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Principios del Derecho de la insolvencia transfronteriza

[Principles of Cross-Border Insolvency Law]

Reinhard Bork*
Universidad de Hamburgo

Resumen

Las normas del derecho de la insolvencia transfronteriza tienen por fundamento una serie de principios. Estos, al mismo tiempo, no sólo son prescripciones de conducta, sino además orientan a la jurisprudencia, y crean nuevas fórmulas de cómo entender este sistema de normas, tanto en el soft law como en el derecho nacional de cada país.

Palabras clave

Principios de Derecho – Insolvencia transfronteriza – Soft Law – Jurisprudencia internacional – Principios.

Abstract

The rules of cross-border insolvency law are based on a set of principles. These, at the same time, are not only behavioral prescriptions, but also guide the jurisprudence, and create new formulas of how to understand the systems of norms, both in the soft law and in the national law of each country.

Key words

Principles of Law– Cross-border insolvency – Soft Law – International Jurisprudence.

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* Lawyer, University of Cologne. Doctor of Law. Professor of Civil Procedure and General Litigation, University of Hamburg / Abogado, Universidad de Colonia, Alemania. Doctor en Derecho. Profesor de Derecho Procesal Civil y Litigación general, Universidad de Hamburgo, Alemania.

I. Introduction

Legal rules are seldom of a purely technical, valueless nature. As will be discussed later, they instead link back to basic principles, which have a systemising function, as well as a legitimising one. This also applies to the cross-border aspects of international insolvency law. An analysis of the norms which constitute this area of the law, which include those categorised as written law, *soft law* and case law, brings these general core values to light and proves that they can be made fruitful not only for the purposes of judicial interpretation and to be used by the law, but they can also support the legislature in creating an appropriate formulation of norms, as well as with regard to the efforts to achieve international harmonisation of the law.

II. International insolvency law

International insolvency law is the entirety of rules which deal with the cross-border aspects of insolvencies. If debtors have assets, creditors, contracts or other affairs, such as subsidiaries, abroad, many questions arise: Which state has international jurisdiction to open insolvency proceeding? Will the decision to open proceedings in state A be recognised in state B? What are the trans-border effects of proceedings (for example: Is there only one single set of insolvency proceedings with worldwide effect or are there different insolvency proceedings in each affected state)? What are the powers of the insolvency practitioner abroad (e. g. will the insolvency practitioner appointed in state A be recognised in state B and do his powers extend to assets in foreign states)? Which insolvency law is applicable (for example: will security rights created in state B be affected by the insolvency law of state A)? There is a huge bundle of challenging questions and it is a fascinating task to inquire after the fundamental principles of this part of insolvency law. In searching for a codification of international insolvency law which can be studied for its foundational principles, a wealth of suitable material can be found.

1. *Transnational law*

Internationally binding laws which apply to more than one state, and thus do not constitute purely national law but rather transnational law, belong within the first group of laws to be depicted here. The first law to be named here is the European Insolvency Regulation (EIR), which came into force in 2000, was revised in 2015, and applies to all Member States

of the European Union with the exception of Denmark[1]. Alongside this, there is the Nordic Bankruptcy Convention (dated 7 November 1933) which applies to the Scandinavian countries of Denmark, Finland, Iceland, Norway and Sweden. Interesting insights can also be obtained from the Istanbul Convention, which was concluded by the European Council on 5 June 1990 but was only ratified by Cyprus. By 1889, Argentina, Bolivia, Columbia, Paraguay, Peru and Uruguay had already concluded the Treaties of Montevideo, which were modified with regard to their application in Argentina, Paraguay and Uruguay in 1940 to include the rules in international insolvency law. The same applies to the Havana Convention of 20 February 1928, which was signed by 15 South American states and is better known as the Code Bustamante, and it also applies to the Uniform Act Organising Collective Proceedings for Wiping off Debts (dated 10 April 1998), which is binding for the 17 Member States of the OHADA (Organisation for the Harmonisation of Business Law in Africa) and was last revised on 10 September 2015.

2. *Transnational soft law*

Those rules which consist of non-binding recommendations for the legislature and for those involved in cross-border insolvency proceedings can be categorised in a second group. A prominent example is the UNCITRAL Model Law on Cross-Border Insolvency of 15 December 1997, which has since been incorporated into the national law of 41 states[2]. In addition, different recommendations by international organisations should be mentioned, such as the Principles of Cooperation in Transnational Insolvency Cases among the NAFTA Countries (NAFTA Principles), which were formulated by the American Law Institute in 2000, or the Cross-Border Insolvency Concordat, which was created by the International Bar Association in 1996. Cooperation guidelines are helpful for practice, particularly the Global Principles for Cooperation in International Insolvency Cases (Global Principles) published by the American Law Institute in cooperation with the International Insolvency Institute in 2012, and the European Communication and Cooperation Guidelines for Cross-Border Insolvencies, presented by INSOL Europe in 2007.

