sentence states: "The effectiveness of the process of adoption and implementation of the restructuring plan should not be jeopardised by company law."

<sup>34</sup> Same result Matthias Tresselt in Christoph Morgen (ed), *Präventive Restrukturierung: Kommentar zur europäischen Richtlinie über präventive Restrukturierungsrahmen* (RWS 2019) Art 12 under III 3.1 b.

<sup>35</sup> Cf proposed Article 370(5) Fw which provides that a legal person does not require permission by the shareholders' meeting to present a plan for adoption, nor is permission required for the implementation. Many corporate powers of the shareholders' meeting are declared inapplicable. A confirmed plan acts as

From the perspective of restructuring experts, the tools dealt with in this paper can even handle dissenting equity holders. Restructuring plans are protected by a clear message conveyed by Article 12: ‘Equity holders, you can join the voting meeting, you can vote in favour of or against the plan, you can try to convince other parties. However, if you are outvoted in your class or your class is subject to a cross-class cram-down, do not think about corporate measures such as instructions or other obstacles.’ In the second and third phase, equity holder rights are restricted to what the system specified in Articles 9 to 11 offers to the owners.<sup>36</sup>

#### b) Equity Holder Rights during the Preparatory Phase

A last thought about the preparation phase. Given the clear wording of Article 12 which mentions only the adoption, confirmation and implementation of the restructuring plan, and given the clear system outlined in Chapter 3 on the restructuring plans, and given the historical development of the Article, which only focussed on the adoption, confirmation and implementation of the restructuring plan, from a dogmatic point of view, there are strong arguments that Article 12 does not cover the preparatory phase.

Consequently, it does not conflict with the Directive if equity holders exercise their influence in the preparatory phase.<sup>37</sup> For example, equity holders of a limited liability company<sup>38</sup> may influence whether or not the preventive restructuring frameworks are used.<sup>39</sup>

However, for this phase, it is not enough to focus only on the equity holders. Directors shall also be taken into account. Therefore, the balance between restructuring

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a substitute for the shareholders’ meeting’s permission. Even though the presentation of a plan for confirmation is not mentioned expressis verbis in the proposed text, the explanatory memorandum makes it clear that the shareholders’ meeting is not allowed to prevent the presentation of a plan for confirmation. See Kamerstukken II 2018/19, 35 249, nr. 3, 38 (“Where the plan amends the rights of shareholders, those shareholders have the right under Article 381(3) to participate in the vote on the plan. Where the debtor submits a request to confirm after the vote, shareholders who voted against the plan can ask the court to refuse that request (Article 383(8)). They can express their views again when the request to confirm is considered.”) Therefore, in conformity with the interpretation presented here, shareholders under Dutch law will only have the right to partake in the voting process and the confirmation process (Articles 9-11 Directive). Decision-making powers are declared inapplicable.

<sup>36</sup> Where Member States exclude equity holders from the application of Articles 9 to 11 and, therefore, derogate from the system of the Directive, they shall ensure by other means that those equity holders are not allowed to unreasonably prevent or create obstacles to the three phases mentioned. It seems to be clear that an alternative system must not be less effective than the system established by the Directive.

<sup>37</sup> Skauradszun (n 15) 189; Seibt and von Treuenfeld (n 27) 1194.

<sup>38</sup> Seibt and von Treuenfeld (n 27) 1195 rightly state that the general assembly of a public limited company under German law does not have the competence to decide on preventive restructuring frameworks.

<sup>39</sup> However, the explanatory memorandum to the WHOA explicitly states that the bill tries to prevent shareholders from making it impossible to use a framework. See Kamerstukken II 2018/19, 35 249, nr. 3, 38 (“It ensures that resistance from shareholders cannot block the board from starting a process that could ultimately lead to a plan.”).

law and corporate law will be established by means of another Article, namely Article 19(a) which states that Member States need to ensure that the directors have due regard for the interest of creditors, equity holders, and other stakeholders.

At first glance, it is surprising that the European legislator named creditors firstly and mentioned equity holders only subsequently. As the first author noted elsewhere<sup>40</sup> and as additional authors<sup>41</sup> have interpreted similarly, the sequence of stakeholders named in Article 19(a) (creditors-equity holders-other stakeholders) does not give rise to a priority of creditors.

Since the European legislator thus intends that the interests of both creditors and equity holders be taken into account, at least two extremes can be assessed. On the one hand, an instruction prohibiting directors from using the preventive restructuring frameworks, although such a framework could rescue the company, cannot be lawful.<sup>42</sup> On the other hand, it cannot be legal for directors to use a restructuring plan to replace shareholders strategically. Directors would not show due regard, in the first case, to the interests of creditors and, in the second case, to the interests of equity holders. This is exactly what Article 19 of the Directive intends to prevent.

With respect to all possibilities between these extremes, it is noteworthy that the purpose of the Directive is not primarily creditors' protection, but, according to Articles 1 and 4 and Recital 1, the rescue of the debtor's company.<sup>43</sup> This is also part of a very modern approach to corporate rescue. The purpose of the legal entity, meaning its goal as defined in its articles of association, has not yet changed. Rather, the purpose of the entity remains in place<sup>44</sup> because at that point in time neither has insolvency occurred nor have insolvency proceedings been opened.

### **III. WHERE DO WE HAVE OPTIONS?**

#### *1. Recognition and Enforcement*

Now that we know some of the tools we have, it is time to move on to the last question: where do we have options to restructure? In today's business setting, it is difficult to imagine companies which are confined in their area of operation to one Member State. With the exception of very small companies, doing business nowadays means looking across borders. This is something which influences the contents and consequences of the frameworks. Take the following example:

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<sup>40</sup> Skauradszun (n 15) 190.

<sup>41</sup> Seibt and von Treuenfeld (n 27) 1193.

<sup>42</sup> *ibid* 1198 with the argument that equity holders, based on the fiduciary duty, are obliged to vote in favour of a restructuring if the company needs to be restructured and is worth being restructured.

