Insolvent Cross-Border Estates of Deceased Persons

Concurrence of the Succession and Recast Insolvency Regulations

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Contents

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I. Introduction

This article examines the administration of insolvent cross-border estates within the European Union with respect to two applicable European regulations. In particular, it discusses the "clash" between the Recast EU Insolvency Regulation 2015/848[1] (also: RIR) and the Succession Regulation 650/2012[2] (Rome IV; also: SR), which both deal with insolvent cross-border estates. Also, the contribution pays attention to the fact that in some EU Member States the Recast Insolvency Regulation does not apply to insolvent estates if the estate was not declared bankrupt before the demise of the person in question. The article argues that if special proceedings exist for the administration of insolvent cross-border estates which meet the requirements of Article 1 RIR, which are not listed in Annex A of the Recast Insolvency Regulation, such proceedings should still be added to Annex A. In legal scholarship, thus far only little attention has been paid to the administration of insolvent cross-border estates within the European Union in general and to the interrelationship between the applicable private international law rules of these regulations.[3]

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[1] Regulation (EU) No 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (Recast Insolvency Regulation), OJ 2015 L 141/19.

[2] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (Succession Regulation), OJ 2012 L 201/10.

[3] An explanation for this may be that the subject matter lies at the intersection between two different areas of the law. Cf. *Max Planck Institute for Comparative and International Private Law*, Comments on the European Commission's Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Succession and the Creation of a European Certificate of Succession, RabelsZ 74 (2010) 522, 711–714 (Art. 45a); *Haris Pamboukis*, in: Pamboukis, EU Succession Regulation No 650/2012: A Commentary (2017) Art. 76, paras. 1–9; *Alessandra Zanobetti*, in: Caravaca / Davi / Mansel, The EU Succession Regulation: A Commentary (2016) Art. 76, paras. 1–3; and for Dutch law: *A.P.M.J. Vonken*, Mr. C. Asser's

When dealing with insolvent cross-border estates, the two regulations show both similarities and differences. Thanks to the contribution of the Max Planck Institute, Hamburg, Article 76 SR was added to the Succession Regulation to tackle the problems related to the "complex interaction" between both regulations, and to address the need for effective creditor protection.[4] The provision states that the Succession Regulation will not affect the application of the Insolvency Regulation. Its meaning will be discussed in further detail below.[5] It should be noted that although Article 76 SR refers to the (now repealed) EU Insolvency Regulation 1346/2000,[6] which was replaced by the Recast Insolvency Regulation, it should be understood that the Succession Regulation does not affect the application of the Recast Insolvency Regulation or the Insolvency Regulation, whichever regulation is applicable.[7]

The structure of this contribution is as follows. It first defines and clarifies the concept of insolvent estates (section II.). Then it examines the scope of both regulations, in particular in which cases both regulations apply and when they do not, thereby discussing the impact of Annex A (section III.). Thereafter, this contribution analyses in its first part the case in which both regulations apply to the administration of the insolvent cross-border estate. It discusses the main differences and similarities between the applicable rules on jurisdiction (section IV.), the applicable law (section V.) and the recognition, enforceability and enforcement of decisions (section VI.) in both regulations. In addition, the article discusses the possible implications of Article 76 SR for the European Certificate of Succession (section VII.). It then further examines on which matters exactly both regulations clash, providing an overview of the topics that are only covered by either the Succession Regulation or the Recast Insolvency Regulation and the topics that are covered by both regulations (section VIII.), followed by a discussion of the pitfalls in the administration of insolvent cross-border estates to which only the Succession Regulation applies in a particular Member State, but not the Insolvency Regulation (section IX.). Finally, the article summarizes the meaning of Article 76 SR and concludes with proposals for amendments to the Succession Regulation and the Recast Insolvency Regulation with respect to insolvent cross-border estates (section X.).

Handleiding tot de beoefening van het Nederlands burgerlijk recht, Vol. 10, Part 2: Internationaal personen-, familie- en erfrecht[2] (2016) 629.

[4] *Max Planck Institute*, RabelsZ 74 (2010) 522, 714.

[5] We will not deal with insolvent successors or insolvent creditors of the estate, as the estate itself should not be affected by these collective insolvency proceedings.

[6] Regulation (EC) No 1346/2000 of the Council of 29 May 2000 on insolvency proceedings (Insolvency Regulation), OJ 2000 L 160/1.

[7] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 1. This is because, pursuant to Art. 91 RIR, references to the repealed Insolvency Regulation are to be construed as references to the Recast Insolvency Regulation.

II. Some remarks on "insolvent estates"

Succession law often deals with passing on wealth,[8] with the goal of benefiting a spouse, one's offspring or others. Considerably less attention has been paid in legal scholarship to passing on debts or other problems, and, in line with this, passing on insolvency.[9] Insolvent estates often go hand-in-hand with beneficiaries protecting themselves against the risk of becoming liable for the deceased's debts by waiving the succession or, if possible, accepting the inheritance with a limitation on their liability. Two different cases of insolvent estates can be distinguished. First, the deceased was already insolvent before his death, and bankruptcy proceedings had already been opened. The bankruptcy may end upon death or be continued.[10] Second, only after the person has died does it become apparent that there are more debts than assets in the estate of the deceased person, and a bankruptcy procedure or another, similar, insolvency procedure may apply.[11] Whereas the first case is clear-cut, the second may require some further elaboration by further distinguishing some categories.

One category is an inheritance where the husband and wife were married, and the surviving spouse has not only inherited many or all assets of the estate of the deceased spouse, but also the debts arising out of the inheritance vis-à-vis – for example – the children of the deceased spouse. If the claims of the children have high interest rates, for example for the purpose of evading or lowering succession tax, or if the surviving spouse has used up most of the assets, the estate of the surviving spouse may turn out to be insolvent. As the claims of the children are usually only due and payable upon the death of the surviving spouse, the problem of an insolvent estate will not be apparent during the life of the surviving spouse.

Another category is an inheritance where, upon the administration of the estate, which includes the sale of assets, it transpires that the assets cannot cover the debts to be paid. For example, following the economic crisis in 2008, the housing market in several EU Member States, such as the Nether-

[8] Cf. for example *Alexandra Braun / Anne Röthel*, Passing Wealth on Death: Will-Substitutes in Comparative Perspective (2016).

[9] Cf. *Jan Peter Schmidt*, Transfer of Property on Death and Creditor Protection: The Meaning and Role of Universal Succession, in: Festschrift for George L. Gretton (2017) 323–337, with references to the few publications on this subject, including *Max Rheinstein*, European Methods for the Liquidation of the Debts of Deceased Persons, Iowa L.Rev. 20 (1935) 431. Cf. further *Kurt Nadelmann*, Insolvent Decedents' Estates, Mich.L.Rev. 49 (1951) 1129–1162; and for Dutch legal scholarship, e.g. *Jan Biemans*, Insolventie en het notariaat (2015) ch. 3, with further references to Dutch literature.

[10] Under Dutch law, for example, if the "schuldsanering natuurlijke personen" ("natural person's debt rescheduling") applied to the insolvency of the deceased person, this procedure will end upon the death of this person.