3. *National law*

National rules on international insolvency law belong to the third

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[1] Henceforth, the EIR 2015 will be referenced, including regarding cases dated prior to when it will come into force.

[2] More on the Relationship between EIR and UNCITRAL Model Law by Bork, *Int. Insolv. Rev.* (2017), pp. 246–269.

group. Examples to be named include §§ 335 et seq. of the German Insolvency Regulation, which leans heavily on the EIR, as well as Chapter 15 of the US Bankruptcy Code, which builds upon the UNCITRAL Model Law. The United Kingdom has four legal regimes operating concurrently regarding cross-border insolvency cases: in relation to other Member States of the EU, the EIR still applies; in relation to Commonwealth states, s. 426 Insolvency Act 1986 (IA 1986) is applied; in relation to all other states, the provisions of the Cross-Border Insolvency Regulation 2006 apply, which incorporated the UNCITRAL Model Law into national English insolvency law. In addition, duties to cooperate can be derived from the *common law*[3].

III. Principles

The principles –here defined as core values and not, like in the Anglo-American linguistic tradition, as meaningful regulatory objects, objectives or solution to legal problems–[4] which can be inferred from these rules[5] can also be summarised into three groups: jurisdictional, procedural and substantive principles.

1. *Principles on the conflict of laws*

The first group concerns itself with jurisdictional principles on the collision of rights, which addresses the circumstances in which two sovereign states are involved in a cross-border insolvency case. Modern international insolvency laws generally base themselves on the principles of unity and universality:[6] there should fundamentally be only one single

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[3] On the history of this development Fletcher, in Santen – van Offeren (ed.), *Perspectives on International Insolvency Law: A Tribute to Bob Wessels, Kluwer* (Deventer, 2014), p. 55 et seq.; on the four sources of English international insolvency law Bowen, *IILR* (2013), p. 121 et seq.; Moss, Fletcher, in Santen – van Offeren (ed.), *Perspectives on International Insolvency Law: A Tribute to Bob Wessels, Kluwer* (Deventer, 2014), p. 95 et seq.; *Taylor*, in Affaki (ed.), *Faillite internationale et conflit de juridiction – Regards croisés transatlantique* (FEC/Bruylant, Paris/Bruxelles, 2007), p. 125 et seq. Taking a critical approach Williams – Walters, *ABIJ* 35.1 (2016), p. 16 et seq.

[4] Paradigmatic Wood, *Principles of International Insolvency Law* (2nd ed., Sweet & Maxwell, London 2007). Despite its title, this book is not about principles but rather about important regulatory objects: compare, for example, the heading of Part 3 of the book ("topics") with Wood, *IIR* 94 (1995) 4, p. 114 ("*key issues*").

[5] To keep the analysis suitably brief, the following text will predominantly analyse the EIR as well as the UNCITRAL Model Law.

[6] Regarding the EIR Recital 23, moreover *ECJ* case C-195/15 *SCI Senior*

set of proceedings opened against an insolvent debtor, which has worldwide application. The latter applies in any case from the perspective of the state opening the proceedings, which demands worldwide application of its "outgoing" proceedings, while it is another story as to whether other affected states will recognise the "incoming" insolvency proceedings as requiring recognition. The principle of equality of states, which can be found in Art. 2 (1) of the Charter of the UN, precludes a state from forcing worldwide application of its law on another, but the principle of mutual trust between states[7] proposes that if the insolvency law and the handling of the insolvency proceedings in the original state meet the required standards, the relevant state should be urged to recognise it. Regardless, the principle of cooperation and communication between the different organs taking part in the proceedings is generally recognised with regard to cross-border insolvency proceedings. The EIR acknowledges this principle, for example, in Art. 41 et seq. regarding the relationship between main and secondary insolvency proceedings and in Art. 56 et seq. regarding group insolvency proceedings; the UNCITRAL Model Law already recognises it in its Preamble, which names as its significant goal the encouragement of cooperation between procedural organs of the affected states, and also refers to it in Art. 25 et seq., which concerns itself extensively with the cooperation of courts and insolvency practitioners. In the context of international insolvency law, the principle of subsidiarity as well as the principle of proportionality also plug the gaps. The EIR refers to both in Recital 86[8], while other regulatory works do not mention them explicitly, but most likely build upon them implicitly.

Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG, ECLI:EU:C:2016:804 para. 17; on the UNCITRAL Model Law *In Re ABC Learning Centres Ltd*, 728 F.3d 301, 307 (3d Cir. 2013); Goode, *Principles of Corporate Insolvency Law* (4th ed., Sweet & Maxwell, London, 2011), para. 16-07, 16-08; Omar, in *Tribute to Bob Wessels…* cit. (n. 3), pp. 103-105; but see also United Nations Commission on International Trade Law, *Legislative Guide on Insolvency Law* (United Nations Publications, New York, 2005), I y II, p. 79, para. 14.

[7] For the Member States of the European Union, the principle of mutual trust is already engrained within European law; see also Recital 65 EIR, also *ECJ* case C-341/04 – *Eurofood*, ECLI:EU:C:2006:281 para. 39 and C-444/07 *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24 para. 27 et seq. In the sessions discussing the UNCITRAL Model Law, the guaranteeing of mutuality was contemplated but ultimately scrapped, see Lifland, in Affakim, cit. (n. 3), p. 31-54, para. 67.

[8] For a comparison, see also *ECJ* case C-649/13 *Comité d'entreprise de Nortel Networks SA und andere gegen Cosme Rogeau und Cosme Rogeau gegen Alan Robert Bloom und andere*, ECLI:EU:C:2015:384 para. 49; case C-292/08 *German Graphics Graphische Maschinen GmbH gegen Alice van der Schee*, ECLI:EU:C:2009:544 para. 24.

2. *Procedural principles*

Alongside the principles on collision of rights, there are the procedural principles. International insolvency law is shaped notably by the principle of efficiency, according to which the proceedings must provide the requested rights protection as quickly and comprehensively as possible. This can be found, among other places, in Recitals 3 and 8 of the EIR[9] as well as in the Preamble to the UNCITRAL Model Law. In addition, there is the principle of transparency: proceedings must be conducted publicly and transparently, so that those affected by them can take part and can bring their legal positions into the discussion. This principle is condensed into many provisions on publication, for example[10]. Of particular relevance is the principle of predictability (legal certainty). This principle is, for example, addressed in the EIR, in Recitals 28, 30 and 67[11], and the UNCITRAL Model Law newly busies itself with this concept in its Preamble. Furthermore, this is closely allied with the principle of procedural justice, which is already recognised in the wider European law with regard to the EIR and is referred to in Recital 83.[12] Finally, the principle of priority must be taken into account, according to which a first set of insolvency proceedings excludes the opening of a second set, including when the second set of insolvency proceedings would take place abroad[13].

3. *Substantive principles*

Up until now, the substantive principles remained largely unresearched, though they shape not only national but also international insolvency law. This particularly applies to the principle of equal treatment of creditors,

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[9] On this, among others, *ECJ* case C-339/07 *Seagon gegen Deko Marty Belgium NV*, ECLI:EU:C:2009:83 para. 22; case C-116/11 *Bank Handlowy w Warszawie SA und PPHU «ADAX»/Ryszard Adamiak gegen Christianapol sp. z o.o.*, ECLI:EU:C:2012:739 No. 62; case C-212/15 *ENEFI Energiahatékonysági Nyrt gegen Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*, ECLI:EU:C:2016:841 para. 22.

[10] For example, Art. 24 et seq. EIR (including specifically Recital 12), moreover Art. 14 UNCITRAL Model Law, Procedural Principle 13 NAFTA Principles, and Global Principle 25.1.

[11] On this also, among others, *ECJ* case C-195/*15 SCI Senior Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG*, ECLI:EU:C:2016:804 para. 28.

[12] For comparison, see furthermore *ECJ*, case C-341/04 – *Eurofood*, ECLI:EU:C:2006:281 para. 65 et seq.