<sup>43</sup> Similarly *ibid* 1193 ("Es kann (und sollte!) daher außerhalb des Insolvenzrechts bei einer Ausrichtung am Unternehmensinteresse, verstanden als Berücksichtigung der Interessenpluralität sämtlicher relevanter Stakeholder des konkreten Unternehmens, mit einem Gewichtungsvorsprung zugunsten der Anteilseignerinteressen bleiben").

<sup>44</sup> *ibid* 1197.

Company X, which produces confectionery, especially Belgian chocolate and waffles, is a company incorporated in Belgium. It is likely to become insolvent in the not-so-distant future. Among its many creditors is the B-Bank, registered in Germany. The B-Bank is a secured creditor holding a right of mortgage on X's warehouse located in Germany. Other (unsecured) creditors are scattered over multiple Member States. X employs many employees in both Belgium and Germany. Its shareholders are domiciled across the European Union.

The cross-border elements in this case can easily be discerned. The influence of these elements can especially be observed with regard to two important aspects of private international law: jurisdiction on the one hand, and recognition and enforcement on the other. The latter will be discussed first.

Let us assume X wants to use a framework in Belgium to restructure its business. Part of the contents of the envisaged restructuring plan is to reduce the debt to its unsecured creditors by engaging in a haircut. Moreover, the B-Bank will have to give up its security, the creditors who have lost part of their claim due to the haircut will instead receive equity, the equity holders will lose their equity and some of the employees in both Belgium and Germany will have to be fired. No unusual measures from a restructuring point of view. However, due to the cross-border aspects, the success of the restructuring plan greatly depends on whether the result will be recognised and be enforceable in other Member States.

If the result of the framework is not recognised in the other Member States, the haircut will only apply to creditors located in Belgium, the shareholders will retain their shares, etc. Moreover, without recognition of the framework, courts in other Member States might come to the conclusion that under their insolvency laws, X is insolvent and will, as a result, open insolvency proceedings. This would make the framework utterly useless. We therefore need a regulatory framework to ensure unproblematic recognition and enforcement in all Member States. Two possibilities will be discussed.

#### a) Brussels I

The recast Brussels I Regulation applies in all Member States, although only by way of an agreement in Denmark.<sup>45</sup> According to Article 36(1), “a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.” In other words, judgments originating in other Member States benefit from compulsory recognition. The only<sup>46</sup> situation in which recogni-

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<sup>45</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2005] OJ L299/62.

<sup>46</sup> It is especially noteworthy that the jurisdiction of the court of origin may not be reviewed, unless Article 45(1)(e) Brussels I applies (Article 45(2) Brussels I). The correct assertion of jurisdiction is therefore not a precondition for recognition and enforcement. See Leo Strikwerda, *Inleiding tot het Nederlandse Internationaal Privaatrecht* (11th edn, Kluwer 2015) para 280; David Paulus, Evgenia Peiffer and Max Peiffer in Paulus, Peiffer and Peiffer (n 10) Einführung para 102 and Art 36 para 7. The situation is fundamentally

tion can be refused is if one of the conditions of Article 45(1) is met. These conditions are all related to public policy. The same applies to the enforcement of judgments. Article 39 sets forth that judgments which are enforceable in the Member State of origin are enforceable in all other Member States. Based on Article 46, the same grounds for refusal as listed in Article 45 regarding recognition are applicable to enforcement. It is safe to say that these grounds are only applicable in a very limited number of cases.<sup>47</sup>

If Articles 36 and 39 can be used for the preventive restructuring frameworks, there should be no problem with recognition and enforcement in other Member States. Articles 36 and 39 can be used if there is a judgment. The term judgment is defined in Article 2(a). In short, it covers “any judgment given by a court or tribunal of a Member State, whatever the judgment may be called”. Two points are of special interest here. The Directive leaves it to the Member States to decide whether the authority competent to decide on matters like the stay of enforcement measures and the confirmation of a restructuring plan is a judicial or an administrative authority. It is likely that the recognition and enforcement provisions of Brussels I will not apply in the case where a decision is made by an administrative authority.<sup>48</sup> The second point concerns the term judgment itself. As the restructuring frameworks resemble the Schemes of Arrangement, the same question arises as with regard to sanctioning decisions concerning the latter. The majority view<sup>49</sup> is that the sanctioning decision falls under the definition of a judgment as described in Article 2(a) and it is submitted here that most judgments given by judicial authorities in the course of the frameworks will fall under the definition as well.

Before it can be proclaimed that preventive restructuring frameworks will profit from the broad recognition and enforcement provisions in Brussels I, one last aspect should be discussed. Again in the context of Schemes of Arrangement, the question has been posed whether Brussels I applies to pre-insolvency restructuring proceedings. According to Article 1(1), Brussels I applies to civil and commercial matters.

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different under the common law, which requires for recognition and enforcement that the court of origin had jurisdiction based on a principle regarded as sufficient by the private international law rules of the court where recognition is requested. See Peter Kutner, ‘Recognition and Enforcement of Foreign Judgments: The Common Law’s Jurisdiction Requirement’ (2019) 83 *RabelsZ* 1, 2.

<sup>47</sup> Eg Evgenia Peiffer and Max Peiffer in Paulus, Peiffer and Peiffer (n 10) Art 45 para 14.

<sup>48</sup> Dominik Skauradszun and Walter Nijmens, ‘Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks’ (2019) 16 *ICR* 193, 195-196.

<sup>49</sup> Abel and Herbst (n 4) paras 30 (“Die in Deutschland h.M. in der Literatur und Rechtsprechung nehmen die Anwendbarkeit der EuGVVO auf das [Scheme of Arrangement] an”) and 39 (“Wie bereits dargelegt, bejaht die wohl h.M. in der Literatur den Anwendungsbereich der EuGVVO und qualifiziert die gerichtliche *sanction* des Scheme gem. § 899 CA 2006 als Entscheidung i.S.d. Art. 36 EuGVVO.”). Emphasis in the original. See also footnote 4.