[11] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 7, who is also of the opinion that both regulations apply if insolvency proceedings are commenced after the death of the person.

lands, Spain and Ireland,[12] went into a crisis, leading to a decrease in the market value of real estate. Being financed by banks for often 100% or more of the initial purchase price of the house, many homeowners had home purchase loans with a higher balance than the free-market value of their homes (a so-called "underwater" mortgage). As long as people did not sell their house and paid the monthly installment and interest, there would be no problems and they could hope for better times. However, upon the death of the homeowner, the loan would automatically be terminated and become due and payable, forcing the heirs to either refinance the loan or sell the house. The negative balance of the testator would thus become problematic upon his death, making the inheritance insolvent.

A third category is a criminal inheritance. An inheritance may have a criminal nature due to various criminal offences relating to the estate or to the deceased, these ranging from social security fraud to white collar crimes such as tax evasion to outright drug trafficking and organized crime. The deceased person may have been murdered. Creditors will include the tax authorities, often filing considerable tax claims for unpaid taxes, and the Ministry of Justice, with considerable claims as well for the confiscation and recovery of illicit assets. Due to the amount of these (often contested) claims by the tax authorities and the Ministry of Justice, the criminal estate will be insolvent as well.[13] Most criminal inheritances are often also cross-border inheritances, for example because money has been hidden in Swiss banks or in trusts in the Cayman Islands or other tax havens.

The last category to be mentioned is the case where the testator foresees his bankruptcy and ends his life before he can be declared bankrupt. If the testator was married and/or had one or more companies, often the estate of the surviving spouse, the companies and the inheritance estate may together be declared bankrupt.[14]

III. Scope (I) – A first exploration and impact of Annex A

1. General remarks on its scope

Although it is not explicitly stated, both the Recast Insolvency Regulation and the Succession Regulation deal only with estates which contain at

[12] Cf. *Miriam Anderson / Esther Arroyo Amayuelas*, The Impact of the Mortgage Credit Directive in Europe (2017) ch. 8, 9, 11.

[13] See for two Dutch examples: Rechtbank (District Court) Oost-Brabant 20 June 2013 (*Aran de Jong*), ECLI:NL:RBOBR:2013:CA3940; Hof (Court of Appeal) Amsterdam 23 December 2014 (*Willem Endstra*), ECLI:NL:GHAMS:2014:5509.

[14] For example: Rechtbank (District Court) Amsterdam 8 March 2017 (*Sjoerd Kooistra*), ECLI:NL:RBAMS:2017:1516.

least one *cross-border* element.[15] We will not further elaborate on this, but we take the cross-border element as a starting point in examining where the scope of both regulations overlaps.

The Succession Regulation applies to "succession to the estates of deceased persons", including the administration of the estate (Article 1(1) SR; and cf. Articles 29 f. SR).[16] Logically, it does not apply to legal entities, although it may apply to the estates of deceased businesspersons or traders. Article 76 SR implies that the Succession Regulation also applies to insolvent cross-border estates. The Succession Regulation does not clash with most other EU regulations, as generally "wills and successions" are excluded from the scope of these regulations, which is the case in Rome I,[17] Rome II,[18] Rome III,[19] Brussels I*bis*[20] and the Debt Recovery Regulation.[21] Brussels I*bis* also excludes insolvency proceedings from its scope.[22]

According to Recital 9 RIR, the Recast Insolvency Regulation applies to "insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual", and these proceedings are defined in Article 1(1) RIR and are listed exhaustively in Annex A.[23] National insolvency

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[15] This follows primarily from Art. 81 TFEU, which gives the EU the power to regulate only matters with cross-border implications. See also *Iveta Rohová / Klára Drličková*, Habitual Residence as a Single Connecting Factor under the Succession Regulation, International Journal of Law and Politics 1 (2015) 107, 109 n. 13. However, with regard to the Recast Insolvency Regulation, see: ECJ 16 January 2014 – Case C-328/12 (*Schmid v. Hertel*), ECLI:EU:C:2014:6.

[16] Several issues are excluded from the scope of the regulation (Art. 1(1) SR), but they are not relevant for the purpose of our contribution.

[17] Art. 1(2) lit. c Regulation (EU) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.

[18] Art. 1(2) lit. b Regulation (EU) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.

[19] Art. 1(2) lit. h Regulation (EU) No 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10.

[20] Art. 1(2) lit. f Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I*bis*), OJ 2012 L 351/1. Cf. Art. 2(2) lit. b Regulation (EC) No 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

[21] Art. 2(2) lit. b Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account reservation order procedure to facilitate cross-border debt recovery in civil and commercial matters, OJ 2014 L 189/59.

[22] Art. 1(2) lit. b Brussels I*bis* excludes "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements [= scheme of arrangements], compositions and analogous proceedings".

[23] Insolvency Regulation 1346/2000 applied to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator" (Art. 1(1) IR).

procedures not listed in Annex A are not covered by the Recast Insolvency Regulation (Recital 9).[24]

Although it does not contain any references to insolvency proceedings related to the estates of deceased persons, Article 76 SR implies that the Recast Insolvency Regulation may also apply to such proceedings, as long as the applicable insolvency proceeding to which the scope of the Insolvency Regulation refers is listed in Annex A. From this we can conclude that the Recast Insolvency Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a deceased "natural person", whether "a trader or an individual", and whether or not the insolvency proceedings are opened before or after the death of the person, as long as the insolvency proceeding is listed in Annex A of the Recast Insolvency Regulation. In these cases, the Recast Insolvency Regulation and the Succession Regulation may clash.[25]

2. Comparative perspective: Annex A and proceedings regarding insolvent estates of deceased persons

It has to be determined per Member State whether a particular procedure that is applicable to an insolvent estate of a deceased person is listed in Annex A. Comparative research shows that Member States differ in this regard.[26]

For example, the process for deceased natural persons in Scotland is sequestration.[27] In England and Wales it is bankruptcy.[28] The same general

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[24] Cf. ECJ 8 November 2012 – Case C-461/11 (*Ulf Kazimierz Radziejewski v. Kronofogdemyndigheten i Stockholm*), ECLI:EU:C:2012:704.

[25] Cf. Caravaca / Davi / Mansel / *Zanobetti* (n. 3) Art. 76, para. 2, who sums up various examples of this; cf. also *Max Planck Institute*, RabelsZ 74 (2010) 522, 711–714.

[26] Succession law may also influence whether insolvency law applies. In some Member States, if the heirs are personally liable for the deceased's debts, the estate cannot be liable, and it can only be the heirs' insolvency that should be dealt with.

[27] s. 5 Bankruptcy (Scotland) Act 2016; cf. *George Gretton / Andrew Steven*, Property Trusts and Succession[3] (2017) para. 26.49. If someone dies insolvent, a creditor can apply, as an alternative to applying for sequestration, to be made the dead person's executor. This is called "confirmation as executor-creditor"; it is available only if there is no ordinary executor in office, and it is available regardless of whether the person was testate or intestate. The executor-creditor is nowadays uncommon. In this case, the executor-creditor can realize assets only up to the amount that he is owed. If some of the estate remains after he has paid himself, another creditor can use the same procedure. Therefore, generally speaking, the question of paying other creditors does not arise. Scottish lawyers do not see it as an "insolvency" proceeding but rather as a form of execution for debt by a particular creditor. Cf. correspondence with (and owing a debt of gratitude to) Prof. George Gretton and Andrew Steven, both from the University of Edinburgh. An executor-creditor is not listed in Annex A of the Recast Insolvency Regulation.