[13] For the EIR, see Art. 62 as well as *ECJ* case C-341/04 *Eurofood IFSC Ltd.*, ECLI:EU:C:2006:281 para. 39, 49, 58; furthermore, see case C-444/07 *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24 para. 27.

according to which creditors of the same rank are to be treated identically, not only regarding their procedural rights but also regarding their substantive rights. Thus the EIR, according to its very own Recital 63, stands likewise on the foundations of the principle of equal treatment of creditors[14], just like the UNCITRAL Model Law, which explicitly emphasises the principle in its accompanying *Guide to Enactment and Interpretation*[15]. Both regulatory works thus pursue –in the interest of optimal satisfaction of creditors– the principle of the best possible realisation of the debtor's assets, with the UNCITRAL newly referring to this in its Preamble, while the EIR references it in Recital 48. The UNCITRAL Model Law aligns itself with the principle of proportionate protection of the debtor in its Preamble as well as Art. 22, while the EIR refers to it, among other places, in the provisions of Art. 78 et seq. on data protection. Above all, however, both regulatory works hold the principle of protection of trust[16] in high regard: the EIR makes clear reference to this in Recital 67 as well as in Art. 8 et seq., which details exceptions to the use of the *lex fori concursus* that are particularly pertinent for the secured creditor[17] and for the addressee of a transactions avoidance measure[18]; the UNCITRAL Model Law refers to it once more in its Preamble and in Art. 22, which provides the foundations for the protection of trust. Finally, the principle of social protection is of considerable significance, which is reflected in Art. 13 EIR primarily for the benefit of employees, and also in Art. 11 for the protection of tenants[19].

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[14] For a comparison, see also *ECJ* case law C-195/15 *SCI Senior Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG*, ECLI:EU:C:2016:804 para. 31; case C-212/15 *ENEFI Energiahatékonysági Nyrt gegen Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*, ECLI:EU:C:2016:841 para. 23, 33.

[15] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency Law with Guide to Enactment and Interpretation* (United Nations Publications, New York, 2014, para. 240.

[16] More extensively on this Bork, in *Festschrift Klamaris* (Sakkoulas Publications, Athens, 2016), p. 77 et seq.

[17] On this, see below at IV.2.; comparatively, see *ECJ* case C-195/15 *SCI Senior Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG*, ECLI:EU:C:2016:804 para. 17 et seq., 28.

[18] On this *ECJ* case law C-310/14 *Nike European Operations Netherlands BV gegen Sportland Oy*, ECLI:EU:C:2015:690 para. 18; case C-557/13 *Hermann Lutz gegen Elke Bäuerle*, ECLI:EU:C:2015:227 para. 34, 54.

[19] For a comparison, see on the latter Bork - van Zwieten - Snowden, *Commentary on the European Insolvency Regulation* (Oxford University Press, Oxford, 2016), para. 11.1.; moreover Bork – Mangano, *European Cross-Border Insolvency Law* (Oxford University Press, Oxford, 2016), para. 4.81; Hess – Oberhammer – Pfeiffer Piekenbrock, *European Insolvency Law*, C.H.Beck/Hart/Nomos (2014), para. 798;

4. *Hierarchies of principles*

The prominent principles outlined previously can also be depicted within hierarchies. Thus, the particularly influential principles of equal treatment of creditors and optimal realisation of the debtor's assets are supported by the principles of unity (which is itself bolstered by the priority principle), of universality, of cooperation and communication, and of efficiency, for example. Since they are oriented towards the protection of those affected by the proceedings, substantive protection of those involved (for the creditors through the principle of equal treatment and the principle of optimal realisation of the debtor's assets; for the debtor likewise through the principle of optimal realisation of their assets as well as the principle of social protection) differs from procedural protection of those involved, which concerns the principles of transparency, predictability and procedural fairness. One must certainly take care not to derive legal consequences from such systemising hierarchies. Rather, it depends in this regard on the correct weighing up of the relevant principles.

IV. Principle-oriented solutions

This should thus be demonstrated by way of a few problems which are prevalent in international insolvency law.

1. *Case law*

There are numerous examples in the case law of a principle-oriented use of the law. The first example that can be referred to here is the decision of the ECJ in *MG Probud*[20]. In the pending case, a German court had refused to recognise Polish insolvency proceedings and had ordered that the accounts of the insolvent debtor were frozen and seized. This breached many different principles in international insolvency law. Due to the principle of unity, there could be only one set of proceedings for MG Probud. These must be the Polish proceedings, which would exclude parallel German proceedings in accordance with the principle of priority. On the basis of the principle of universality, the Polish proceedings have worldwide effect and were to be automatically recognised in Germany (Art. 19 EIR). The barrier to recognition provided by a violation of the *ordre public* (Art. 33 EIR) must be interpreted narrowly, since it is an exception to the prominent principle of universality. This and the principle of mutual

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Kienle, NotBZ 2008, 245, 254; Virgós – Schmit, *Report on the Convention on Insolvency Proceedings*, EC Council Document 6500/96 of 3 May 1996, para. 118; Wessels, *International Insolvency Law* (3rd ed., Kluwer, Deventer, 2012), para. 10685.