One can either see the frameworks as proceedings based on corporate law or insolvency law.<sup>50</sup> Whichever one prefers, both lead to the conclusion that the contents of the frameworks concern civil and commercial matters.<sup>51</sup>

Article 1(2)(b), however, excludes from the scope of Brussels I “bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings”. This provision does not create a problem with regard to the frameworks. The Court of Justice of the European Union (CJEU) has interpreted this exception on multiple occasions. The bottom line is that actions derived directly from bankruptcy or winding-up which are closely connected to proceedings for realising the debtor's assets or judicial supervision fall under this exception.<sup>52</sup> As the frameworks are concerned with companies which are not yet insolvent, but only have a likelihood of insolvency, there is little room to view them as falling under bankruptcy or winding-up. The result is therefore that the frameworks will be recognised and enforceable in all Member States based upon the Brussels I regulatory framework.<sup>53</sup> Problems regarding the fact that company X operates and has creditors all over the EU will not arise.

#### b) EIR

Apart from Brussels I, there is another possible regulatory framework enabling EU-wide recognition and enforcement of judgments, namely the EIR.<sup>54</sup> Articles 19(1) and 32(1) provide for recognition and enforcement of judgments relating to insolvency proceedings. As in Brussels I, Article 33 EIR informs us that recognition and

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<sup>50</sup> Against the insolvency law view, Stephan Madaus, ‘Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law’ (2018) 19 EBOR 615, 645.

<sup>51</sup> Seibt and von Treuenfeld (n 27) 1191 point several times to the contractual feature of the restructuring plan (“Restrukturierungsvertrag”); Stephan Madaus, ‘Die Vorgaben der EU-Richtlinie über präventive Restrukturierungsrahmen an den deutschen Gesetzgeber – Handlungsspielräume und -grenzen’ [2019] Der Betrieb 592, 595 describes the court’s assistance as a contractual one (“Das Gericht leistet Vertragshilfe”); Skauradszun and Nijnsen (n 48) 196. See also *ibid* 626 (“Restructuring agreements concluded outside formal court proceedings (workouts) are commonly held to be contracts. From a normative view, there is no reason to look at things differently if the agreement results from court proceedings.”), 630 (“In my view, a restructuring is nothing but a specific (coordinated) kind of debt contract renegotiations.”) and 645 (“contractual approach to restructuring proceedings”).

<sup>52</sup> Eg CJEU 22 February 1979, Case 133/87, ECLI:EU:C:1979:49, *Gourdain/Nadler*, para 4; CJEU 19 April 2012, Case C-213/10, ECLI:EU:C:2012:215, *F-Tex*, paras 22-23; CJEU 6 February 2019, Case C-535/17, ECLI:EU:C:2019:96, *NK/BNP Paribas Fortis*, paras 26-27.

<sup>53</sup> Madaus (n 51) 598; Skauradszun and Nijnsen (n 48) 197-198. See also Articles 1(1)(a) and 4(1) Directive. The WHOA proposes to create two framework procedures: a confidential pre-insolvency plan procedure and a public pre-insolvency plan procedure. The former will fall within the scope of Brussels I for the abovementioned reasons and, therefore, benefit from the recognition and enforcement provisions. See WJE Nijnsen, ‘Internationaal privaatrechtelijke aspecten van de WHOA’ (2019) 25 TvI 257, 263-265 (TvI 2019/34). See for a different opinion PM Veder, ‘Internationale aspecten van de WHOA: de openbare en de besloten akkoordprocedure buiten faillissement’ (2019) 11(6) FIP 53, 60-61 (FIP 2019/219).

<sup>54</sup> Briefly Madaus (n 51) 598.

enforcement can only<sup>55</sup> be refused in case the judgment is manifestly contrary to public policy, which is a more theoretical scenario in terms of the restructuring frameworks.<sup>56</sup>

Naturally, Articles 19 and 32 EIR can only be used if the preventive restructuring frameworks fall within the scope of the EIR.<sup>57</sup> Article 1(1) EIR lists the requirements, but in the end, it all comes down to whether the frameworks are added to Annex A. The requirements can give an indication whether the implemented national frameworks can be added to the Annex.<sup>58</sup> The proceedings need to be public, collective, based on laws relating to insolvency, for a purpose as described in the provision and normally produce an effect listed in either sub a, b or c.

A framework will become public if the mandatory information listed in Article 24(2) EIR is published in a register as described in Article 24(1).<sup>59</sup> The requirement of collective proceedings will also be met.<sup>60</sup> It is true that frameworks do not have to include all creditors, but this does not pose a problem. Article 2(1) defines collective proceedings as those “which include all or a significant part of a debtor's creditors”. The second and third sentences of Recital 14 state that proceedings which only involve the financial creditors are still collective, as are proceedings aimed at rescuing the debtor. The frameworks have as their goals preventing the debtor's insolvency and ensuring its viability, so again there is no problem. The second sentence of Article 1(1) provides that if proceedings are:

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<sup>55</sup> Comparable to Article 45(2) Brussels I, the EIR does not allow a court to check whether the court of origin correctly asserted jurisdiction (Recitals 9 and 65 EIR). See Dominik Skauradszun in Bruno M Kübler, Hanns Prütting and Reinhard Bork (eds), *InsO* (74<sup>th</sup> edn, RWS 2017) Art 19 EuInsVO para 11 and Dominik Skauradszun in Kübler, Prütting and Bork (n 6) Art 32 EuInsVO para 14 with further references.

<sup>56</sup> Cf Christoph G Paulus, *EuInsVO* (5<sup>th</sup> edn, RWS 2017) Art 33 para 2.

<sup>57</sup> Madaus prefers the recognition of restructuring plans to be governed by the rules on the recognition of foreign contracts instead of those on international insolvency law. See Madaus (n 50) 644.