[28] Art. 421(1) Insolvency Act 1986 (on insolvent estates of deceased persons). Cf. *Max Planck Institute*, RabelsZ 74 (2010) 522, 712f.

principles apply whether or not the person has died before the insolvency.[29] Both insolvency proceedings are listed in Annex A of the Recast Insolvency Regulation. The applicable law in Scotland refers to the Recast Insolvency Regulation for the purpose of opening secondary proceedings.[30]

Under Spanish law, if the estate has been accepted by the heir or heirs with limited (*intra vires*) liability, it can be subject to insolvency proceedings and the Spanish Bankruptcy Act[31] applies. If, instead, acceptance has taken place so that the heir is personally liable for the deceased's debts (*ultra vires hereditatis*), the estate is not insolvent; if that is the case, it is the heir's insolvency that should be dealt with, by means of the Bankruptcy Act as well. In both cases, the applicable insolvency proceeding is the "concurso de acreedores" listed in Annex A of the Recast Insolvency Regulation.[32]

Also under German law, insolvency proceedings may be opened for the estate of a deceased person.[33] In addition to the general provisions, the German Insolvency Act contains special provisions dealing with insolvent estates.[34] The applicable insolvency proceeding ("Insolvenzverfahren") is listed in Annex A of the Recast Insolvency Regulation.

However, if a Member State has a particular insolvency proceeding that applies to insolvent estates of deceased persons and which is not listed in Annex A of the Insolvency Regulation, the Insolvency Regulation does not apply and only the Succession Regulation does. This is for example the case in the Netherlands.[35] If a person has been declared bankrupt, the Dutch Bankruptcy Act applies and continues to apply after his death.[36] Before the introduction of the new succession law in the Civil Code, the estate of a

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[29] Cf. *Gretton / Steven*, Property Trusts (n. 27) para. 26.49.

[30] s. 5 Bankruptcy (Scotland) Act 2016, regarding the sequestration of the estate of a deceased debtor. Certain terms in s. 5(d) were substituted in 2017 by The Insolvency (Regulation (EU) 2015/848) (Miscellaneous Amendments) (Scotland) Regulations 2017 (S.S.I. 2017/210), regs. 1, 4(3) (with reg. 9).

[31] Art. 1 Ley Concursal 22/2003.

[32] Cf. correspondence with (and owing a debt of gratitude to) Prof. Miriam Anderson, University of Barcelona.

[33] Section 11 para. 2, no. 2 German Insolvency Code.

[34] Cf. also Sections 315 to 331 of the German Insolvency Code.

[35] Cf. Asser / *Vonken*, Internationaal personen-, familie- en erfrecht (n. 3) 617 f.; and *Steven Perrick*, Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, Vol. 4: Erfrecht en schenking[16] (2017) 600 f. Before the Succession Regulation came into force, the regime of Arts. 10:149 and 10:180 of the Dutch Civil Code (DCC) was applicable; cf. *Jan-Ger Knot*, Internationale boedelafwikkeling volgens de regels van de Erfrechtverordening: vereffening, verdeling en Näherberechtigung vanaf 17/8/2015, WPNR 7024 (2014) 593, 595.

[36] Cf. *Jan Biemans*, Toepassing van de faillissementspauliana en de actio Pauliana op de vereffening van de nalatenschap, WPNR 7136 (2017) 113–121; *Steven Perrick*, Insolventie en erfrecht, in: Insolventierecht in de notariële praktijk, ed. by G.H. Lankhorst et al. (2011) 265–334; *Maaike Steegmans / Ian Sumner*, De Europese Erfrechtverordening voor het notariaat (2016) para. 1.4.3.

deceased person could be declared bankrupt as well and the Bankruptcy Act would apply.[37] However, as of 1 January 2003, the administration of an insolvent estate of a deceased person which is opened after the death of this person is a special liquidation procedure, regulated in the succession law part of the Dutch Civil Code.[38] The procedure has a broader scope, also applying where the estate is not insolvent, but where there are no heirs and the estate is unmanaged,[39] or an heir has accepted the estate with limited liability,[40] even though there is no insolvency. If an heir has accepted the estate with limited liability, the heirs become the joint administrators of the estate by operation of law.[41] However, the court may also appoint, at the request of a creditor on grounds similar to the opening of bankruptcy proceedings, a professional administrator instead of the heirs (and/or may also open, if this has not yet been done yet, the *vereffening* procedure), in which case stricter provisions apply.[42] In general, the regulation on the *vereffening* procedure contains several references to the Dutch Bankruptcy Act.[43] The *vereffening* procedure is not listed in Annex A of the Recast Insolvency Regulation.[44] As a consequence, the Recast Insolvency Regulation does not apply to Dutch insolvency proceedings if they are opened after the death of a person, which occurs (more) frequently than a bankruptcy followed by the death of a person.

Under French law, insolvency proceedings against the estate of a deceased person fall within the scope of the Recast Insolvency Regulation only in the event where the deceased was running an independent personal activity and died in a state of cessation of payments. If not, the administration of insolvent estates is subject to the benefit of inventory ("bénéfice d'inventaire"), which is covered by succession law. If the deceased was insolvent on a balance sheet but did not die in a state of cessation of payments, the administration of the deceased's estate will continue to be governed by succession

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[37] The now repealed Art. 198 Dutch Bankruptcy Act 1893.

[38] As part of Book 4 of the Dutch Civil Code on succession law, called the "vereffening van nalatenschappen" ("settling of inheritances"). Cf. Arts. 4:202 f. DCC.

[39] Art. 4:204 para. 1 lit. a DCC.

[40] Art. 4:202 DCC.

[41] Art. 4:195 DCC.

[42] Arts. 4:203 para. 1 lit. b and 4:204 para. 1 lits. b, c DCC.

[43] Although the references are incomplete, which pose other problems in themselves, cf. *Biemans*, WPNR 7136 (2017) 113–121; *idem*, Insolventierecht en het notariaat; een tweeluik (2015) 82 with further references.

[44] It is not correct to generally classify the *vereffenings* procedure as a succession procedure or an insolvency procedure. Although its regulation is based on the succession law part of the Dutch Civil Code, it contains several references to the Dutch Insolvency Code, see: Arts. 4:210 para. 1, 4:217 para. 1, 4:218 para. 5 and 4:223 DCC. Depending on the situation in which the *vereffenings* procedure applies, those provisions may become applicable. If the Netherlands wants to list this procedure in Annex A, this may require the Netherlands to specify in which situations the *vereffening* procedure applies.

rules. This procedure is not listed in Annex A of the Recast Insolvency Regulation.[45]

Further, under Italian law there is the principle of the impossibility of bankruptcy for a person who had already stopped his activities. Consequently, a deceased individual can only be declared bankrupt if his condition of insolvency arose within a year from his death or from his business activity's shutdown. As a rule, the term of one year runs from the shutdown: only if the individual dies before the shutdown will the term run from his death.[46] Creditors or the public authorities have the burden of showing when the business effectively ceased its activities. Within a year a court must declare a deceased person bankrupt, considering that solely a request of bankruptcy is not enough.[47] Once the term of one year has expired, it is no longer possible to declare a deceased person bankrupt and the succession proceedings will be opened.[48]

If the Recast Insolvency Regulation does not apply and the Succession Regulation does apply to an insolvent estate in a Member State, this in itself raises several questions. If such an estate nevertheless contains assets in another Member State where the Recast Insolvency Regulation applies to insolvent estates of deceased persons, there may be a clash between both regulations of a different kind. This will be discussed in further detail below in section IX.

