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What is an insolvency proceeding?

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Abstract

Insolvency proceedings and issues relating to personal and business insolvencies are the daily subject of scholarly work and insolvency practice. But what is an insolvency proceeding? And why is this an important question? This article deals with a specific regulatory problem that is raised by these questions, namely: the necessary features of a proceeding in a cross-border context for the proceeding's effects to merit immediate, universal recognition. The article's goal is normative, i.e. it seeks to shape insolvency policy and lawmaking. Existing approaches to the regulatory problem examined in this article are used as a stepping-stone to develop a more convincing regulatory model. The article's main thesis is that: in a cross-border context, only 'fully collective' proceedings should be characterized as insolvency proceedings such that their effects merit immediate universal recognition. Proceedings are fully collective in that sense if individual claim enforcement of all creditors is impeded, e.g., by a stay or by the possibility of rights modifications. Based on this test, U.S. Chapter 11 and the German Insolvenzordnung are insolvency proceedings. The French procédure de sauvegarde financiére accélérée, by contrast, is not an insolvency proceeding, and the English Scheme of Arrangement is not one either.

Keywords: Insolvency Proceedings, Bankruptcy Proceedings, Cross-Border Insolvencies, Chapter 11, Scheme of Arrangement, Procédure de Sauvegarde, Insolvenzordnung

JEL Classifications: G33, K35, K41

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What Is an Insolvency Proceeding?

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Insolvency proceedings and issues relating to personal and business insolvencies are the daily subject of scholarly work and insolvency practice. But what is an insolvency proceeding? And why is this an important question? This article deals with a specific regulatory problem that is raised by these questions, namely: the necessary features of a proceeding in a cross-border context for the proceeding's effects to merit immediate, universal recognition. The article's goal is normative, i.e. it seeks to shape insolvency policy and lawmaking. Existing approaches to the regulatory problem examined in this article are used as a stepping-stone to develop a more convincing regulatory model. The article's main thesis is that: in a cross-border context, only 'fully collective' proceedings should be characterized as insolvency proceedings such that their effects merit immediate universal recognition. Proceedings are fully collective in that sense if individual claim enforcement of all creditors is impeded, e.g., by a stay or by the possibility of rights modifications. Based on this test, U.S. Chapter 11 and the German Insolvenzordnung are insolvency proceedings. The French procédure de sauvegarde financiére accélérée, by contrast, is not an insolvency proceeding, and the English Scheme of Arrangement is not one either.

I. Introduction

Across the globe, procedures to restructure financially distressed businesses are increasing in importance. In Europe, for example, many Member States are experimenting with novel rescue procedures to save (more) viable but financially distressed businesses.[1] *Prima facie*, many of these procedures are very different from 'classical' insolvency proceedings.[2] Unlike classical insolvency proceedings, restructuring procedures now usually begin before insolvency (as measured on a cash flow or balance sheet test), are conducted by the debtor in possession (D.I.P.)[3] without the appointment of an insolvency administrator, feature only

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1 See Horst Eidenmüller, *Comparative Corporate Insolvency Law* (June 23, 2016), available at https://ssrn.com/abstract=2799863, at 21–25 (forthcoming in JEFFREY N. GORDON & WOLF-GEORG RINGE EDS., THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2018)).

2 "Bankruptcy law" is the term more used in the U.S., "insolvency law" is more common elsewhere in the world, especially in the U.K. I am using both terms interchangeably.

3 "Debtor in possession" is a term of art under Chapter 11 of the United States Bankruptcy Code. *See* 11 U.S.C. § 1101(1) (defining "debtor in possession"). At the same time, it has become widely used to denote restructuring procedures that are conducted by the debtor without the appointment of an insolvency

minimal court involvement, and often only affect certain creditors or groups of creditors. The European Commission has recently proposed a Directive on 'preventive restructuring frameworks' ('Draft Restructuring Directive', D.R.D.) that seeks to harmonize key features of such 'frameworks' in the European Union.[4] The question thus arises: should such procedures nevertheless be characterized as insolvency proceedings?

It is important to clarify this question and thus frame its theoretical and practical relevance before answering it. The characterization problem raised in the preceding paragraph may relate to how insolvency proceedings are defined by a specific legal instrument, such as the recast European Insolvency Regulation (E.I.R.)[5] or the Draft Restructuring Directive. Framed in this way, the question would relate to which proceedings are currently within the scope of an instrument such as recast Article 1(1) E.I.R. However, the characterization problem can also be interpreted normatively. The question posed would then be directed towards which proceedings *should* (rightfully) be characterized as insolvency proceedings. This is the perspective adopted in this paper.[6] It abstracts from existing laws and regulations without disregarding them as an intellectually and practically relevant resource.

The question about the rightful or correct characterization of a proceeding as an insolvency proceeding is important for both insolvency scholarship and legal practice. A fundamental issue for insolvency scholarship is delimiting the problem that insolvency laws attempt to address. This problem defines the scope of the discipline. It would seem fair to assume that many would be comfortable with the statement that insolvency law is "... a collective response to a debtor's general default ...".[7] From a practical perspective, the characterization issue is important given the legal consequences that follow if a proceeding is determined to be an insolvency proceeding. For instance, in the European cross-border

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administrator; see, for example, Commission Staff Working Document, Impact assessment accompanying the document: Proposal for a Directiveof 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, SWD (2016) 358 final (Nov. 22, 2016), at 64–67.

4 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 (Nov. 22, 2016). On the proposal see Horst Eidenmüller, *Contracting for a European Insolvency Regime*, 18 EUR. BUS. ORG. L. REV. 273 (2017).

5 Parliament and Council Regulation (EU) 2015/848, 2015 O.J. (L 141) 19. References in the text are to the recast E.I.R. According to its Article 92, it applies from June 26, 2017.

6 As will become clear from the discussion in the text, the normative standard I use is both a fairness and an efficiency rationale. It relates to the question when it is legitimate to override creditors' expectations as to dispute resolution forum and applicable law.