[20] *ECJ* case C-444/07 *MG Probud Gdynia sp. z o.o.*, ECLI:EU:C:2010:24.

trust lead to the result that seizing the accounts was impermissible due to the opposing Polish insolvency proceedings.

While this decision is beyond reproach, the decision of the Supreme Court of Canada in the case *Antwerp Bulkcarriers*[21] can only be described as extraordinarily problematic. Here, a Belgian insolvency practitioner had demanded from the Canadian authorities the conveyance of a ship belonging to the debtor, by way of a claw-back action arising from the insolvency; the ship had been attached by US creditors and was located in Canada. In this case, one must also go from the basis of the principle of unity of proceedings: there could only be one set of proceedings governing the assets of the Belgian debtor, through which the Belgian proceedings excluded Canadian proceedings due to the principle of priority. On the basis of the principle of universality, the Belgian proceedings had worldwide effect and in accordance with the principle of cooperation, the Canadian authorities must support the Belgian proceedings. The principle of mutual trust also spoke in support of this, i.e. that the Canadian authorities were to trust in the Belgian insolvency law and the Belgian insolvency proceedings. Nevertheless, the Supreme Court of Canada refused conveyance of the ship, indeed with the unacceptable justification that foreign insolvency law must reflect the rules of Canadian insolvency law: the protection of secured creditors was a very important goal in Canadian insolvency law, while international coordination of insolvency proceedings was indeed important but not necessarily a decisive factor.

In contrast, the decision of the Full Federal Court of Australia in the case *Akers v. DCT*[22] is praiseworthy. In this case, an insolvency practitioner from the Cayman Islands demanded conveyance of assets belonging to the debtor from the Australian authorities. The Australian tax authorities refuted this, wanting to use the assets to satisfy its own claims against the debtor. According to the principle of universality, the proceedings in the Cayman Islands had worldwide effect and the principle of cooperation, as well as the principle of mutual trust, demanded that the Australian authorities put their trust in, and show their support for, foreign insolvency law and foreign insolvency proceedings. The court also came to a different conclusion than *MG Probud*, but this time with good reason, since the insolvency law of the Cayman Islands –which incidentally differed from

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[21] *Antwerp Bulkcarriers N. V. v. Holt Cargo Systems, Inc.* [2001] 3 S.C.R. 951; see also *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)* [2001] 3 S.C.R. 907 as well as the enlightening analysis of both decisions by Pottow, *Mich. L. Rev.* 104 (2006) pp. 1899-1922 et seq.

[22] *Akers as joint foreign representative v. Deputy Commissioner of Taxation* [2014] FCAFC 57; on this Atkins – McCoy, en *ICR* 11 (2014), p. 304 et seq.

Art. 2(12) EIR–[23] excluded participation regarding foreign tax claims. This violates the principle of equal treatment of creditors and represents discrimination which clashes with the principle of procedural justice, thus there was no reason to trust in the appropriateness of the foreign proceedings and an exception could be made to the usual pre-eminence of the principle of universality.

2. *Legislation*

A principle-oriented approach can also simplify the work of the legislature and can simultaneously support the critical analysis of existing rules. Taking, for example, Art. 8 EIR into consideration, the unsustainability of this norm becomes quickly evident. According to this norm, the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. According to current prevailing opinion, this means that regarding secured assets which are located in a Member State other than the one in which insolvency proceedings are opened, neither the insolvency law of the opening State (*lex fori concursus*) nor that of the State in which the secured asset is located (*lex situs / lex rei sitae*) is applicable. Instead, the security remains untouched by all insolvency law and is instead dealt with by the securities law that would otherwise be used on it[24]. The background to this is that while all national insolvency laws respect securities, they have differing rules on their use and realisation of the secured asset as well as on liability for the realisation costs. The EIR justifies this in Recitals 67 and 68 using the principle of predictability (legal certainty) and of legitimate expectations, and this is followed by the decision of the ECJ in the case *Erste Bank Hungary*[25].

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[23] See also *ECJ* case C-195/15 *SCI Senior Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG*, ECLI:EU:C:2016:804 para. 31; case C-212/15 *ENEFI Energiahatékonysági Nyrt gegen Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*, ECLI:EU:C:2016:841 para. 38.