IV. Jurisdiction

1. Introduction

The regulations determine the courts of which Member State have jurisdiction to open insolvency proceedings or, respectively, succession proceedings (Articles 3–6 RIR and Articles 4–19 SR). In order to determine which court has jurisdiction to rule on insolvency or succession proceedings, the Recast Insolvency Regulation and the Succession Regulation use different concepts. Under the Recast Insolvency Regulation the courts must determine where the debtor's "centre of main interests" (COMI) is located, while the Succession Regulation uses "habitual residence" as the relevant connect-

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[45] Arts. L 631-3, L 640-3 Code de commerce; *Max Planck Institute*, RabelsZ 74 (2010) 522, 712 f.

[46] Arts. 10, 11 Italian Insolvency Code; cf. Caravaca / Davi / Mansel / *Zanobetti* (n. 3) Art. 76, para. 2 with fn. 8.

[47] Correspondence with (and owing a debt of gratitude to) Giulia Comparini; Arts. 10, 11 Italian Insolvency Code.

[48] Cass. 12 April 2013, n. 8932 (*C.O. v. Equitalia Nord S.P.A.*), available at <www.distretto.torino.giustizia.it/>.

ing factor. Unlike the Recast Insolvency Regulation, the Succession Regulation allows for jurisdictional exceptions to the main rule of habitual residence, including a choice-of-court agreement, which the Recast Insolvency Regulation does not recognize. These different concepts and rules will lead to different outcomes regarding the competent courts and the law that is applicable to the proceedings.[49]

If both regulations apply and lead to similar outcomes, the Recast Insolvency Regulation nevertheless applies and not the Succession Regulation, even though it makes no material difference. If both regulations apply and lead to different outcomes, it follows from Article 76 SR that the Succession Regulation's rules on jurisdiction will yield to those of the Recast Insolvency Regulation.[50]

2. Succession Regulation

Article 4 SR determines that the courts of the Member State in which the deceased had his habitual residence have jurisdiction to rule on the succession as a whole.[51] There are several cases in which the courts of another Member State may nevertheless have jurisdiction, despite the fact that the deceased did not have his habitual residence in that Member State at the time of his death. *First*, where the habitual residence of the deceased is not located in a Member State, the courts of a Member State in which assets of the estate are located will nevertheless have jurisdiction to rule on the succession as a whole in so far as (i) the deceased had the nationality of that Member State at the time of his death; or, failing that, (ii) the deceased had his previous habitual residence in that Member State, provided that, at the time the court is seized,[52] a period of not more than five years has elapsed since that habitual residence changed (Article 10 SR). *Second*, where the law chosen by the deceased to govern his succession pursuant to Article 22 SR is the law of a Member State, the parties concerned may agree that a court or

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[49] The Recast Insolvency Regulation also uses the concept of secondary insolvency proceedings (Art. 3(2), (3), Arts. 34–52 RIR), generally opened for bankruptcies of large companies with establishments in different countries. Because of their limited practical relevance for individual persons, we will not further discuss them. However, such secondary proceedings could be an interesting tool for administering insolvent estates, especially where assets are involved in Member States where the Recast Insolvency Regulation does not apply.

[50] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 8; Caravaca / Davi / Mansel / *Zanobetti* (n. 3) Art. 76, para. 1.

[51] Cf. *Mariusz Załucki*, New Revolutionary European Regulation on Succession Matters – Key Issues and Doubts, Revista de Derecho Civil 3:1 (2016) 165, 168–171, <http://nreg.es/ojs/index.php/RDC/article/view/162>; *Jan-Ger Knot*, Procederen in erfrechtzaken onder vigeur van de Europese Erfrechtverordening, REP 1 (2014) 31, 32 f.

[52] Cf. Art. 14 SR for the time when a court will be deemed to be seized.

the courts of that Member State are to have exclusive jurisdiction to rule on any succession matter (Article 5(1) SR).[53] This is called a choice-of-court agreement.[54] If not all parties to the proceedings were parties to such a choice-of-court agreement, but nevertheless appear without contesting the jurisdiction of the court, the court will continue to exercise jurisdiction; however, if it is contested, the court is to decline jurisdiction (Article 9 SR). Similarly, a court seized pursuant to Article 4 SR or Article 10 SR may *decline* jurisdiction if it considers that the courts of the Member State of the chosen law are better placed to rule on the succession; a seized court may also decline jurisdiction when a choice-of-court agreement exists, in which case the courts of a Member State whose law has been chosen by the deceased pursuant to Article 22 SR are to have jurisdiction (Article 6 SR; cf. Article 7 SR). Thus, the party autonomy of all parties involved[55] may determine the jurisdiction of an alternative court as well. *Third*, where no court of a Member State has jurisdiction pursuant to other provisions of the Succession Regulation, Article 11 SR provides a *forum necessitatis* rule. In all cases, the court seized must examine whether it possesses jurisdiction and if this is not the case declare *ex officio* that it has no jurisdiction (Article 15 SR).

Pursuant to Article 13 SR, *in addition* to the court having jurisdiction to rule on the succession pursuant to this Regulation, "the courts of the Member State of the habitual residence of any person who, under the law that is applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court". Articles 17 and 18 SR contain rules on jurisdiction in the case of concurring (and connected or related) proceedings.[56] Article 19 SR provides for the possibility of granting provisional (including protective) measures.

From the provisions it follows that, other than in the case of Article 13 SR, as a main rule the courts or a court of only one Member State will have jurisdiction to rule on the succession as a whole. The provisions are such that a court, in the end, either exercises or declines jurisdiction. Only where the estate of the deceased comprises assets located in a third State may the court seized to rule on the succession decide, at the request of one of the parties,

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[53] See Art. 5(2) SR for the formal requirements of such an agreement. Cf. also the out-of-court settlements in a Member State whose law was chosen by the deceased pursuant to Art. 22 SR (Art. 8 SR).

[54] *Patrick Wautelet*, Drafting Choice of Law and Choice of Court Provisions under the EU Succession Regulation (2017), <http://hdl.handle.net/2268/207471>, pp. 1 f.

[55] Including the testator through his choice of law.

[56] Cf. for Arts. 17–18 SR also subsection VIII.7. below.

not to rule on one or more of such assets if it may be expected that its decision in respect of those assets will not be recognized and, where applicable, declared enforceable in that third State (Article 12 SR).

A court of a Member State may have jurisdiction not only based on the habitual residence of the deceased, but also (alternatively) based on (i) the party autonomy of all parties involved through the law of a Member State chosen by the deceased combined with the (implicit) acceptance by the parties involved of the court of that Member State (Articles 5–9 SR); (ii) the location of assets in a Member State combined with the nationality of the deceased of that Member State or his previous habitual residence in that Member State (Article 10 SR); (iii) the *forum necessitatis* rule (Article 11 SR); or (iv) where the matter concerns, in short, the acceptance or waiver of the succession, the habitual residence of the person making the declaration regarding such an acceptance or waiver (Article 13 SR).

As stated above, the Succession Regulation uses the concept of habitual residence[57] as a single connecting factor to determine general jurisdiction. Lacking a definition, Recital 23 provides a detailed explanation, stating that in order to determine the habitual residence, the authority dealing with the succession should make an "overall assessment of the circumstances of the life of the deceased" during the years preceding his death and at the time of his death, taking account of "all relevant factual elements", in particular "the duration and regularity of the deceased's presence" in the State concerned and "the conditions and reasons for that presence". The habitual residence thus determined should reveal a "close and stable connection with the State" concerned, "taking into account the specific aims of this Regulation".