7 JAY LAWRENCE WESTBROOK, CHARLES D. BOOTH, CHRISTOPH G. PAULUS & HARRY RAJAK, A GLOBAL VIEW OF BUSINESS INSOLVENCY SYSTEMS 3 (The World Bank, 2010).

context, any judgment opening insolvency proceedings, handed down by a court of a Member State that has jurisdiction pursuant to Article 3, shall be recognized in all other Member States from the moment that it becomes effective in the State in which the proceeding is opened.[8] Likewise, judgments handed down by a court (whose judgment concerning the opening of proceedings is recognized in accordance with Article 19), which concern the course and closure of insolvency proceedings, and compositions approved by that court, shall be recognized with no further formalities.[9]

This paper deals exclusively with insolvency proceedings in such a cross-border context, in Europe and beyond. Against this background, the research question posed at the beginning of the article can be restated precisely as: which proceedings should be characterized as insolvency proceedings such that their effects merit immediate universal recognition? When using the term 'recognition' I have in mind a strong form of recognition as reflected, for example, in Articles 19(1) and 32(1) E.I.R.: the effects of the proceeding are legally respected by other jurisdictions immediately without the need for *exequatur* proceedings.[10] This strong form of recognition includes a more weak form in the sense of a requirement for assistance to the proceedings in another jurisdiction, such as through Chapter 15 of the U.S. Bankruptcy Code discussed below.

The importance of the research question examined in this paper can be illustrated by the following practical examples: is a Scheme of Arrangement (U.K.) an insolvency proceeding for the purposes of Article 1 E.I.R. or Article 1(2)(b) Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)[11] ('Brussels Ia Regulation')? What about a Chapter 11 proceeding under the U.S. Bankruptcy Code? And what about a Spanish *Procedimiento de homologación de acuerdos de refinanciación*,[12] or a French *procédure de sauvegarde*,[13] *procédure de sauvegarde accélérée*,[14] or a *procédure de sauvegarde financiére accélérée*?[15] All these proceedings can

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8 Article 19(1) E.I.R.

9 Article 32(1) E.I.R.

10 An exequatur is a legal document issued by or on behalf of a sovereign authority that permits the exercise or enforcement of a right within the jurisdiction of the authority.

11 Parliament and Council Regulation (EU) 1215/2012, 2012 O.J. (L 351) 1. Article 1(2)(b) of the Brussels Ia Regulation stipulates that it does not apply to insolvency proceedings.

12 On the Spanish 'Homologated Refinancing Agreement' see Ignacio Tirado, *Out of Court Debt Restructuring in Spain: A Modernised Framework* (Jan. 2017) (manuscript on file with author).

13 Article L620-1 et seq. C.COM.

14 Article L628-1 et seq. C.COM.

15 Article L628-9 et seq. C.COM.

be initiated pre-insolvency, are conducted without the appointment of an insolvency administrator, feature only minimal court involvement, and/or only affect certain creditors or groups of creditors. This paper develops a framework which shows that some, but not all, should be characterized as 'insolvency proceedings' for purposes of universal recognition.

The paper proceeds as follows. In Section II, I examine existing approaches to the characterization problem. Thus, I examine the scope of Article 1 E.I.R. (as recast), Article 2 of the UNCITRAL Model Law on Cross-Border Insolvency (1997), as well as U.S. case law under Chapter 15 of the Bankruptcy Code. It will become clear that there is significant regulatory diversity and uncertainty with respect to when and why a proceeding should be recognized as an insolvency proceeding in a cross-border context. Against this background, I then attempt to develop a new approach in Section III. My main thesis is: in a cross-border context, only 'fully collective' proceedings should be characterized as insolvency proceedings such that their effects merit immediate universal recognition. A proceeding is fully collective if it attempts to solve a common pool problem by, in one form or another, restricting individual rights enforcement by all the creditors of a debtor, e.g. by a stay or by the power to modify claims non-consensually. Section IV concludes with a summary of the main results of this article.

II. Existing approaches to the characterization problem

Understanding the current approaches to characterization of proceedings in a cross-border context is an important stepping-stone towards a critical and normative discussion of how the law might be changed. In the following, I will examine the scope of Article 1 E.I.R. (as recast), Article 2 of the UNCITRAL Model Law on Cross-Border Insolvency (1997), as well as U.S. case law under Chapter 15 of the Bankruptcy Code. The purpose of this comparative analysis is to better understand which proceedings are currently recognized as insolvency proceedings in a cross-border context and whether any – and if so which – rationale is offered for such recognition.

1. European Insolvency Regulation

The reform discussion in the run-up to the E.I.R. revision was shaped by concerns about broadening its scope to include pre-insolvency proceedings and D.I.P. proceedings.[16] In the end, Article 1(1) E.I.R. was recast as follows (important criteria are underlined):

> "This Regulation shall apply 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, reorganization or liquidation:
> (a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
> (b) the assets and affairs of a debtor are subject to control or supervision by a court; or
> (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).
> Where the proceedings referred to in this paragraph may be 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. The proceedings referred to in this paragraph are listed in Annex A."[17]

The term 'collective proceeding' used in Article 1(1) is defined in Article 2(1) as "proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them ...".[18]

From Recital 16 of the E.I.R. it follows that proceedings "... that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency." If Article 1(1) is read with this explanation in mind, it is clear that the U.K. Scheme of Arrangement which is based on the Companies Act 2006 is

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[16] *See* EXTERNAL EVALUATION OF REGULATION NO. 1346/2000/EC ON INSOLVENCY PROCEEDINGS, JUST/2011/JCIV/PR/0049/A4 (BURKHARD HESS, PAUL OBERHAMMER & THOMAS PEIFFER EDS., 2013) 10–12, 36–42, available at http://ec.europa.eu/justice/civil/files/evaluation_insolvency_en.pdf; Christoph Thole, *Die Reform der Europäischen Insolvenzverordnung – Zentrale Aspekte des Kommissionsvorschlags und offene Fragen* –, 22 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 39, 43–51 (2014); Horst Eidenmüller, *A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond*, 20 MAASTRICHT J. EUR. & COMP. L. 133, 139–42 (2013); Horst Eidenmüller & Kristin van Zwieten, *Restructuring the European Business Enterprise: the European Commission's Recommendation on a New Approach to Business Failure and Insolvency*, 16 EUR. BUS. ORG. L. REV. 625, 642–50 (2015).

[17] Article 1(1) E.I.R. According to the definition in Article 2(4) of the E.I.R., "'insolvency proceedings' means the proceedings listed in Annex A". Annex A contains a list of such proceedings of the Member States of the European Union. On the importance of the listing in Annex A see *infra* note 19 and accompanying text.