[24] *ECJ* case C-195/15 *SCI Senior Home (in administration) gegen Gemeinde Wedemark/Hannoversche Volksbank eG*, ECLI:EU:C:2016:804 para. 17 et seq.; case C-527/10 *ERSTE Bank Hungary Nyrt gegen Magyar Állam und andere*, ECLI:EU:C:2012:417 para. 41; case C-557/13 *Hermann Lutz gegen Elke Bäuerle*, ECLI:EU:C:2015:227 para. 38 et seq.; Bork – Mangano, cit. (n. 19), para. 4.66 et seq.; *M*ankowsk – Mülle – Schmidt, *EIR* 2015 (Munich, 2016), Art. 8 para. 34.

[25] *ECJ* case C-527/10 *ERSTE Bank Hungary Nyrt gegen Magyar Állam und andere*, ECLI:EU:C:2012:417.

However, there are many doubts as to whether this served as a proper solution[26]. Instead, the opposing principles of universality, equal treatment of (secured) creditors, procedural justice and optimal realisation of the debtor's assets collide with those which support regulation, such as the principle of predictability (legal certainty), protection of trust and efficiency of proceedings. If one looks closer, this regulatory approach proves to be untenable, when it is scrutinised using a principle-oriented analysis. What is preferable is a norm which subjugates *in rem* credit securities to the insolvency law of the state in which proceedings were opened (*lex fori concursus*) and thus puts into practice not only the principle of universality, but above all the principles of procedural justice and equal treatment of all secured creditors, regardless of whether the secured asset is located in the State in which proceedings were opened or it is located in another Member State.

With respect to the norm and the leading principle of predictability (legal certainty), one must acknowledge that every clear rule ensures legal certainty. The limitless application of the *lex fori concursus* is also a clear rule, which the secured creditor can prepare themselves for in advance. It is true that the applicable insolvency law is then dependent on the COMI (centre of main interests) of the debtor at the point in time at which proceedings were opened, but this is normally evident. The ascertainment of the *lex fori concursus* may well be difficult *ex ante* (i.e. at the point of acquiring the security) but this has nothing to do with legal certainty.

With a view to the principle of efficiency, one must concede that the use of the *lex fori concursus* is less efficient at the point in time at which the security is acquired. However, first of all, this concerns people who get involved with and take securities from foreign debtors, who are normally

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[26] For criticism, amongst other commentary, Bork, cit. (n. 1), para. 6.12 et seq.; Bork, *Festschrift Klamaris…* cit. (n. 16), p. 79 et seq.; Bork – van Zwieten, cit. (n. 19), para. 0.49; van Galen – André – Fritz – Gladel – van Koppen – Marks – Wouters, *Revision of the European Insolvency Regulation, Proposals by INSOL Europe* (INSOL Europe, Nottingham, 2012), p. 52 para 5.6 et seq.; Paulus, *IILR* (2014), pp. 366-369 ff.; Veder, *IILR* (2011), pp. 285-289 et seq.; Virgós – Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer Law International, The Hague, 2004), para. 164; Wessels, cit. (n. 19), para. 10640b; Wiórek, *Das Prinzip der Gläubigergleichbehandlung im Europäischen Insolvenzrecht* (Baden-Baden, 2005), p. 236 et seq. In contrast, the norm is defended by Fletcher, *Insolvency in Private International Law* (2nd ed., Oxford University Press, Oxford, 2005), para. 7.87; Moss – Fletcher – Isaacs – Fletcher, *The EC Regulation on Insolvency Proceedings* (Oxford University Press, 3rd ed., Oxford 2016, para. 4.11 et seq.; Sheldon - Arnold, *Cross-Border Insolvency, Bloomsbury Professional* (4th ed., Haywards, Heath, 2015), para. 2.76.

professional providers of credit, for whom the extra effort incumbent upon investigating foreign insolvency law is manageable; second, the application of the *lex fori concursus* to this is more efficient when it is done as part of the insolvency proceedings themselves, since the insolvency practitioner can use the same law for all securities, regardless of their location, and is liberated from the need to investigate foreign insolvency law.