<sup>58</sup> Alexander Bornemann in Klaus Wimmer, Alexander Bornemann and Marc D Lienau, *Die Neufassung der EuInsVO* (Luchterhand 2016) para 93 with further references; Bob Wessels, *International Insolvency Law Part II: European Insolvency Law* (4<sup>th</sup> edn, Wolters Kluwer 2017) para 10496. Cf with regard to Article 1(1) of the European Union Convention on Insolvency Proceedings Manfred Balz, ‘The European Union Convention on Insolvency Proceedings’ (1996) 70 *American Bankruptcy Law Journal* 485, 502. The European Commission will check whether the proposed proceedings meet the requirements. Cf Jean-Luc Vallens, ‘Scope of the European Insolvency Regulation and Definition of Insolvency’ in Stefania Bariatti and Paul J Omar (eds), *The Grand Project: Reform of the European Insolvency Regulation* (INSOL Europe 2014) 20-21; Commission, ‘Proposal for a Regulation of the European Parliament and of the Council replacing the lists of insolvency proceedings and insolvency practitioners in Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings’ COM(2016) 317 final, 3.

<sup>59</sup> Cf Kristin van Zwieten in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (OUP 2016) para 1.16; Moritz Brinkmann in Moritz Brinkmann (ed), *European Insolvency Regulation: Article-by-Article Commentary* (C.H. Beck/Hart Publishing/Nomos 2019) Art 1 para 14. However, it is important to consider negative effects of publication in an insolvency register. Cf Seibt and von Treuenfeld (n 27) 1191.

<sup>60</sup> Moritz Brinkmann in Brinkmann (n 59) Art 1 para 8; Skauradszun and Nijnens (n 48) 200. See also Abel and Herbst (n 4) para 68 (“Die Tatsache, dass der Schuldner die Auffassung vertritt, eine Sanierung durch Einbeziehung einiger relevanter Gläubiger herbeiführen zu können, deutet per se darauf hin, dass eine Einbeziehung des wesentlichen Teils der Gläubiger vorliegen dürfte”).

“commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.”

As already mentioned, the entire purpose of the frameworks is to prevent debtors from becoming insolvent and to ensure their viability. The Directive leaves it to the Member States to decide how to define the ‘likelihood of insolvency’. One might therefore wonder whether the concept of ‘likelihood of insolvency’ in the EIR is to be interpreted autonomously or in line with the nationally implemented provisions. The European legislator has made it clear in Article 6(8) and Recitals 13 and 14 of the Directive that the frameworks should be able to fall within the scope of the EIR. It can even be convincingly argued that the European legislator has a clear preference for this option. It would not be possible to achieve this result if the interpretation of the ‘likelihood of insolvency’-concept prevented the frameworks from falling within the EIR's scope. So even if the concept needs to be interpreted autonomously, it will likely not require more than the situation in which a company is not yet insolvent, even though insolvency is foreseeable and the goal of the proceeding is to prevent the insolvency from happening.<sup>61</sup> One might finally wonder whether it is necessary to check if one of the effects in sub a, b or c of Article 1(1) EIR is produced. There are, however, valid arguments not to check these in case there is a proceeding based on a likelihood of insolvency as opposed to actual insolvency.<sup>62</sup> The conclusion is therefore that the frameworks could fall within the scope of the EIR.<sup>63</sup> In the end it all comes down to whether they will be added to Annex A.<sup>64</sup> There are, however, three reasons why it will be practically impossible to prevent the use of Brussels I. First of all, it is possible that Member States do not wish their frameworks to be added to Annex A.<sup>65</sup> Secondly, changing Annex A will take some time, as it requires the use of the ordinary legislative proceeding to change the EIR, and history has shown that a time period of one and a half years is not an unrealistic expectation.<sup>66</sup> Thirdly, Denmark is, by way of an extra agreement, party to Brussels I, but not to the EIR. It is, therefore, reassuring to know that there is a regulatory framework to fall back on in case the frameworks are not added to Annex A.

## 2. Jurisdiction and Forum Shopping

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<sup>61</sup> Skauradszun and Nijns (n 48) 200-201.

<sup>62</sup> In favour of checking Heinz Vallender in Heinz Vallender (ed), *EuInsVO: Kommentar* (RWS 2017) Art 1 para 38 and Moritz Brinkmann in Brinkmann (n 59) Art 1 para 17. Against checking Jessica Schmidt in Peter Mankowski, Michael F Müller and Jessica Schmidt, *EuInsVO 2015* (C.H. Beck 2016) Art 1 paras 32-33.

<sup>63</sup> For the same conclusion regarding most current restructuring proceedings see Madaus (n 50) 643.

<sup>64</sup> Madaus (n 51) 598. The Netherlands are determined to request the Commission to start proceedings to add their proposed public pre-insolvency plan procedure (as opposed to their confidential pre-insolvency plan procedure) to Annex A EIR. See Kamerstukken II 2018/19, 35 249, nr. 3, 6. See Nijns (n 53) 260-263 on why the public pre-insolvency plan procedure in its proposed form cannot be added to Annex A if the European legislator really checks all conditions. For a different opinion see Veder (n 53) 55-58.

<sup>65</sup> Apparently, Austria belongs to this category. One should bear in mind that the UK previously decided that it did not want Schemes of Arrangement to be added to Annex A.

<sup>66</sup> Skauradszun and Nijns (n 48) fn 69.



As stated above, cross-border operation by companies has two<sup>67</sup> private international law aspects with respect to preventive restructuring frameworks. The focus will now shift to the second aspect, namely (international) jurisdiction. For the purpose of convenience, the example stated above is repeated here. Company X is registered in Belgium, has a warehouse in Germany, employees in both Belgium and Germany, and shareholders and creditors spread across Europe. Very importantly, the German B-Bank has a right of mortgage on the German warehouse. The question in this scenario is where company X can use a preventive restructuring framework. At first sight, there are two Member States which seem the most probable candidates: Belgium and Germany. However, the answer depends upon the applicable regulatory framework. As with the question on recognition and enforcement, there are two<sup>68</sup> options: the EIR or Brussels I.

a) EIR

To start with the EIR this time, the international jurisdiction question can be answered relatively easily. If the national frameworks are added to Annex A, international jurisdiction will be governed by Article 3. Article 3(1) provides us with the very important concept of the centre of the debtor's main interests (COMI). There is now quite a lot of experience with COMI. The use of it with regard to the frameworks would therefore not be very problematic.<sup>69</sup> In the example of company X, the COMI will most likely be in Belgium. Main proceedings in Belgium are therefore the most logical outcome.