[18] Hence, the E.I.R. appears to define 'being involved' with 'being affected' and vice versa. See also Recital 14 E.I.R.: "The collective proceedings which are covered by this Regulation should include all or a significant part of the creditors to whom a debtor owes all or a substantial proportion of the debtor's outstanding debts provided that the claims of those creditors who are not involved in such proceedings remain unaffected."

not within the scope of the recast E.I.R. The Scheme of Arrangement also is not to be found in Annex A, and in cases of doubt it is the listing of a proceeding in Annex A that is decisive.[19]

While recasting the E.I.R., the European Commission has also been initiating a process that seeks to reform the pre-insolvency restructuring laws of the EU Member States. In the Commission's view, increased convergence of such laws "...would facilitate greater legal certainty for cross-border investors and encourage the timely restructuring of viable companies in financial distress."[20] Specifically, in March 2014, the Commission published a 'Recommendation on a new approach to business failure and insolvency' ('Restructuring Recommendation', R.R.).[21] Apparently, most Member States chose to ignore the Restructuring Recommendation.[22] Yet, the Commission persisted: in its 'Action Plan on Building a Capital Markets Union' of Sept. 30, 2015,[23] the Commission announced that it will follow up with a "legislative initiative on business insolvency, addressing the most important barriers to the free flow of capital" in the fourth quarter of 2016.[24] This initiative has now been launched in the form of a proposed Directive ('Draft Restructuring Directive', D.R.D.).[25] Unlike recommendations, which have no binding force,[26] directives are "binding, as to the

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19 This is clear from Recital 9 of the recast E.I.R. which reads as follows: "... National insolvency procedures not listed in Annex A should not be covered by this Regulation." Under the 'old' E.I.R. it was actively disputed whether the criteria in Article 1(1) or listing of a proceeding in Annex A are determinative. In the *Bank Handlowy* case, the C.J.E.U. adopted the latter view. See Case C-116/11, *Bank Handlowy*, paras. 31–35, available at http://curia.europa.eu/juris [ECLI:EU:C:2012:739].

20 COM (2016) 723 final, *supra* note 4, at 2.

21 Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (2014/135/EU), 2014 O.J. (L 74) 65. Recommendations are not binding on the Member States, see Article 288 of the Treaty on the Functioning of the European Union (T.F.E.U.). For a critical analysis of the Recommendation see Eidenmüller & Van Zwieten, *supra* note 16. *See also* Mihaela Carpus Carcea, Daria Ciriaci, Dimitri Lorenzani, Peter Pontuch & Carlos Cuerpo, *European Commission staff paper, The Economic Impact of Rescue and Recovery Frameworks in the EU*, Discussion Paper 004 (Sept. 2015), available at https://ec.europa.eu/info/publications/economy-finance/economic-impact-rescue-and-recovery-frameworks-eu_en. This paper attempts to demonstrate econometrically a number of positive effects of efficient pre-insolvency restructuring regimes (e.g., the 'culture' of a timely restructuring and of giving entrepreneurs a 'second chance', promotion of entrepreneurship, timeliness/costs of discharging businesses and/or consumers).

22 Evaluation of the implementation of the Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency (Sept. 30, 2015), available at http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm. Member States ignoring the Recommendation might have done so because they believe in the benefits of regulatory diversity (and regulatory competition), because they consider to already have efficient pre-insolvency restructuring frameworks in place and/or because they think that the Recommendation contains serious regulatory flaws.

23 Commission Action Plan on Building a Capital Markets Union, COM (2015) 468 final (Sept. 30, 2015).

24 Id. at 25, 30.

25 COM (2016) 723 final, *supra* note 4.

26 Article 288(5) T.F.E.U.

result to be achieved … but shall leave to the national authorities the choice of form and methods."[27]

The goal of the European Commission has been to make sure that the scope of the revised E.I.R. precisely matches the type of restructuring proceedings recommended or directed for adoption by the Member States.[28] If recasting the E.I.R. was centrally about expanding its scope to cover pre-insolvency proceedings and D.I.P. proceedings, then efficient pre-insolvency / D.I.P. proceedings as contemplated by the Commission should also be under the umbrella of the E.I.R. as recast.

However, the Commission will probably miss this goal, for several reasons. To begin, proceedings according to the D.R.D. may (potentially) lead to the appointment of a supervisor[29] or to a temporary stay of individual enforcement actions.[30] Yet, there is no guarantee that this happens.[31] A similar gap likewise applies with respect to the criterion of 'collectivity' ('collective proceedings'). Proceedings based on the D.R.D. may or may not affect all creditors of a debtor. Indeed, such proceedings may be restricted to very few creditors or even only a single creditor.[32] Moreover, the D.R.D. does not envisage 'public proceedings' within the meaning of Article 1(1) E.I.R. To the contrary, the Commission pushes for proceedings which are initiated without formal court involvement.[33] Such formal court involvement should also be kept to a minimum in the course of the proceedings.[34] The Explanatory Memorandum for the D.R.D. makes clear the Commission's goal: to avoid or at least to contain the negative signal associated with the initiation of formal, court-supervised proceedings and its detrimental effects on restructuring prospects and firm value.[35] By

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27 Article 288(3) T.F.E.U.

28 COM (2016) 723 final, *supra* note 4, at 9.

29 Article 5(2) and 5(3) D.R.D. – cf. Article 1(1)(b) E.I.R.

30 Article 6 D.R.D. – cf. Article 1(1)(c) E.I.R.

31 That is because, under the D.R.D., the competent judicial or administrative authority is given a broad discretion as to the appointment of a supervisor and/or ordering a stay.

32 Article 2(3) D.R.D. – cf. Article 1(1) and Article 2(1) E.I.R.

33 Recital 18 and Article 4(3) D.R.D.

34 Article 4(3) D.R.D.

35 *Cf.* COM (2016) 723 final, *supra* note 4, at 2–3, 5–6, and Recital 18 D.R.D.: "To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting the involvement of judicial or administrative authorities to where it is necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. ... Furthermore, there should not necessarily be a court order for the opening of the restructuring process which may be informal as long as the rights of third parties are not affected." – Indirect insolvency costs (reductions in firm value due to the initiation of insolvency proceedings) are typically in the range of 10-20% of firm value; see, for example, Zacharias Sautner & Vladimir Vladimirov, *Indirect Costs of Financial Distress and Bankruptcy Law: Evidence from Trade Credit and Sales*, REV. FIN. (forthcoming) with further references.

contrast, the public and appealable decision to open insolvency proceedings handed down by a court of a Member State according to Article 19(1) E.I.R. is a cornerstone of the Regulation.