Recital 24 describes the complex case of a deceased who for professional or economic reasons had moved to live abroad in order to work there, sometimes for a long time, but who still maintained a close and stable connection with his State of origin. According to Recital 24, he could be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Further, the Recital states that where the deceased lived in several States alternately or travelled between States without settling anywhere and he was a national of one of those States, his nationality could be a special factor in determining his habitual residence. If the deceased had all his main assets in one of those States, another special factor could be the location of those assets.

The Regulation thus aims to ensure that "a genuine connecting factor" exists between the succession and the Member State in which jurisdiction is exercised (Recital 23 SR), which requires a close and stable connection be-

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[57] Cf. *Rohová/ Drličková*, International Journal of Law and Politics 1 (2015) 107, 110–115, who extensively discuss the notion of "habitual residence"; see also Pamboukis / *Pamboukis* (n. 3) Art. 4, paras. 5–17.

tween the life of the deceased and the State concerned. This could consist of strong and sustainable relationships related to the social, family and economic life of the deceased. In most cases, the aforementioned parts of someone's life coincide. However, given the considerations in Recital 24, if these elements need to be weighed against each other, certain circumstances in respect of someone's social and family life seem to be decisive. For example, if a deceased lived for all his life in Germany, but has multiple houses or a business in Belgium, the German courts will most likely have jurisdiction.

3. Recast Insolvency Regulation

The courts of the Member State within the territory of which the COMI is situated have jurisdiction to open insolvency proceedings (Article 3 RIR).[58] No other insolvency proceedings can be opened in other Member States.[59] The proceedings have universal scope: they are aimed at encompassing all the debtor's assets and all creditors lodge their claims in these proceedings (Recital 23 and Article 45 RIR). A court seized of a request to open insolvency proceedings must, prior to opening insolvency proceedings, *ex officio* examine whether it has jurisdiction pursuant to Article 3 RIR. This court is obliged to specify the grounds on which jurisdiction is based (Article 4 RIR). The debtor or any creditor may challenge before a court the decision to open the main insolvency proceedings on grounds of international jurisdiction (Article 5 RIR).

The Recast Insolvency Regulation defines COMI[60] (Article 3(1) RIR) as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties", which means the central place where the debtor manages his interests (i.e. the "brain" of the debtor). The place where the debtor manages his interests may not necessarily be the same as the location of his main assets (i.e. the "muscles" of the debtor).[61] By using the term "interests", the Regulation intends to encompass

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[58] These proceedings are called the "*main* insolvency proceedings" if also secondary insolvency proceedings are opened.

[59] *Miguel Virgos / Etienne Schmit*, Report on the Convention on Insolvency Proceedings, EU Council reference 6500/1/96 of 8 July1996, Art. 3, paras. 15, 73.

[60] Cf. *Samantha Bewick*, The EU Insolvency Regulation, Revisited, I.I.R. 24 (2015) 172, 178–181; *Michael Weiss*, Bridge over Troubled Water: the Revised Insolvency Regulation, I.I.R. 24 (2015) 192, 199–202; *Robert van Galen*, De Herziene Insolventieverordening, Ondernemingsrecht 3 (2017) 13, 15 f.; *Sanne van Dongen*, De Herziene Insolventieverordening, FIP 8 (2016) 29–35, article 215; *Bob Wessels*, International Insolvency Law, Part II: European Insolvency Law (2017) Art. 3, paras. 10541–10570j; and the references made in notes 61–74 below.

[61] *Francisco Garcimartín*, The EU Insolvency Regulation: Rules on Jurisdiction (21 March 2016), <http://ssrn.com/abstract=2752412>, p. 13; *Dubravka Akšamović*, EU Insolvency Law –

commercial, industrial, professional and also general economic activities, such as the activities of private individuals (consumers).[62] The COMI must be identified by reference to criteria that are both objective *and* ascertainable by third parties.[63] The word "and" implies that the COMI is not automatically ascertainable by third parties.[64] This element must be proved apart from the criterion of objectivity, which emphasizes the importance of the role of third parties, typically creditors, and their perception as to where a debtor conducts the administration of his interests (cf. Recital 28 RIR). The rationale behind the concept of the COMI is legal certainty for creditors.[65]

To simplify the application of the rule, Article 3 RIR lays down three presumptions as to the place of the COMI.[66] Which presumption applies depends on the legal entity and the activities of the debtor.[67] In the case of an insolvent estate, the Max Planck Institute has argued that the COMI should be determined with reference to the deceased, as opposed to, for example, the heirs as "debtor" to the insolvency.[68] We concur with this view.[69]

In the case of "an individual exercising an independent business or professional activity", the COMI will be presumed to be that individual's principal place of business (Article 3(1) RIR). "Principal place of business" is not defined in the Recast Insolvency Regulation. In literature this criterion is described as an official and clearly ascertainable place where the debtor manages his economic activities.[70] An address used by the debtor for his commercial correspondence or other signs that indicate that the debtor was managing economic activities at a certain place could be factors in establishing the location of the principal place of business (Recital 28 RIR).

New Recast Regulation on Insolvency Proceedings, in: Procedural Aspects of EU Law, ed. by Dunja Duić / Tunjica Petrašević (2017) 69, 80.

[62] *Virgos / Schmit*, Report (n. 59) Art. 3, para. 75.

[63] This follows from Art. 3(1) RIR; cf. ECJ 2 May 2006 – Case C-341/04 (*Eurofood IFSC*), ECLI:EU:C:2006:281, para. 33, and ECJ 20 October 2011 – Case C-396/09 (*Interedil Srl*), ECLI:EU:C:2011:671, para. 49.

[64] *Federico Mucciarelli*, Private International Law Rules in the Insolvency Regulation Recast: A Reform or a Restatement of the Status Quo? (25 August 2015), <https://ssrn.com/abstract=2650414>, p. 11.

[65] *Virgos / Schmit*, Report (n. 59) Art. 3, para. 75; ECJ 2 May 2006 – *Eurofood*, ECLI:EU:C:2006:281, para. 33; ECJ 20 October 2011 – *Interedil*, ECLI:EU:C:2011:671, para. 49.

[66] *Garcimartín*, EU Insolvency Regulation (n. 61) 3.

[67] For the purpose of a comparison with the Succession Regulation, we will not discuss the COMI of a company or legal person.

[68] *Max Planck Institute*, RabelsZ 74 (2010) 522, 711–714, also with references to German literature and Section 315 German Insolvency Act.

[69] If not accepted, more clashes are foreseeable.

[70] *Mucciarelli*, Private International Law Rules (n. 64) 12; cf. *Virgos / Schmit*, Report (n. 59) Art. 3, para. 75: "In principle, the centre of main interests will in the case of professionals be the place of their professional domicile […]".

In the case of "any other individual", the COMI is to be presumed to be the place of the individual's habitual residence. The concept of habitual residence is also recognized by Article 4 SR, as discussed above, and other European regulations, but it does not have a uniform meaning in European legislation.[71] The Recast Insolvency Regulation does not define habitual residence. According to legal literature, the habitual residence is a debtor's settled, permanent home,[72] a place where he is firmly rooted, in terms of his family or profession, or with which he is strongly connected in social terms.[73]

The presumptions do not apply if the debtor has relocated his registered office, principal place of business or habitual residence within a certain period prior to the request for the opening of insolvency proceedings. In the case of an individual not exercising an independent business or professional activity ("any other individual"), the Recast Insolvency Regulation adopts a period of six months. In the case of the other two categories of debtors ("a company or legal person" and "individuals exercising an independent business or professional activity"), a period of three months applies.