The principle of protecting trust also does not tend to justify the norm. Only reasonable expectations can be protected, and the expectation of being freed from the imposition of all insolvency law is not reasonable enough to be worthy of protection; whoever provides a loan must reckon with potential insolvency of the individual/institution taking out the loan, and thus must reckon with the application of at least one set of insolvency laws. The expectation that one will only be confronted with the *lex rei sitae* is also not worth protecting. If you provide a loan to a foreign debtor, then foreign proceedings, which are conducted according to foreign law, should not come as a surprise. The fact that the secured asset is located in a Member State other than the State in which insolvency proceedings were opened therefore does not create an exception for the purposes of protecting trust. Besides, Art. 8 EIR, in linking itself to the location of the asset at the time of the proceedings being opened, chooses the wrong time frame. This aspect not only fuels the temptation to move the secured asset abroad before proceedings begin, but it also overlooks the fact that trust has already been invested at the point in time at which the security is created. Therefore, it would be preferable if, in stark contrast to Art. 8 EIR as it currently stands, the security right *in rem* were subject to the *lex fori concursus*, which would also allow those with the security right to prove that the COMI of the debtor was in a Member State other than the one in which proceedings were commenced when the security was acquired.[27]

3. *Harmonisation*

A final area of use for principle-oriented solutions is for the purpose of harmonising international insolvency law. Many organisations are working on this task, though interestingly enough there is currently no elaborate theory on harmonisation. It lies beyond the remit of this article

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[27] A suggestion for the formulation of the provision would be as follows. (1) The law of the State in which insolvency proceedings were opened determines the effect of the insolvency law on proprietary rights. (2) Insofar as the secured creditor proves that the debtor had the centre of his main interests in a Member State other than the one in which proceedings were opened when the security was acquired, the law of this other State will determine the effect of the insolvency proceedings on proprietary rights.

to develop such a theory[28], but perhaps the following considerations can make a small contribution to discussion of this topic.

First of all, there should be a consensus on the idea that the harmonisation of international insolvency law is necessary and useful[29]. A unifying rule in this area of law which applies to many states, within its area of application, reduces the complexity which arises from the competing usage of divergent national laws. This also reduces the costs for both cross-border transactions, which must be conducted in anticipation of the possibility that one or more of the parties could become insolvent in the future, and for cross-border insolvency proceedings, since both must no longer concern themselves with legal systems other than the *lex fori concursus*; determining the laws of other systems and how they apply to the current legal system is very resource-intensive. Furthermore, a harmonised international insolvency law supports its own principles. Proceedings would become more efficient if they were freed from need to deal with divergent regulations.[30] Unburdening practitioners etc. from such a costly task is thus completely in line with the principle of efficiency, and it also furthers the principle of optimal realisation of the debtor's assets. In addition, legal certainty and

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[28] Initial remarks were made by Faria, *Unif. L. Rev.* 14 (2009), p. 5 et seq., and there are enriching contributions in: Andenas – Baasch Andersen (eds.), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, Cheltenham, UK/Northampton, MA, 2012) above all the considerations of Andenas – Baasch – Andersen – Ashcroft, Ibid., p. 572 et seq. Also helpful are the methodological considerations of Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed., Wolters Kluwer, Alphen aan den Rijn, 2010), *passim*.

[29] Only to be seen in UNCITRAL, (n. 15), para. 5 et seq.: "However, national insolvency laws by and large have not kept pace with the trend, and they are often ill-equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to a fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation and hinder maximization of the value of those assets. Moreover, the absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment (…). Fraud by insolvent debtors, in particular by concealing assets or transferring them to foreign jurisdictions, is an increasing problem, in terms of both its frequency and its magnitude. The modern, interconnected world makes such fraud easier to conceive and carry out".

[30] From the perspective of an economic analysis of the law Gomez, in Hartkamp/Hesselink/Hondius – Mak – du Perron (eds.), *Towards a European Civil Code* (4th ed., Wolters Kluver, Alphen aan den Rijn, 2011), p. 401 et seq. with further references in Fn. 6 and on p. 423 et seq.; Wool, *Unif. L. Rev.* 8 (2003), p. 389 et seq.

mutual trust is strengthened if all legal systems use the same rules, and this also encourages the acceptance of the principle of universality, since there are barely any reasons for not recognising the worldwide application of proceedings launched by another state if this area of law is harmonised anyway.[31] This also enforces the principle of equal treatment of creditors,[32] since exceptions to protect local creditors become unnecessary if they are given exactly the same protection abroad as they would receive as a local creditor.

However, this should not be about the encouragement of principles through harmonisation but rather the reverse: the encouragement of harmonisation through principles. A three-step principle-oriented harmonisation can be conceptualised. First, it is helpful not to begin harmonisation efforts with finding different solutions for identical problems, since that almost automatically ignites arguments over who can offer the best solution. Instead, it is preferable to begin with ascertaining the principles, in other words to make sure that the participating legal systems all base themselves on the same principles, which can be described in detail.