All in all, it appears that the European lawmaker does not have a clear perspective on which proceedings should, in a cross-border setting, be characterized as insolvency proceedings – with the consequence of universal and immediate recognition – or on the basis for such a characterization.[36] Rather, the European Commission seems to proceed 'inductively' – *i.e.*, in being confronted with a great variety of different existing procedures in the Member States that increasingly look different from 'classic' collective insolvency proceedings that are initiated upon the debtor's insolvency, the Commission strives to arrive at an intuitively plausible judgment as to which proceedings 'deserve' universal recognition and which do not. This is a pragmatic approach that may be considered appropriate in a political setting. However, from a conceptual and scholarly perspective this approach is unsatisfactory because it lacks a consistent and convincing normative basis.

2. UNCITRAL Model Law (1997)

To gain further insight into the types of proceedings that should qualify for universal recognition, one might look to the 'UNCITRAL Model Law on Cross-Border Insolvency' (1997) ('Model Law').[37] It already existed when the 'original' E.I.R. was negotiated. However, since the 'original' E.I.R. was almost identical to the 'European Union Convention on Insolvency Proceedings' (1995), which failed to receive U.K. support (because of the dispute over British beef and the 'mad cow disease'), it was the E.I.R. that influenced the Model Law rather than *vice versa*.[38]

The relevant provision dealing with the scope of the Model Law is Article 2. It reads as follows (important criteria are underlined): "*Definitions*. For the purposes of this Law: *(a)* 'Foreign proceeding' means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which

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[36] It is a confirmation of this assessment that the latest attempt of the European Commission to define 'insolvency procedure' in Article 2(1) of the D.R.D. is completely circular: "'*insolvency procedure*'means a collective *insolvency procedure* which entails a partial or total divestment of the debtor and the appointment of a liquidator" (emphasis added).

[37] UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (May 30, 1997), available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. A model law seeks to reflect best practice rules with respect to a particular field of the law – such as cross-border insolvency – and may be adopted by states with or without amendments.

[38] The Model Law's influence on the U.S. international insolvency regime was much greater, given that it has been shaped by legal concepts originating in U.S. law and scholarship to a significant degree (on this see Section 3 *infra*).

proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation ...".

If one compares the text of the Model Law with that of the recast E.I.R., two differences are immediately noticeable. First, the Model Law defines as 'foreign proceedings' only (fully) collective judicial or administrative – hence public – proceedings.[39] By contrast, the recast E.I.R. would provide universal recognition even if only a significant portion of a debtor's creditors are involved. Second, under the Model Law the assets and affairs of the debtor must be subject to control or supervision by a foreign court.[40] By contrast, Article 1 E.I.R. lists this as only one of three options for a Member State to bring a proceeding under the umbrella of the Regulation (appointment of an insolvency practitioner, control or supervision of assets and affairs of the debtor, or a temporary stay of individual enforcement proceedings count). As a consequence, the scope of the recast E.I.R. is wider than that of the Model Law. This can be explained by the fundamental changes in the 'restructuring landscape' that we have been witnessing since 1997. The increasing popularity of pre-insolvency D.I.P. proceedings that affect only the interests of some creditors or creditor classes was not yet reflected in the approach of the Model Law. The recast E.I.R. takes account of this development, albeit without a clear conceptual foundation.

3. Chapter 15 U.S. Bankruptcy Code

A better understanding of the Model Law's approach is aided by Chapter 15 of the United States Bankruptcy Code. Chapter 15 is a relatively new chapter of the Code. It was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[41] The purpose of Chapter 15 is to adopt the Model Law in U.S. law. In cases of doubt, provisions in Chapter 15 should be interpreted in light of the corresponding rules in the Model Law and legal practice in other states that have adopted it. Thereby, legal harmonization is furthered – a key objective of the Model Law. However, given the dominant influence of U.S. scholarship and

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39 This is further defined in the Guide to Enactment and Interpretation (*supra* note 37) as follows: "It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State" (at 39); "… a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding …" (at 40).

40 However, according to the Guide to Enactment and Interpretation, *supra* note 37, at 41, this control or supervision may be "potential rather than actual".

41 For an overview see John J. Chung, *The New Chapter 15 of the Bankruptcy Code: A Step toward Erosion of National Sovereignty*, 27 NW. J. INT'L L. & BUS. 89 (2006).

legal practice on the development of the Model Law,[42] it will likely have special weight in interpreting the Model Law's provisions.

An ancillary case under Chapter 15 is commenced by the filing of a petition for recognition of a foreign proceeding by a foreign representative pursuant to 11 U.S.C. §§ 1504 and 1515. With the exception of interim relief, such recognition is a precondition for relief granted by U.S. courts under Chapter 15. A 'foreign representative' is defined in 11 U.S.C. § 101(24) as: "[a] person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or to act as a representative of such foreign proceeding". The term 'foreign proceeding' is defined in 11 U.S.C. § 101(23) (important criteria are underlined): "(i) a collective judicial or administrative proceeding in a foreign country, (ii) under a law relating to insolvency or the adjustment of debt in which (iii) the assets and affairs of the debtor are subject to control or supervision by a foreign court, (iv) for the purposes of reorganization or liquidation".

If one compares this provision with the UNCITRAL Model Law, two substantial differences are noticeable in addition to insignificant language differences: first, interim proceedings are not mentioned in 11 U.S.C. § 101(23); second, the provision includes laws relating to the 'adjustment of debt' which are not mentioned in the Model Law.