One should, however, be aware that the inclusion of the national frameworks in Annex A does not only mean that main proceedings can be opened. Just like with regular insolvency proceedings, territorial or secondary proceedings will become a possibility if a company has an establishment in a different Member State than where

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<sup>67</sup> A third aspect of private international law, applicable law, will not be discussed here.

<sup>68</sup> It is unlikely for there to be more options. Because the frameworks fall within the scope of Brussels I, there is no possibility to fall back on national rules regarding jurisdiction, unless Brussels I allows this (eg Article 6(1)) or Brussels I only provides rules on international jurisdiction and not local jurisdiction (eg Article 4(1)). Cf CJEU 19 December 2013, Case C-9/12, ECLI:EU:C:2013:860, *Corman-Collins/La Maison du Whisky*, paras 21-22; P Vlas in P Vlas and TFE Tjong Tjin Tai (eds), *Groene Serie Burgerlijke Rechtsvordering* (15 June 2015, Wolters Kluwer) Art 5 Brussel I-bis para 1 ("De internationale bevoegdheid van de rechter kan uitsluitend worden gebaseerd op de gronden die in de verordening zijn aangegeven."); David Paulus in Paulus, Peiffer and Peiffer (n 10) Art 5 para 1 ("Mit anderen Worten sperrt die Verordnung im Rahmen ihres regelungsbereichs gegenüber Beklagten mit Wohnsitz in einem Mitgliedstaat den Rückgriff auf nationale Zuständigkeitsvorschriften."); F Ibili in AIM van Mierlo and CJC van Nispen (eds), *Tekst & Commentaar Burgerlijke Rechtsvordering* (8th edn, Wolters Kluwer 2018) Art 5 Brussel I-bis under 1. According to proposed Article 369(7) Fw, there are two possible ways to assert jurisdiction: (a) based on the EIR, which will be the case for the public pre-insolvency plan procedure; or (b) based on Article 3 of the Dutch Code of Civil Procedure, which will be the case for the confidential pre-insolvency plan procedure. The latter ignores the application of Brussels I. Nowhere in the explanatory memorandum is Brussels I mentioned. Moreover, the Council of State (the government's most important advisor) did not discuss jurisdiction aspects.

<sup>69</sup> However, an analogous question may arise which was highlighted by Grell and Klockenbrink (n 26) 1490: If finance contracts prohibit a COMI shift in order to prevent the abusive application of Article 3 EIR in regular insolvency proceedings, the application of such a prohibition clause *on preventive restructuring frameworks* and the legal consequences need to be reviewed now.

its COMI is located.<sup>70</sup> There is no indication in the Directive that the European legislator has foreseen this possibility.

Nevertheless, there is experience in European insolvency law with restructuring companies even though main and secondary proceedings have been opened. The EIR also provides for cooperation and communication duties between insolvency practitioners, between courts and between insolvency practitioners and courts of the main and secondary proceedings (Articles 41-43). In the case of the preventive restructuring frameworks, there is of course no real insolvency practitioner. The Directive provides for the appointment of a practitioner in the field of restructuring (Articles 2(1)(12), 5(2) and 5(3) Directive), but the cooperation and communication duties will only apply to him if his office is added to Annex B EIR.<sup>71</sup> If this does not happen, the debtor company will still be obligated to cooperate and communicate based on the debtor-in-possession provision of Article 41(3). The bottom line is that adding the frameworks to Annex A will mean international jurisdiction is governed by Article 3, which provides the rules for the opening of main and territorial/secondary proceedings. In the example of company X, main proceedings in Belgium and secondary proceedings in Germany seem possible. It is not yet clear whether the other EIR provisions will be entirely compatible with the frameworks. This should be the object of further research.

#### b) Brussels I

Moving on to Brussels I, the complexity increases dramatically. As stated above, the frameworks fall within the scope of the regulation and it is very unlikely that application of Brussels I can be prevented, at least for some time. The question of jurisdiction under Brussels I is therefore a question which cannot be left unanswered and will provide many with a slight headache. The reason for this is that Brussels I is ill-equipped for proceedings like the frameworks.<sup>72</sup>

##### aa) Article 4(1): Forum Rei

The general provision providing for international jurisdiction in Brussels I is Article 4(1). The point of departure is the forum rei, the courts of the Member State where a defendant is domiciled. This is problematic in our case because in proceedings like the frameworks, there is no real defendant.<sup>73</sup> Considering the example concerning company X, if all the parties mentioned (secured creditor, unsecured creditors, employees, shareholders) are to be included as affected parties in the restructuring plan, who is the defendant?

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<sup>70</sup> Cf Irene Lynch-Fannon and Jennifer LL Gant, 'Judicial Co-operation in economic recovery (JCOERE)' Winter 2018/2019 *eurofenix* 28, 28.

<sup>71</sup> In the explanatory memorandum to the WHOA, there is no mention of requesting the Commission to add the *herstrukturierungsdeskundige* to Annex B.

<sup>72</sup> Cf Stefania Bariatti and others, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, JUST/2013/JCIV/AG/4679, 36.