If the presumptions nevertheless apply, they are still rebuttable if the COMI is in fact located outside the Member State of the presumed locations. In *Eurofood*,[74] the ECJ ruled that the presumption "can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which the location of the (presumed place) is deemed to reflect". Additionally, Recital 30 RIR provides exemplary cases in which it is possible to rebut the presumption. In the case of an individual not exercising an independent business or professional activity: "it should be possible to rebut this presumption, for example where the major part of the debtor's assets is located outside the Member State of the debtor's habitual residence, *or* where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation" (Recital 30 RIR, emphasis added). Although one could argue that the first circumstance is not very consistent with the core of the COMI concept, where the relevant element is not the place where most of the debtor's assets are located but the place from which those assets are managed or administered,[75] its meaning seems clear. Consequently, for example,

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[71] Cf. *Rohová / Drličková*, International Journal of Law and Politics 1 (2015) 107, 113.

[72] *Mucciarelli*, Private International Law Rules (n. 64) 12.

[73] *Marek Szydło*, Prevention of Forum Shopping in European Insolvency Law, EBOR 11 (2010) 253, 259 f.

[74] ECJ 2 May 2006 – *Eurofood*, ECLI:EU:C:2006:281, para. 34.

[75] *Garcimartín*, EU Insolvency Regulation (n. 61) 15; cf. also *Mucciarelli*, Private International Law Rules (n. 64) 12.

an individual who has multiple houses in a Member State other than where his habitual residence lies has his COMI in that other Member State.

4. Comparison: individuals exercising an independent business or professional activity and any other individuals

According to Pamboukis, it will not often occur that both regulations lead to different outcomes because habitual residence and COMI will usually coincide.[76] Indeed, if not exercising an independent business or professional activity, the COMI is presumed to be the place where the debtor has his habitual residence, and in other cases, generally the COMI will be located in the same Member State as that of his habitual residence. The Recast Insolvency Regulation and the Succession Regulation will declare the same jurisdictions to be applicable. However, in other cases the rules on jurisdiction in the Succession Regulation and the Recast Insolvency Regulation may lead to different outcomes.[77]

First, the COMI may differ from the habitual residence of the deceased. We distinguish between deceased persons who "exercised an independent business or professional activity", on the one hand, and "any other deceased individuals", on the other. It is possible that the deceased exercised an independent business or professional activity in a Member State other than the Member State where he had his habitual residence. For example, in 2004 the Supreme Court of the Netherlands ruled that a debtor, living in Belgium, had his COMI in the Netherlands due to his significant ownership interests there, through which he implemented his trading interests.[78] The Succession Regulation, by contrast, would, given those circumstances, most likely have designated jurisdiction to the courts in Belgium, as this was the Member State where the deceased person had his habitual residence.[79]

If the insolvent estate concerns "any other individual", both the Recast Insolvency Regulation and the Succession Regulation use the place of the habitual residence of the debtor. However, the presumption that the COMI of the debtor ("any other individual") is located in the place of his habitual residence is rebuttable. In the scenario where the major part of the debtor's

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[76] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 6.

[77] The Succession Regulation does not recognize the concept of main proceedings and secondary proceedings, which may also lead to different outcomes. This will not be discussed.

[78] Hoge Raad (Dutch Supreme Court) 9 January 2004 (*Fortis v. Vennink*), ECLI:NL:HR:2004:AN7896; *Alexander Bělohlávek*, Center of Main Interest (COMI) Principle in the New EU Regulation on Insolvency Proceedings, in: Proceedings of the 3rd International Conference on European Integration 2016, ed. by Eva Kovářová / Lukáš Melecký / Michaela Staníčková (2016) 80, 87.

[79] Cf. section IV.2. above and Recital 24 SR.

assets is located outside the Member State of the debtor's habitual residence, the regulations could declare different jurisdictions to be applicable. Consequently, if a person has lived in France but has several houses in Spain, under the Recast Insolvency Regulation the law of Spain would most likely be applicable (Recital 30 RIR), while the Succession Regulation would designate French law. However, if the insolvent deceased had not settled anywhere prior to his death, the Succession Regulation would determine that the location of his main assets could be a special factor in determining the applicable law. In that case, the laws declared applicable by the regulations could coincide.

Another scenario in which the presumption of habitual residence could be rebutted is where the debtor has engaged in forum shopping (cf. Recital 30 RIR). If a debtor moved from France to Ireland shortly before his death and it is clear from all the circumstances of this case that the principal reason behind moving was forum shopping,[80] the Recast Insolvency Regulation would designate France as the COMI, even if the debtor during this period of time had really settled in Ireland. The Succession Regulation does not contain such an explicit safeguard against forum shopping.[81] Therefore, the Succession Regulation would most likely declare that the courts in Ireland have jurisdiction.

Second, if the deceased insolvent person had his COMI and habitual residence in one Member State, but had chosen the law of another Member State to govern his succession pursuant to Article 22 SR, the courts of the latter Member State may exercise jurisdiction under the Succession Regulation (Articles 5–9 SR),[82] but not under the Recast Insolvency Regulation. The courts of the latter Member State have no jurisdiction based on the Succession Regulation, in so far as the proceedings fall under the jurisdiction of the courts of the Member State under the Recast Insolvency Regulation. An insolvency practitioner as referred to in Article 2(5) RIR and Annex B RIR will be one of the "parties concerned" as referred to in Arti-

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[80] However, see *Garcimartín*, EU Insolvency Regulation (n. 61) 15 f., pointing out that the relationship between Recital 30 RIR and Art. 3(1) fourth paragraph RIR is not clear.

[81] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 1, para. 89, although Recital 26 SR states that "nothing in this Regulation should prevent a court from applying mechanisms designed to tackle the evasion of the law, such as *fraude à la loi* in the context of private international law". Pamboukis / *Pamboukis* (n. 3) Art. 21, para. 6 (the concept of habitual residence in Art. 21 is identical to the concept in Art. 4 SR) states in this regard that it should be possible, by way of an exception, to examine an evasion of the law by the debtor. If this is not possible, "the intention of the deceased to circumvent the law can be addressed by way of exception, with the correction mechanism of the exemption or escape clause of paragraph 2 and more rarely with public policy reservation".

[82] *Jacopo Crivellaro / Sabine Herzog / Marnin Michaels*, The EU Succession Regulation and Its Impact for Non-Member States and Non-Member State Nationals, Trusts & Trustees 22 (2016) 227, 229 f.

cle 5 SR. He may also be "a party to the proceedings" as referred to in Articles 6–9 SR.

Third, if the habitual residence of the deceased insolvent person was not located in a Member State, the courts nevertheless have jurisdiction under the Succession Regulation to rule on the succession as a whole if the deceased had the nationality of that Member State and the assets of the estate are located in that Member State (Article 10 SR).[83] The same may be true if the *forum necessitatis* rule applies (Article 11 SR).[84] If the COMI is located in another Member State, the courts have jurisdiction based on the Recast Insolvency Regulation, and this jurisdiction would prevail over the jurisdiction based on Article 10 or Article 11 SR. However, if both the habitual residence and the COMI are not located in a Member State, a court may have no jurisdiction at all under the Recast Insolvency Regulation, while a court does have jurisdiction under the Succession Regulation.