It is also illuminating how United States courts interpret the criterion of 'collectivity' that is found in 11 U.S.C. § 101(23) as well as in Article 2 of the Model Law. 'Collectivity' is not otherwise defined in these provisions. In this connection, one relevant decision is by the U.S. Bankruptcy Court for the District of Nevada *in re* Betcorp.[43] This case concerned the recognition of a voluntary winding-up proceeding, *i.e.*, of a voluntary liquidation, according to Australian law (Part 5.5 of Chapter 5 Corporations Act). The U.S. court opined that this was a proceeding within the meaning of 11 U.S.C. § 101(23) despite the fact that no petition had been filed with an Australian court. The court further opined that the proceeding was judicial or administrative in nature (primarily it was held to be administrative, but it could potentially also become judicial). The court then turned to the collectivity criterion. On this it opined as follows: "A collective proceeding is one that considers the rights and obligations of all creditors. This is in contrast, for example, to a receivership remedy instigated at the

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42 *See* Sefa M. Franken, *Cross-Border Insolvency Law: A Comparative Institutional Analysis*, 34 OXF. J. LEG. STUD. 97 (2014).

43 *In re* Betcorp Ltd., 400 B.R. 266 (Bankr. D. Nev. 2009).

request, and for the benefit, of a single secured creditor. A voluntary winding up fits this 'collective' criterion."[44]

On the further criteria that are relevant under 11 U.S.C. § 101(23), the court opined that authorization under a law relating to insolvency or the adjustment of debt does not require the firm to be technically insolvent or planning to use the Australian rules to adjust its debt. According to the court, the Australian Corporations Act governs the whole lifecycle of a corporation. It stipulates different forms of dissolution of a corporation and, depending on the circumstances of the individual case, a switch from one of these forms to another. Most importantly, however, the Australian lawmakers apparently thought that Chapter 5 of its Corporations Act would satisfy the conditions of the Model Law: "Accordingly, based upon the Australian legislature's interpretation of the UNCITRAL Model Law and Australian domestic law, a company engaged in a voluntary winding up is being administered under a law relating to insolvency."[45] Finally, the court also opined that the assets and affairs of the corporation that was dissolved were subject to control or supervision by an Australian court: the liquidators, the U.S. court held, were controlled by the Australian capital markets commission ASIC (Australian Securities and Investments Commission) and – upon a petition by the liquidators and/or by creditors – also by the competent Australian courts.

The decision in *In re Betcorp* is remarkable for at least two reasons. First, the court is rigid (formalistic) with respect to the collectivity criterion: the foreign proceeding must consider the rights and obligations of *all* creditors. However, it is quite unclear what this means in substance. For instance, "considers the rights and obligations of all creditors" might mean that the rights/obligations of all creditors are liable to be modified in principle without necessarily being actually modified in an individual case. However, it might also mean that these rights/obligations must be respected. Second, the court is quite generous when interpreting the criterion of a "law relating to insolvency or the adjustment of debt": the voluntary liquidation of a solvent (!) company is judged to be a foreign (insolvency) proceeding based, *inter alia*, on the remarkable argument that the Australian lawmakers thought so.[46]

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[44] *Id.* at 281.

[45] *Id.* at 283.

[46] What may have motivated this holding is that the Australian Corporations Act, from the perspective of the court, functions like U.S. Chapter 11 in certain important respects, and Chapter 11 does not require insolvency to commence a case, see note 64 *infra*. However, it seems clear that the Model Law takes another position on this issue. See Guide to Enactment and Interpretation, *supra* note 37, at 41: "A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its

Other U.S. courts have followed *Betcorp*'s reasoning that the collectivity criterion should be interpreted to require that the rights and obligations of all creditors must be considered. In *In re Gold & Honey*[47] the U.S. Bankruptcy Court for the Eastern District of New York had to assess a receivership proceeding under the laws of Israel. The court cited the standard developed in *Betcorp* and then applied it to the facts before it: "The Israeli Receivership Proceeding is not simply collective in nature. It does not require the Receivers to consider the rights and obligations of all creditors. ... [T]he Receivership is more akin to an individual creditor's replevin or repossession action than it is to a reorganization or liquidation by an independent trustee." Based on this reasoning it is at least clear that proceedings which are conducted primarily in the interest of one creditor or which resemble individual enforcement actions cannot be recognized as foreign proceedings under Chapter 15.

In re Gold & Honey, the court also dealt with the requirement that the assets and affairs of the debtor must be subject to control or supervision by a foreign court: "Here, while the Israeli Court may have jurisdiction over the assets of GH LP and GH Ltd., the Receivers have not carried their burden of showing that GH LP's affairs are subject to the Israeli Court's jurisdiction. ... FIBI [a pre-petition lender to GH Ltd.] conceded at oral argument that the Receivers were not provided with authority over the business affairs of GH LP."[48] Hence, the bankruptcy court heavily emphasized that both the assets *and* the affairs of the debtor must be subject to control or supervision by the foreign court for the proceeding to be recognized under Chapter 15.[49]

Since Chapter 15 entered into force, the U.S. courts have repeatedly had to deal with the question whether a Scheme of Arrangement under English law[50] can be recognized as a foreign (insolvency) proceeding.[51] The question is important because Schemes can be done

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legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress." Nevertheless, The High Court of the Republic of Singapore followed the reasoning of the decision in re Betcorp, see *Re* Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation) & others, [2016] SGHC 287 at [7]–[10].

47 *In re* Gold & Honey, Ltd., 410 B.R. 357 (Bankr. E.D.N.Y. 2009).

48 *Id.* at 371.

49 This is in line with the approach taken by the Model Law. *See* Guide to Enactment and Interpretation, *supra* note 37, at 42: "Subparagraph *(a)* of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding."

50 Sections 895–901 Companies Act 2006.

51 *See In re* Lloyd, 2005 Bankr. LEXIS 2794 (Bankr. S.D.N.Y. Dec. 7, 2005); *In re* Lion City Run-Off Private Ltd., 2006 Bankr. LEXIS 5102 (Bankr. S.D.N.Y. 2006); *In re* Gordian Runoff (UK) Ltd., Case No. 06-11563 (Bankr. S.D.N.Y. 2006).

before a company is materially insolvent ('Solvent Scheme of Arrangement'). Further, a Scheme typically does not involve all creditors of a debtor but only select groups or classes of creditors.[52] For both of these reasons, the German Bundesgerichtshof [Federal Court of Justice] decided that a Solvent Scheme of Arrangement cannot be recognized as an insolvency proceeding under German law.[53] The U.S. courts take a different view. Since 2005, U.S. bankruptcy courts have consistently held that such Schemes should be recognized as foreign insolvency proceedings.[54]

Reviewing the U.S. case law on the recognition of foreign (insolvency) proceedings under Chapter 15, it appears that the collectivity criterion is applied in a strict manner – the interests of all creditors must be "considered".[55] However, it is quite unclear what this means in substance. Proceedings that clearly do not affect all creditors may be recognized (U.K. Scheme of Arrangement), provided that they are not conducted primarily in the interest of one creditor alone or more closely resemble an individual enforcement action (e.g., a receivership proceeding under the laws of Israel). The material insolvency of the debtor is of no relevance to characterizing a proceeding as an "insolvency proceeding" for purposes of cross-border recognition.