<sup>73</sup> *ibid.*

The same problem applies to Schemes of Arrangement.<sup>74</sup> There seem to be two possible outcomes: either the company which intends to be restructured is the defendant or the affected parties are all defendants. The first option seems the least likely.<sup>75</sup> In most cases, it will be the company which, having in mind the threat of becoming insolvent, will start a framework. It seems completely against common sense to view the party *who wants something* as a defendant. The other option is to see all affected parties as defendants.<sup>76</sup> This seems more logical, as they are the ones who will lose something and, therefore, the most likely parties to try to oppose the restructuring plan. This outcome, however, has huge implications. If Brussels I only provided Article 4(1) to govern jurisdictional matters, proceedings would have to be opened against all affected parties individually in the Member States where they are domiciled, an absolutely bizarre outcome.

#### bb) Article 8(1): Concentration of Claims

Fortunately, Article 8(1) provides a solution. According to that provision:

“[a] person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

It is safe to assume that the claims restructured in a restructuring plan are closely connected, because if they are not dealt with together, a restructuring plan has little chance to succeed. If a company needs to change all claims separately, the refusal of one affected party can result in the entire restructuring process failing. It therefore seems plausible to use Article 8(1) in order to concentrate all defendants in proceedings in one Member State where at least one affected party has its domicile.

Besides being ‘closely connected’, there is another aspect which requires attention. Concentration of the proceedings should take place to avoid irreconcilable judgments. If irreconcilable judgments are no threat, Article 8(1) cannot be used to concentrate the proceedings. In this regard the *Roche/Primus*<sup>77</sup> case needs to be considered, which was decided by the CJEU in 2006. It concerned a matter of intellectual property law: multiple companies in the Roche group had allegedly violated rights which Drs Primus and Goldenberg held based on a patent. Each member of the group had violated the rights in their own territory. The claimants brought an action against all group companies at the Rechtbank (District Court) ’s-Gravenhage in the Netherlands. The Dutch Hoge Raad (Supreme Court) eventually requested a preliminary ruling from the CJEU. The case concerned the interpretation of Article 6(1) of the

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<sup>74</sup> Stefan Sax and Artur M Swierczok, ‘Die Anerkennung des englischen Scheme of Arrangement in Deutschland post Brexit’ [2017] ZIP 601, 604

<sup>75</sup> Regarding Schemes *ibid.*

<sup>76</sup> Regarding Schemes *ibid.*

<sup>77</sup> CJEU 13 July 2006, Case C-539/03, ECLI:EU:C:2006:458, *Roche Nederland BV and others/Frederick Primus and Milton Goldenberg*. The judgment has received a lot of criticism. See eg Peter Schlosser, ‘Anmerkung’ [2007] JZ 305, especially footnote 3.

Brussels Convention, which is a predecessor of current Article 8(1) Brussels I. The CJEU decided that:

“in order that decisions may be regarded as contradictory<sup>78</sup> it is not sufficient that there be a divergence in the outcome of the dispute, but that divergence must also arise in the context of the same situation of law and fact.”<sup>79</sup>

The question that arises with regard to preventive restructuring frameworks is the following: if proceedings in a framework are not concentrated at a court based on Article 8(1) Brussels I, will there be a risk of irreconcilable outcomes due to multiple proceedings being based on the same situation of law and fact?<sup>80</sup> In essence, there are two ways to look at this. If a judgment is requested (eg a stay or the confirmation of a restructuring plan), is the request based on the framework or on the underlying claims of the affected parties? In case of the former, it is safe to assume Article 8(1) can be used. The frameworks provide new procedures which have their own legal basis in EU law. There is, therefore, only one situation of law. The same applies to the facts: the use of the framework is required by the debtor's situation of being in financial difficulty (likelihood of insolvency). In case of the latter (underlying claims as bases for the request), the situation becomes more complicated. If one were to argue that the restructuring plan is in essence an effort to change all affected claims involved and that the request is, therefore, based on the claims themselves, the situations of law and fact cannot be said to be the same. If a debtor wants to restructure claims belonging to junior creditors and shareholders, the envisaged changes will be different and based on different laws (likely the law applicable to the respective contracts). In our view, the former approach is the only one possible. From a technical point of view, the frameworks are proceedings on their own. They are created to prevent debtors from having to negotiate separately solutions with all individual affected parties. If a debtor requests the confirmation of a restructuring plan, the request is made based on the framework, not on contract law, property law, etc. From a teleological point of view, any different approach would diminish the usefulness of the frameworks. If Article 8(1) cannot be used in the context of the frameworks, the consequence is that, notwithstanding the provisions to be discussed next, affected parties will all need to be summoned before the courts of the Member State in which they are domiciled. This will lead to multiple proceedings and probably the downfall of the frameworks. The reader only has to imagine a cross-class cram-down in a situation where neither all classes nor all affected parties belonging to a class are present in the proceedings to see the problem. If the CJEU wants to ensure the *effet utile* of the new Directive, it will have little choice but to interpret Article 8(1) in the way discussed here.

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<sup>78</sup> *Roche/Primus and Goldenberg* (n 77) para 25 (“assuming that the concept of ‘irreconcilable’ judgments for the purposes of the application of Article 6(1) of the Brussels Convention must be understood in the broad sense of contradictory decisions”). The CJEU did not find it necessary to decide whether this assumption is correct. Footnote added by the authors.

<sup>79</sup> *ibid* para 26.

<sup>80</sup> For a discussion of “the same situation of law and fact” see Zheng Sophia Tang, ‘Multiple defendants in the European Jurisdiction Regulation’ [2009] *European Law Review* 80, 86-90.

Even though the use of Article 8(1) seems possible, this can lead to strange results. In the example of company X, X could choose to start a framework in any Member State in which at least one affected party is domiciled. So even if only one shareholder is domiciled in the middle of nowhere on a distant Greek island where X has no business whatsoever, all other affected parties, including employees, creditors and shareholders need to partake in Greek proceedings. It is very hard to match this result with the underlying concept of protection of the defendant.<sup>81</sup> No affected party will be able to predict the opening of Greek proceedings.