Fourth, if the COMI and the habitual residence are outside the European Union, but the assets of the deceased person are located in a Member State and the deceased had the nationality of that Member State, the Recast Insolvency Regulation will most likely not apply; instead, the Succession Regulation would apply, resulting in the jurisdiction of the courts of that Member State (Article 10 SR).[85]

V. Applicable law

1. Introduction

Both regulations contain provisions on the applicable law (Article 7(1) RIR and Articles 21–22 SR). In the Succession Regulation, the applicable law governs the succession as a whole (Article 23(1) SR). In the Recast Insolvency Regulation, the applicable law governs the insolvency proceedings and their effects (Article 7(1) RIR). Both regulations specify which particular aspects of the succession and the insolvency proceedings are to be determined by the applicable law (Article 7(2) RIR and Article 23(2) SR), and both regulations contain special applicable law provisions on particular topics, such as the Succession Regulation on dispositions of property upon death and the Recast Insolvency Regulation on set-off. If both regulations apply and lead to similar outcomes, the Recast Insolvency Regulation nevertheless applies and not the Succession Regulation, even though it makes no material difference. If both regulations apply and lead to different outcomes,

[83] Pamboukis / *Pamboukis* (n. 3) Art. 10, paras. 1–13; see also *Crivellaro / Herzog / Michaels*, Trusts & Trustees 22 (2016) 227, 228 f.

[84] Pamboukis / *Pamboukis* (n. 3) Art. 11, paras. 1–10.

[85] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 4.

Article 76 SR determines that the Succession Regulation's rules on jurisdiction will yield to those of the Recast Insolvency Regulation. Below we discuss the applicable law provisions, followed by a comparison of both regulations.

2. Succession Regulation

Unless otherwise provided for in the Succession Regulation, the law applicable to the succession as a whole is to be the law of the Member State in which the deceased had his habitual residence at the time of his death (Article 21(1) SR). Similar to the applicable rules in the Recast Insolvency Regulation, the Succession Regulation uses habitual residence not only to determine jurisdiction but also the applicable law. Consequently, the law that is applicable to the succession is generally the law of the Member State where the courts have jurisdiction to rule on the succession. However, there are some exceptions to this rule.

Where the deceased, at the time of death, was "manifestly more closely connected" with a Member State other than the Member State where the deceased had his habitual residence, the law of that other Member State is applicable. This must be "clear from all the circumstances of the case" (Article 21(2) SR). The meaning of this provision seems to be somewhat vague, but its rationale can be found in Recital 25. According to Recital 25 SR, habitual residence can be established after a fairly short period of time, for example where the deceased had moved shortly before his death. Given the short period of time, it is possible that the deceased, in fact, had a closer connection with (the legal system of) another Member State. Because the Succession Regulation aims to ensure that the succession is governed by a predictable law with which it is closely connected (Recital 37 SR), this provision was incorporated. Recital 25 SR explicitly mentions that this connection should not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex; it is rather an exception to the general rule of Article 21(1) SR.[86]

Another deviation from Article 21(1) SR is laid down in Article 22 SR, which provides that a person may choose a law to govern his succession as a whole (choice of law). This law must be the law of the Member State whose nationality the deceased possesses.[87]

Pursuant to Article 23(1) SR, the applicable law governs the succession as a whole, which is further specified in Article 23(2) SR. This means that all

[86] *Elizabeth B. Crawford / Janeen M. Carruthers*, Speculation on the Operation of Succession Regulation 650/2012: Tales of the Unexpected, ERPL 22 (2014) 847, 859; see also Pamboukis / *Pamboukis* (n. 3) Art. 21, paras. 7–11.

[87] Pamboukis / *Pamboukis* (n. 3) Art. 22, paras. 1–73, who extensively discusses this topic.

property forming part of the estate is governed by the law of one Member State, irrespective of the nature of the assets and regardless of whether the assets are located in another Member State or in a third State (Recital 37 SR). The Succession Regulation does not distinguish between moveable and immovable assets; only with regard to third States is it possible that a scission system arises.[88] As stated in Article 21(1) SR, the Succession Regulation provides for exemptions from the general rule, which are mostly listed in Articles 24–33 SR and include provisions on the "disposition of property upon death" (Articles 24–27 SR), "validity as to form of a declaration concerning acceptance or waiver" (Article 28 SR), "special rules (of the law of a Member State) imposing restrictions concerning or affecting the succession in respect of certain assets" (Article 30 SR)[89] and commorientes (Article 32 SR).

Article 1(2) lit. k SR explicitly excludes "the nature of rights *in rem*" from the scope of the Succession Regulation. Therefore, Member States are not required to recognize a right *in rem* relating to property in their territory if the right *in rem* in question is not recognized under their law (Recital 15 SR). However, from Article 31 SR it can be inferred that under certain circumstances an adaptation of rights *in rem* is possible.[90]

3. Recast Insolvency Regulation

Save as otherwise provided in the Recast Insolvency Regulation, the law that is applicable to (main) insolvency proceedings and their effects is the law of the Member State within the territory of which such proceedings are opened (Article 7(1) RIR). The law of the Member State where the main proceedings are opened will generally be the law that governs the main insolvency proceedings. Article 7(2) RIR states that the applicable law determines the conditions for the opening, conduct and closure of those proceedings. Under letters a–m it provides what the applicable law particularly determines. The designated applicable law is limited to national insolvency proceedings and insolvency practitioners as listed in Annexes A and B. An

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[88] *Angelika Fuchs*, The New EU Succession Regulation in a Nutshell, ERA Forum – Journal of the Academy of European Law 16 (2015) 119, 122 f.

[89] Slovenia, for example, recognizes special rules for inheriting agricultural land; *Angela Giuliano*, De Erfrechtverordening: één bevoegde autoriteit en één toepasselijk recht, FJR 3 (2013) para. 5.

[90] ECJ 12 October 2017 – Case C-218/16 (*Kubicka v. Przemysława Bac q.q.*), ECLI:EU:C:2017:755; *Sjef van Erp*, De Europese Erfrechtverordening: een doorbreking van het Nederlandse goederenrecht?, WPNR 7183 (2018) 193–198. However, note Art. 1(2) lit. l SR, which explicitly excludes from the scope of the Succession Regulation "any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register".

insolvency practitioner can exercise all the powers conferred on it by the law of the Member State on the opening of proceedings in other Member States (Article 21 RIR). If national insolvency proceedings and/or national insolvency practitioners are not listed in the Annexes, the Recast Insolvency Regulation is not applicable in respect of those proceedings and practitioners.[91]

As stated in Article 7(1) RIR, the Recast Insolvency Regulation (also) provides for exceptions from the general rule, which are listed in Articles 8–18 RIR and include provisions on "third parties' rights *in rem*" (Article 8), "set-off" (Article 9), "reservation of title" (Article 10), "contracts relating to immovable property" (Article 11), "effects on rights subject to registration" (Article 14) and "effects of insolvency proceedings on pending lawsuits or arbitral proceedings" (Article 18). As noted, many of these provisions cover topics that may also arise in the administration of the estate of a deceased person, but for which the Succession Regulation has no special provisions.