All in all, a comparative analysis of existing approaches to the characterization problem in a cross-border context yields a disappointing result. A noticeable international trend is to relax both the collectivity requirement and the insolvency requirement. As a consequence, the contours of "insolvency proceedings" get increasingly blurred. A well-founded conceptual and consistent answer to the question "What is an insolvency proceeding?" cannot be derived from existing laws and regulations, or by the interpretation of these laws and regulations by competent courts. Hence, it is unclear, in a cross-border context, which proceedings should properly be characterized as insolvency proceedings such that their effects merit immediate universal recognition.

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52 *See*, for example, Jennifer Payne, *Cross-border Schemes of Arrangement and Forum Shopping*, 14 EUR. BUS. ORG. L. REV. 563, 565–66 (2013); REINHARD BORK, SANIERUNGSRECHT IN DEUTSCHLAND UND ENGLAND margin no. 9.17 (2011); Horst Eidenmüller & Tilmann Frobenius, *Die internationale Reichweite eines englischen Scheme of Arrangement*, 64 WERTPAPIER-MITTEILUNGEN 1210, 1211–12 (2010).

53 Bundesgerichtshof [BGH] [Federal Court of Justice) Feb. 15, 2012, Case No. IV ZR 194/09 (*Equitable Life*), para. 39, available at http://bundesgerichtshof.de, declining recognition per Section 343(1) of the German Insolvenzordnung.

54 See *In re* Lloyd, 2005 Bankr. LEXIS 2794, at 3–4; *In re* Lion City Run-Off Private Ltd., 2006 Bankr. LEXIS 5102, at 2–3; *In re* Gordian Runoff (UK) Ltd., Case No. 06-11563. For an analysis of these cases see Jennifer D. Morton, *Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15*, 29 FORDHAM INT'L L.J. 1312 (2006).

55 *In re* Betcorp Ltd., 400 B.R. at 283; *In re* Gold & Honey, Ltd., 410 B.R. at 371.

III. A new approach to the characterization problem

Against this background I should like to take a fresh look at this question and develop a new approach to 'solving' the characterization problem outlined in the introduction of this article. By way of prefacing my considerations I should like to remark that any sort of 'ontological perspective' on the issue should be ruled out at the outset. There is no such thing as 'the nature' of an insolvency proceeding out of which certain characteristics of such a proceeding could be derived. Insolvency proceedings are jurisprudential and legal artefacts. Their normative features are based on a reasoned determination of the lawmaker in every individual case. Moreover, an abstract definition of 'insolvency proceeding' also is not helpful to adequately addressing the characterization problem. What is important, rather, are the *legal (and economic) consequences* that follow from such a definition or characterization and the conditions under which these consequences can be justified. If one focuses on the cross-border context of the characterization problem (see Section I *supra*), a differentiation between 'fully collective' and 'less than fully collective' proceedings is the key to 'solving' this problem.

1. Fully collective proceedings

A fully collective proceeding is a proceeding that, in principle, affects all creditors of a debtor worldwide, regardless of the law governing the claims and or whether these creditors have agreed to the jurisdiction of the courts in the country in which the proceeding is initiated. All creditors are affected if, in one form or another, individual rights enforcement of all creditors is restricted by the proceeding (by *procedural* rules or *substantive* changes in creditor entitlements, see *infra*).

A paradigmatic case for a 'fully collective proceeding' in this sense is a German insolvency proceeding based on the *Insolvenzordnung* that is opened as a main insolvency proceeding at the debtor's 'centre of main interests' (C.O.M.I.) under the (recast) E.I.R. The opening of such a proceeding is automatically recognized in all other Member States once the opening decision has become effective in the State of the opening of proceedings.[56] The proceeding, in principle, affects all creditors of the debtor: once the proceeding has been

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[56] Article 19(1) E.I.R.

opened, a stay is imposed on all creditors.[57] The debtor has the right to propose a restructuring plan that, if adopted, can materially change the entitlements of all creditors.[58] It is immaterial which law governs these entitlements. It is also immaterial whether, based on the applicable rules of international civil procedure found in the Brussels Ia Regulation, the courts in the opening State would have jurisdiction to resolve disputes between a creditor and the debtor.

Thus, the crucial normative question with respect to such a proceeding is: what *justifies* these effects? Or, put differently: what justifies subjecting the claim of a creditor to a (collective) proceeding even though the creditor and debtor might have stipulated that the claim shall be subject to a governing law that is very different from that of the opening state and even though they might have stipulated that the courts of another state shall have exclusive jurisdiction to hear all disputes between the creditor and debtor? That is, what criterion provides sufficient 'normative weight' to counteract, or outweigh, the legitimate expectations of creditors with respect to the forum (jurisdiction) and measuring rod (applicable law) for dispute resolution with the debtor.

I submit that such a criterion can only be found in a situation in which the debtor's creditors have a strategic incentive to try and collect on their claims as soon as possible because the debtor's finances presumptively are not sufficient to meet all outstanding claims.[59] This is the situation of a common pool problem (multi-party prisoners' dilemma) of the creditors that arises upon material insolvency of a debtor.[60] The incentive structure of the situation is such that creditors appear to have a dominant strategy, and this is to collect on their claims as fast as possible and seize the debtor's assets.[61] If the law grants certain creditors a priority position, these creditors might not participate in the 'asset race'. However, the pool available for the general (unsecured) creditors will shrink, making the common pool problem even more acute. At the same time, these strategic actions by creditors threaten to lead to a suboptimal equilibrium in which the going concern value of a business is dissipated

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57 Sections 80 et seq., 165 et seq. Insolvenzordnung. – I should note that Article 8 E.I.R. limits the scope of the stay with respect to certain rights *in rem*. However, this is immaterial for the analysis undertaken herein.