An interpretation of Articles 4 and 8 like the one presented here will lead to the restructuring company being able to choose the location of the framework from the location of any of the affected parties. This will undoubtedly lead to forum shopping.<sup>82</sup> Recital 14 of the Directive explicitly mentions the advantage of the EIR in this regard: it provides safeguards to prevent abusive forum shopping. One can debate at length whether these safeguards provided for in the EIR are really effective to prevent abusive forum shopping, but if anything is clear then it is that these safeguards are much more effective than the application of Brussels I. If a framework is added to Annex A EIR, Brussels I does no longer apply due to the exception in Article 1(2)(b) Brussels I. This framework will then only be available to debtors which have their COMI, or an establishment in the case of territorial/secondary proceedings, in the Member State which has added it to Annex A. Consequently, the number of forum shopping opportunities is reduced with every framework added to Annex A.

The issue is not over yet. Brussels I contains more provisions regarding international jurisdiction than Articles 4 and 8. Three more of them will be discussed next.

#### cc) Article 24(1): Rights in Rem in Immovable Property

Article 24(1) provides exclusive jurisdiction for the courts of the Member State in which property is located, in the case where the proceedings “have as their object rights *in rem* in immovable property or tenancies of immovable property.”<sup>83</sup> Therefore, another problem arises. In the example, company X has a secured creditor, the B-Bank, the security right being a right of mortgage over X's warehouse in Germany. It is difficult to interpret Article 24(1) in a different way than leading to the conclusion that a change of the security right can happen in no other Member State than in the one where the warehouse is located, namely in Germany (the *forum rei sitae*). This would mean that even if company X wants to start a framework in Belgium, it

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<sup>81</sup> For this concept see Trevor Hartley, *Civil Jurisdiction and Judgments in Europe* (OUP 2017) paras 7.16 and 7.25.

<sup>82</sup> Seibt and von Treuenfeld (n 27) 1190-1191 are of the opinion that the implementation of the Directive into national law will make “restructuring forum shopping” superfluous. However, they do not examine international jurisdiction and do not consider the number of flexibility clauses and, therefore, different implementation acts.

<sup>83</sup> Emphasis in the original.

will have to open a framework or some other regular proceeding regarding the right in rem in Germany as well.

One might think that if a framework has to be used in the *forum rei sitae*, one can just as well only use that framework for all affected parties, in other words concentrate the proceedings in Germany. Article 24(1), however, does not enable the concentration of proceedings at the *forum rei sitae*. Moreover, Article 8(1) cannot be used to reach that result, as it only applies to concentration at the place where a defendant has their domicile.<sup>84</sup> It does not concentrate claims so that one proceeding can be opened at a court which has jurisdiction based on a different connecting factor.<sup>85</sup> There is only one possibility to combine all claims at one court in case of a right in rem. If a court has jurisdiction based on both Article 24(1) (the *forum rei sitae*) and Article 8(1) (domicile of one of the defendants), one framework encompassing all affected parties can be opened there.<sup>86</sup> In the example of company X, because both the B-Bank is registered<sup>87</sup> and the warehouse is located in Germany, all proceedings could be concentrated in Germany. This seems quite straightforward, but there is a catch. Article 8(1) gives both international and local jurisdiction to courts.<sup>88</sup> Article 24(1) does not decide on local jurisdiction, which is left to national procedural law.<sup>89</sup> If national procedural law provides that proceedings regarding the right in rem have to be opened at the court which is located nearest to the immovable property, which is most likely, then there is a significant chance that the court deciding on the right in rem and the court having jurisdiction based on Article 8(1) will not be the same. If national procedural law does not provide for the means to consolidate these proceedings at the court having jurisdiction based on Article 8(1), there is no other way than to treat the right in rem separately from all other claims. In the case of company X, this could mean that an envisaged change in the security right would have to be dealt with in Germany, while all other affected parties would be engaged in a framework elsewhere. This could lead to more than one restructuring plan being necessary. If the B-Bank opposes changes to the security right, the entire restructuring effort could fail.

#### dd) Article 22(1): Individual Contracts of Employment

Article 22(1) provides that with regard to individual contracts of employment “[a]n employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.” Again this creates problems. If employees are not all domiciled in one Member States, this can lead to multiple frameworks being required. There is no provision enabling the consolidation of all proceedings against

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<sup>84</sup> Cf Tang (n 80) 97.

<sup>85</sup> Cf David Paulus in Paulus, Peiffer and Peiffer (n 10) Art 8 para 23.

<sup>86</sup> Cf Tang (n 80) 97.

<sup>87</sup> A legal person’s domicile is determined either by its statutory seat, central administration or principal place of business (Article 63(1) Brussels I).

<sup>88</sup> David Paulus in Paulus, Peiffer and Peiffer (n 10) Art 8 para 5.

<sup>89</sup> *ibid* Art 24 para 7.

employees.<sup>90</sup> As the Directive provides Member States with the chance to include employees as a separate class in frameworks,<sup>91</sup> these problems are not merely academic ones.<sup>92</sup>

#### ee) Article 25: Prorogation Clauses

Most restructurings will at least affect finance contracts such as loan agreements and delivery contracts.<sup>93</sup> Many contracts with a significant economic value contain a choice-of-court agreement (prorogation clause). Pursuant to Article 25(1) Brussels I, the parties may agree:

“that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship”.

In this case, “that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State” (sentence 2).

One can immediately see the resulting question: does the prorogation clause stipulate where a contractual party may be subject to a preventive restructuring framework? This may sound like a strange question since the debtor normally includes numerous parties in the framework and multiple prorogation clauses would give rise to multiple frameworks.

This question needs to be settled in the first instance based on Article 25 Brussels I. A potential provision in a national implementation act permitting or prohibiting prorogation clauses will not apply since Article 25 Brussels I overrides national procedural law.<sup>94</sup>

As a choice-of-court agreement has a dual nature, contract law on the one hand and procedural law on the other,<sup>95</sup> a prorogation clause does not apply to preventive restructuring frameworks for the following reasons.

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<sup>90</sup> Article 8(1) only applies to employees’ claims against employers, not the other way around (Article 20(1) Brussels I).