The question which should then be addressed is which regulations are typically indicated by these principles. The principle of equal treatment of creditors demands, for example, rules on informing and the rights to participate of foreign creditors (including public creditors), on the proportionate distribution of proceeds from realisation obtained locally and in other states, as well as the consistent usage of the same insolvency law norms for all involved, including norms on credit securities and claw-back actions. The principle of universality especially demands provisions on international jurisdiction, the recognition of foreign proceedings as well as the cross-border effect of recognised proceedings, the implications of questions on the applicable law, and moreover on the provision of support for foreign insolvency proceedings.

During both of these initial stages, the goal is only to formulate the right questions, not to answer them just yet. The insight that despite different cultural and legal backgrounds, different states are fundamentally in agreement and can identify the same regulatory themes on the basis of the same foundations, can certainly have an encouraging effect on further

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[31] Franken, *ELJ* 11 (2005), pp. 232-247.

[32] Jabez Henry, the late British judge and author of the guiding decision *Odwin v. Forbes* ([1817] 1 Buck 57, 60), was already demanding a harmonised international insolvency law in 1825, "[in order to] place the subjects of each [state] on a footing of equality as to those rights which they are equally acknowledged to possess" (cited in Nadelmann, *ICLQ* 10 (1961), pp. 70-77); see also Graham, *CLP* 42 (1989), pp. 217-224; Omar, *IIR* 11 (2002), pp. 173-184.

harmonisation efforts, because the emphasis here is still not on controversial solutions to practical problems, but rather on consensus over the principles.[33] If the negotiating partners are, for the first time, presented with the possibility of consensus (here probably regarding their approach, as well as the principles and the regulatory themes arising therefrom), they are likely to go into discussions about concrete regulatory suggestions with a more open mind.

Of course, at the end of the day, concrete issues must still be addressed by concrete norms. However, it can be helpful here not to stumble headlong into competing to decide who has the best national laws, but instead to determine what seems like an appropriate solution according to the principles.[34] For example, the principle of universality insists that insolvency proceedings possess worldwide validity. Accepting this –and thus simultaneously showing deference to the principle of mutual trust– can be easier if one is assured that these proceedings are based on a legal structure which, in spite of all of the differences when it comes down to details, is based on the same cornerstones as one's own insolvency law.[35] If the parties are thus in agreement during harmonisation negotiations on the principle of universality (which is nowadays largely the case), then all problems are admittedly not solved, but an important step has been made. This can also encourage the parties to face more controversial themes, such as the treatment of proprietary rights. As was explained above[36], a provision such as Art. 8 EIR is not justifiable under a principle-oriented analysis. The strict, exclusive use of the *lex fori concursus* would be more principle-oriented, while the use of the insolvency law of the State in which the secured asset is located would be acceptable as a compromise, but the exclusion of all insolvency law would be in no way suitable to a principle-oriented approach.

It should not be underestimated that a principle-oriented harmonisation process must overcome significant hurdles. It spans from the influences on international insolvency law of other areas of law which are also capable of harmonisation (such as labour law, company law or tax law, which are all shaped by their own principles[37] that differ from those of international insolvency law) to irrelevant, protectionist influences. However, a principle-oriented approach at least enables the naming of irrelevant

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[33] See also Pottow, Mich. L. Rev. 104 (2006), pp. 1899-1929 et seq.

[34] Also on the necessity of taking basic principles into consideration during harmonisation Gaa, *Int'l. Law.* 27 (1993), pp. 881-884 et seq., p. 893 et seq.

[35] Pottow, *Mich. L. Rev.* 104 (2006), pp. 1899-1931 et seq.

[36] See IV.2.

[37] Franken, ELJ 11 (2005), pp. 232-247.

factors and the critical analysis of rules which have come into force due to their pernicious influence. It can likewise encourage a fruitful exchange of ideas and opinions[38] and can help those involved become accustomed to thought which encourages harmonisation, step by step, such as the idea that legal systems can have effects that go beyond the borders of their own states.[39] On the basis of this, worldwide harmonisation of international insolvency law indeed seems improbable, but not impossible.[40]

[38] Lenaerts – Gutiérrez – Fons, *CML Rev*. 47 (2010), pp. 1629-1630.
[39] Pottow, *Virg. J. Int'l. L.* 45 (2005), pp. 935-1011.
[40] Westbrook, *Mich. L. Rev.* 98 (2000), pp. 2276-2294.