58 Sections 217 et seq. Insolvenzordnung.

59 To be sure, this criterion tells us only *whether* and *when* an 'insolvency proceeding' as a 'fully collective proceeding' may be opened and not *where* (in which forum) it may legitimately be opened. The latter question is beyond the scope of this paper.

60 See THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW (1986).

61 To be sure, in reality there is no automatism that leads them to pick this strategy. There are various reasons why we might not get an equilibrium in dominant strategies (social norms, repeated interaction, cooperation forced by legal norms etc.).

or at least significantly reduced.[62] A suboptimal equilibrium might also result if the firm is economically distressed and should be liquidated: the best liquidation strategy will often require the assets of the firm to be kept together for some time ('deferred liquidation').

In this situation, an insolvency proceeding, as a collective proceeding, can be conceived as a hypothetical collective contract amongst the debtor's creditors binding them to cooperate (in the common interest) which, because of the strategic incentives of creditors and prohibitively high transaction costs, the creditors cannot and do not conclude ad hoc. Only if the debtor's creditors are confronted with such a common pool problem is it justified to force them into a fully collective proceeding in a forum which they might not have anticipated – or even deliberately have deselected – and according to material distribution rules which are applied to everybody, regardless of the laws governing the creditors' claims. Only the exceptional case of the common pool problem justifies overriding the legitimate expectations of the creditors with respect to the dispute resolution forum and applicable law.

This case surely exists if the debtor is materially insolvent as assumed in the previous paragraph. However, the common pool problem can arise at a much earlier point in time: if (some) creditors know that the debtor will be insolvent the day after tomorrow, then these creditors have a strong incentive to collect on their claims tomorrow. In fact, acting already today appears to be even smarter (backward induction).[63] What matters, therefore, is not the material insolvency of the debtor, but rather whether the proceeding attempts to solve a common pool problem of the creditors. This is always the case if it restricts individual enforcement actions by all creditors in one form or another. This restriction may come in the form of *procedural* rules, such as by an automatic stay that is imposed on all creditors upon the initiation of the proceeding: if the law prohibits individual creditor enforcement actions by imposing an automatic stay, it thereby demonstrates that it seeks to address a common pool problem of the creditors and the 'asset race' associated with it. Alternatively, the restriction of creditor rights enforcement may come in the form of *substantive* changes in creditor entitlements to which creditors may be forced against their will: the lawmaker might stipulate, for example, that creditor rights are subject to a deferment of payment, cuts, swaps in equity positions or other modifications which can be forced upon creditors by a restructuring plan adopted by a creditor majority and/or sanctioned by a competent court.

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62 See HORST EIDENMÜLLER, UNTERNEHMENSSANIERUNG ZWISCHEN MARKT UND GESETZ 19–22 (1999).

63 See, for example, Horst Eidenmüller, *Trading in Times of Crisis: Formal Insolvency Proceedings, Workouts and the Incentives for Shareholders/Managers*, 7 EUR. BUS. ORG. L. REV. 239, 242–43 (2006).

Against this background, an insolvency proceeding based on the German *Insolvenzordnung*, for example, clearly is an insolvency proceeding under the approach recommended in this article. As noted, this German proceeding comes with an automatic stay, and it also allows forced modifications of creditors' entitlements. The same applies to a Chapter 11 proceeding under the U.S. Bankruptcy Code. Such a proceeding may be initiated independent from a material insolvency of the debtor.[64] However, a Chapter 11 proceeding triggers an immediate automatic stay,[65] and it also allows forced creditor rights modifications.[66] The English High Court got it right, therefore, when it recognized a Chapter 11 proceeding as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006 (C.B.I.R.) in *In Re 19 Entertainment Limited.*[67] The French *procédure de sauvegarde*[68] and the *procédure de sauvegarde accélérée*[69] are also insolvency proceedings within the meaning of the characterization problem examined here. While these proceedings do not allow modifications of all creditor claims,[70] a universal automatic stay is imposed on all creditors.[71] The same holds true for the Spanish *Procedimiento de homologación de acuerdos de refinanciación* once a petition for homologation of the refinancing agreement is filed.[72]

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64 See the definition of "insolvent" in 11 U.S.C. § 101(32): "… financial condition such that the sum of such entity's debts is greater than all of such entity's property …". For initiating a Chapter 11 proceeding "insolvency" is not a requirement. However, most courts do recognize a good faith requirement which, in turn, reflects a concern about common pool problems. See Horst Eidenmüller, *Strategische Insolvenzen: Möglichkeiten, Grenzen, Rechtsvergleichung* (April 30, 2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2429438.

65 11 U.S.C. § 362. It is immaterial that there are certain limited exceptions to the (universal) automatic stay such as, importantly, for the closing of derivatives transactions in 11 U.S.C. § 362(b)(27). This exception was introduced to address financial stability and systemic risk concerns (*see* Kenneth Ayottee & David A. Skeel, Jr., Bankruptcy or Bailouts ?, 35 J. CORP. L. 469, 493-496 (2010)). It does not undermine Chapter 11's general attempt to address and solve a common pool problem of the creditors that is reflected in the universal automatic stay that is not restricted to certain creditors or classes of creditors.

66 11 U.S.C. § 1123.

67 *Re* 19 Entertainment Limited [2016] EWHC 1545 (Ch). The case involved an English company which had its C.O.M.I. in the U.S. Relief was granted under Articles 20 and/or 21 Schedule 1 C.B.I.R. The court was quick to hold that the proceedings before the court in New York are 'foreign proceedings' for the purposes of the 1986 Regulations ("Article 2 of the schedule defines the term 'foreign proceeding' to mean a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. The evidence of Mr. Feldman [who provided an expert report on U.S. Chapter 11] … persuades me completely that the proceedings are 'foreign proceedings' within the meaning of the 1986 Regulations."). The decision is also interesting because the court was satisfied that the company itself and each of its directors was a 'foreign representative' of the foreign proceedings.

68 Article L620-1 et seq. C.COM.

69 Article L628-1 et seq. C.COM.

70 The *procédure de sauvegarde* and the *procédure de sauvegarde accélérée* affect only trade creditors with claims exceeding 3% of the total volume of trade creditors' claims, see article L626-30 C.COM.