<sup>91</sup> Articles 6(5)(2) and 9(4)(2) Directive.

<sup>92</sup> Especially if one considers that a framework can include operational changes, including changes which impact labour law aspects. These changes can lead to changes relating to individual contracts of employment. See Recital 2 and Article 2(1)(1) Directive.

<sup>93</sup> See in depth Boris Dostal, ‘Zur internationalen Zuständigkeit für Klagen aus grenzüberschreitenden Vertriebsverträgen’ [2018] EuZW 944.

<sup>94</sup> Heinrich Dörner in Ingo Saenger (ed), *Zivilprozessordnung* (Nomos 2019) Article 25 EuGVVO para 1.

<sup>95</sup> Hartley (n 81) para 13.05.

First, regarding the contractual nature of the choice-of-court agreement, the clause needs to be interpreted in the same way as every clause in a contract.<sup>96</sup> Having said that, the interpretation of a choice-of-court agreement is generally a narrow one.<sup>97</sup> First, the prorogation clause covers “disputes which have arisen or which may arise in connection with a particular relationship” (Article 25(1) Brussels I). Strictly speaking, there is no *individual* dispute, which has arisen from the contract, but a *general* dispute whether the debtor can affect the contractual parties, for example by way of a stay or a confirmation order. At the time of agreeing to the prorogation clause, a *collective* adjustment of all or a significant number of contracts was not *foreseeable*. The latter is, however, a prerequisite for the application of the prorogation clause.<sup>98</sup> This “requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum”.<sup>99</sup>

Second, the prorogation was agreed between contractual parties and, therefore, typically designed for a *one-on-one* dispute before a court. The preventive restructuring framework affects multiple parties, in some cases even all creditors and equity holders, which is the regular nature of collective proceedings. Hence, a one-on-one dispute is a completely different scenario than a framework based on the Directive. Even if a choice-of-court agreement is presumed to be exclusive,<sup>100</sup> the agreement obviously focuses on disputes where the contract and respective rights and obligations are disputed, but the choice-of-court agreement does not include the situation where the contractual party of the debtor is only a small part of the restructuring framework.

Summing up, the interpretation of a prorogation clause shows that this kind of agreement is not relevant for the preventive restructuring frameworks.

#### ff) Interim Conclusion

Where recognition and enforcement are in essence quite unproblematic, jurisdiction is a completely different aspect. As long as Brussels I applies to international jurisdiction, forum shopping will likely be the *rule* instead of the *exception* and there is

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<sup>96</sup> Basically for the interpretation of prorogation clauses CJEU 20 May 2015, Case C-352/13, ECLI:EU:C:2015:335, *Cartel Damage Claims (CDC)*, para 67; German Supreme Court 6 December 2018, IX ZR 22/18, [2019] NJW 1300, para 25; Astrid Stadler in Hans-Joachim Musielak and Wolfgang Voit (eds), *ZPO* (16<sup>th</sup> edn, Vahlen 2019) Article 25 EuGVVO para 15.

<sup>97</sup> CJEU 20 February 1997, Case C-106/95, ECLI:EU:C:1997:70, *Mainschiffahrts-Genossenschaft (MSG)/Les Gravières Rhénanes*, para 14; Heinrich Dörner in Saenger (n 94) Article 25 EuGVVO para 7; Astrid Stadler in Musielak and Voit (n 96) Article 25 EuGVVO para 8.

<sup>98</sup> *Cartel Damage Claims (CDC)* (n 96) paras 68 and 70; German Supreme Court 6 December 2018, IX ZR 22/18, [2019] NJW 1300, para 32; Peter Gottwald in Wolfgang Krüger and Thomas Rauscher (eds), *Münchener Kommentar zur ZPO* (5<sup>th</sup> edn, C.H. Beck 2017) Article 25 Brüssel Ia-VO para 63; Astrid Stadler in Musielak and Voit (n 96) Article 25 EuGVVO paras 6 and 8.

<sup>99</sup> *Cartel Damage Claims (CDC)* (n 96) para 68; following German Supreme Court 6 December 2018, IX ZR 22/18, [2019] NJW 1300, para 32.

<sup>100</sup> This is the basic principle, see Hartley (n 81) para 13.15; Astrid Stadler in Musielak and Voit (n 96) Article 25 EuGVVO para 2.



a good chance that more than one framework will be required if there are among the affected parties secured creditors with rights of mortgage or employees domiciled in multiple Member States. It is unlikely that the European legislator has foreseen these problems, but they will have to be dealt with. From a jurisdictional point of view, it would be advisable to add the frameworks to Annex A of the EIR as soon as possible.

#### **IV. CONCLUSION**

In the not-so-distant future, restructurings in the EU will be faced with two new situations: Brexit and the new Directive on preventive restructuring frameworks. The latter reduces for the Member States the negative impact of the former. We can be pleased with the new tools put in our restructuring toolbox by the European legislator. However, only after the Member States have implemented the Directive will it be possible to make definitive observations. Notwithstanding the importance of the Member States' implementation acts, there are some private international law matters which will have a tremendous impact on the efficacy of the frameworks. Recognition and enforcement of judgments in the course of framework-proceedings, if they are taken by a judicial rather than an administrative authority, will not be problematic. Brussels I provides a suitable regulatory framework in this regard. The problems start with the review of international jurisdiction. As long as Brussels I remains applicable to the frameworks, it is not difficult to forecast that in many cases debtors will need to use more than one framework or other proceedings if they wish to include all affected parties in the restructuring effort. Another possibility is that some affected parties will be left out of the restructuring proceedings, because a change of their claims would require separate proceedings in a Member State other than the one in which the framework is being used. A possible solution to these problems could be to add the national implemented frameworks to Annex A of the EIR. This would undoubtedly solve the jurisdiction issues, but it is not yet clear whether all other provisions of the EIR are compatible to the frameworks. There is, in other words, more than enough research yet to be done.