71 Article L622-21 et seq. C.COM. – Hence, the European lawmakers got it right when listing both proceedings in Annex A of the recast E.I.R. In the *Bank Handlowy* case (*supra* note 19), the C.J.E.U. had to deal

2. Not fully collective proceedings

A different assessment is warranted with respect to the *procédure de sauvegarde financiére accélérée*.[73] This proceeding affects only financial creditors, and the automatic stay is also restricted to these creditors.[74] A different assessment is also warranted for a Scheme of Arrangement (U.K.): as already discussed (Section II 3 *supra*), a Scheme typically affects only certain groups of creditors or classes of claims, and it also does not involve an automatic stay.[75] Hence, U.K. law permits and, indeed, aims for restructuring without full collectivization, and this is decisive from a normative standpoint as adopted in this article. As a consequence, both proceedings are examples of "not fully collective proceedings."[76]

Proceedings of this type do not attempt to address a general common pool problem. Instead, their purpose is to bring about an early financial restructuring of portions of creditors' claims. Hence, the interests and incentives of creditors in this instance differ significantly. Nobody has to accept that his or her claim shall be reduced in a forum different from that which was contractually agreed or would be available under the non-insolvency rules of the applicable international civil procedure regime. Further, nobody has to accept a claim modification based on laws and regulations different from the law governing his or her claim. To the contrary, the legitimate expectations of the creditors with respect to the dispute resolution forum and applicable law must be respected. Only if a creditor had to expect

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with a *procédure de sauvegarde*. Based on the listing in Annex A, the court found that the proceeding came within the scope of the Regulation. See Case C-116/11, *Bank Handlowy*, paras. 31–35. Gabriel Moss, *Principles of EU Insolvency Law*, 28 INSOLV INTEL 40, 42 (2015), agrees that, because of the listing, the court had to treat the proceeding as an insolvency proceeding. However, he asserts that "...[e]veryone knew that the French proceeding was not an insolvency proceeding ...". Based on the analysis in the text, the proceeding *was* an insolvency proceeding.

72 *See* Tirado, *supra* note 12. Hence, the European lawmaker got it right when listing the proceeding in Annex A of the recast E.I.R.

73 Article L628-9 et seq. C.COM.

74 Article L628-9 sentence 2 C.COM. See also Adam Gallagher & Aude Rousseau, *French Insolvency Proceedings: La Révolution a Commencé*, AM. BANKR. INST. J., Nov. 2014, at 20, 64. For this reason, the European lawmaker got it wrong when listing this proceeding in Annex A of the recast E.I.R. The *procédure de sauvegarde financiére accélérée* was originally created as "pre-pack *à la française*" as a tool to cram down pre-packed debtor plans on dissenting financial creditors, see Reinhard Dammann & Gilles Podeur, *Sauvegarde financière express : vers une consecration legislative du « prepack à la française » ?*, D. 2010, 2505, 2505–06. Based on the model of the *procédure de sauvegarde financiére accélérée* the (general) *procédure de sauvegarde accélérée* was created later.

75 See BORK, *supra* note 52, margin no. 10.30. Hence, the European lawmaker got it right when not listing the Scheme in Annex A to the (recast) E.I.R. Whether we are dealing with a Solvent Scheme or an Insolvent Scheme is not, based on the analysis in this article, a decisive factor.

76 Similarly, an English liquidation procedure also is a "not fully collective proceeding" since it does not impose a full stay on secured creditors. The common pool problem arises also in liquidations (see in the text *supra* section III 1), and the English liquidation procedure does not address it.

adversarial proceedings in the forum of the 'insolvency' or 'restructuring' proceeding, *i.e.*, typically in cases of a contractual forum selection, and only if his or her claim is governed by the substantive laws of the jurisdiction in which the proceeding is conducted, is it normatively justified to subject the creditor's claim to the effects of the proceeding. If the situation is not so exceptional that all creditors are involved irrespective of the law governing their claims and irrespective of the 'regular' (agreed) forum for an adversarial dispute resolution, then their legitimate expectations must be respected.

This has the following consequences for a Scheme of Arrangement: a Scheme is not an insolvency proceeding within the meaning of the characterization problem discussed in this article. Its effects are limited to those creditors whose claims are governed by English law and who would have been obliged to pursue their claims in an English forum.[77]

IV. Summary and conclusion

The question posed at the beginning of this article ("What is an insolvency proceeding?") matters most against the background of the legal consequences that are triggered by the characterization of a proceeding as an insolvency proceeding. Hence, the 'characterization problem' can be restated as a question that is directed towards the conditions that justify these consequences. Further, the problem is relevant only within a specific legal context in which it is raised.

If one confines the analysis to the cross-border effects of a proceeding, the following conclusion emerges: insolvency proceedings are only those proceedings which attempt to address a common pool problem of the creditors. This is always (but also only) the case if the proceeding restricts, in one form or another, the enforcement of all individual creditor rights. The restriction may be procedural in nature, especially in the form of a universal automatic stay that applies, in principle, once the proceeding is initiated. The restriction can also take the form of substantive modifications of creditor entitlements to which all creditors, in principle, are subject even if they dissent.

If universal recognition[78] of a proceeding as an insolvency proceeding were limited to fully collective proceedings, states might have comparatively strong incentives to 'collectivize' proceedings to make them more attractive than they would be without such recognition. One may view this as a desirable corollary to the thesis developed in this paper:

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77 See Eidenmüller & Frobenius, *supra* note 52, at 1213–17.

78 See *supra* section I.

not every proceeding deserves universal recognition that overrides legitimate creditor expectations with respect to dispute resolution forum and governing law. Only fully collective proceedings merit such serious consequences.

Based on the test developed in this paper, U.S. Chapter 11 and the German *Insolvenzordnung* are insolvency proceedings. However, the French *procédure de sauvegarde financiére accélérée* is not an insolvency proceeding, and the English Scheme of Arrangement is not one either. It follows that the European lawmakers got it wrong when listing the former in Annex A of the recast E.I.R., and it got it right when not listing the latter. It also follows that U.S. bankruptcy courts have erred when recognizing English Schemes as 'foreign proceedings' within the meaning of 11 U.S.C. § 101(23).[79] This "pattern of US acquiescence" in "[underwriting] the efficacy of UK schemes"[80] should be challenged.

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[79] See references *supra* in note 54 and accompanying text.

[80] Adrian Walters, *United States' bankruptcy jurisdiction over foreign entities: exorbitant or congruent?*, 17 J. CORP. L. STUD. 367, 375 (2017).

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