4. Comparison

Both regulations determine as a general rule that the applicable law is to be the law of the Member State where proceedings are opened. If both regulations determine that the same courts are to have jurisdiction, this will generally mean that the regulations also declare the law of the same Member State to be applicable. Conversely, where the regulations determine that courts from different Member States have jurisdiction, the applicable law will normally be different too. There are, however, some exceptions to this rule. These exceptions may lead to the outcome that despite similar jurisdictions, the applicable law is nevertheless different, or that despite different jurisdictions, the applicable law is the same.

First, under the Succession Regulation it is possible that the courts having jurisdiction will not be applying their own law. This can be the case if the deceased was manifestly more closely connected with a Member State other than the Member State in which he had his habitual residence or where the deceased may have made a choice of law. The law of that other Member State will apply to the succession, even if the courts that have jurisdiction are not located in that Member State (Article 21(2) SR). The Insolvency Regulation does not contain similar exceptions. This could lead to the situation where both regulations, for example, determine that the courts in the Netherlands have jurisdiction, but the Succession Regulation specifies Polish law as the applicable law, while the Recast Insolvency Regulation determines that Dutch law applies.

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[91] As already stated above, this follows from ECJ 8 November 2012 – *Kazimierz*, ECLI:EU:C:2012:704.

Second, assuming that the regulations declare the law of the same Member State to be applicable, it is still possible that the regulations with regard to specific assets or transactions provide that different laws apply, as especially the Recast Insolvency Regulation provides for several exemptions that are not recognized by the Succession Regulation. For example, the Recast Insolvency Regulation states that contracts relating to immovable assets are to be governed solely by the law of the Member State in which the immovable property is located, while the Succession Regulation determines that the law that applies to the succession also applies to a contract relating to immovable assets. Another example is set-off, where the Recast Insolvency Regulation provides for more favourable rules for creditors of the deceased person than does the Succession Regulation. Although both regulations determine that Member States should not be required to recognize a right *in rem* relating to property located in their territory that is not recognized under their law (Recital 15 SR; Article 7 RIR), the Succession Regulation provides for the concept of adapting a right *in rem* to the closest equivalent right under the law where the property is located (Article 31 SR), excluding the nature of rights *in rem* from its scope (Article 1(2) lit. k SR). The Recast Insolvency Regulation does not contain this or a similar provision. Lastly, an insolvency practitioner can exercise all the powers conferred on it by the law of the Member State of the opening of the insolvency proceedings, while the administrator is appointed according to the law that is applicable to the succession, exercising the powers of administration under that law, even when it is the law of a different Member State.

VI. Recognition, enforceability and enforcement of decisions

Both regulations contain a chapter on the recognition, enforceability and enforcement of decisions: the Recast Insolvency Regulation in Chapter II (Articles 19–33 RIR) and the Succession Regulation in Chapter IV (Articles 39–58 SR). In addition, the Succession Regulation contains additional provisions on the acceptance and enforceability of authentic instruments and court settlements (Chapter V; Articles 59–61 SR).

In our opinion, the rules on the recognition, enforceability and enforcement of decisions should follow the outcomes on jurisdiction and applicable rules pursuant to Article 76 SR, as discussed above. Thus, if an issue is addressed by both regulations or by the Recast Insolvency Regulation, the provisions of Chapter II RIR apply; if an issue is addressed only by the Succession Regulation, the provisions of Chapter IV SR apply.[92]

[92] There is support for this view in Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 8.

VII. European Certificate of Succession

All articles regarding the European Certificate of Succession[93] (ECS; Articles 62–73 SR) are related purely to the succession and are therefore logically not provided for in the Recast Insolvency Regulation. These provisions do not have to yield to the Recast Insolvency Regulation, in so far as even when insolvency proceedings are opened, an ECS can still be issued. If this is the case, the ECS should refer to the particular insolvency proceedings, the applicable law as determined by the provisions of the Recast Insolvency Regulation (Article 68 lit. i SR) and the powers of the insolvency practitioner (Article 68 lit. o SR), preferably with a reference to Annex A and Annex B RIR.

Taking into account Article 76 SR, an insolvency practitioner should not need an ECS. The Recast Insolvency Regulation contains provisions on proof of the insolvency practitioner's appointment (Article 22 RIR), the establishment and interconnection of insolvency registers (Articles 24–27 RIR) and other means of publishing the opening of insolvency proceedings (Articles 28–29 RIR).

VIII. Scope (II) – Which part of the "succession as a whole" will be covered by the "insolvency proceedings"?

1. Introduction

As mentioned, Article 76 SR states that the Succession Regulation will not affect the application of the Recast Insolvency Regulation. It implies that the Succession Regulation is to yield to the Recast Insolvency Regulation with regard to the topics covered by both regulations. Provisions of the Recast Insolvency Regulation which are not recognized by the Succession Regulation as such will also apply to the insolvency proceedings of an insolvent estate of a deceased person. Topics which relate purely to succession proceedings fall outside the scope of Article 76 SR; with regard to these aspects, it can be argued that the clash of both regulations has no effect.[94] In order to understand the precise meaning of Article 76 SR, it is therefore necessary to assess which topics fall within the scope of only the Succession

[93] The following authors have discussed the ECS in their articles: *Fuchs*, ERA Forum 16 (2015) 119, section 3.6; *Christian Hertel*, European Certificate of Succession – Content, Issue and Effects, ERA Forum 15 (2014) 393–407; *Elise Goossens*, A Model for the Use of the European Certificate of Succession for Property Registration, ERPL 25 (2017) 523–551; *Liviu-Bogdan Ciucă / Alexandra Crisan*, Some Considerations Regarding the Procedure for Issuing the European Certificate of Succession Starting 17 August 2015, Conferinta Internationala (2015); *Sjef van Erp*, De Europese Erfrechtverklaring, WPNR 7024 (2014) 600–606.

[94] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, paras. 1–9.

Regulation or the Recast Insolvency Regulation, and which fall under both. In order to do so, we first specify the scope of both Regulations (subsection VIII.2.), before concluding per topic whether it falls under one of the regulations or under both (subsections VIII.3.–VIII.6.).[95]

2. Scope of the regulations

Apart from the issues mentioned in Article 1 SR that are excluded from the scope of the Succession Regulation, the regulation covers in principle "the succession as a whole". The courts of a Member State "shall have jurisdiction to rule on the succession as a whole" (Article 4 SR). Also, the applicable law "shall govern the succession as a whole" (Article 23(1) SR), as further specified in Article 23(2) SR. Succession is defined as: "all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession" (Recital 9 and Article 3(1) SR). The Succession Regulation recognizes the concept of "Gleichlauf", which means that jurisdiction and the applicable law coincide.[96] Consequently, the material scope of the Succession Regulation is determined by the criterion "succession as a whole", meaning all civil-law aspects of succession to the estate of a deceased person.

The overall scope of the Recast Insolvency Regulation is narrower than the scope of the Succession Regulation. Article 3 in conjunction with Article 6(1) RIR reads that courts are to have jurisdiction with regard to the opening of the insolvency proceedings and "for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions".[97] The exact meaning of a "directly and closely linked action" is not clear.[98] Article 7(1) RIR determines that the applicable law concerns the "insolvency proceedings and its effects", which is further specified with examples in Article 7(2) RIR. It is clear that "insolvency proceedings and its effects" includes at least "the conditions for the opening of those proceedings,

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[95] The Recast Insolvency Regulation does not contain a similar provision with regard to the Succession Regulation as it does with regard to the Brussels I*bis* Regulation in Art. 6(2) RIR.

[96] Cf. *Fuchs*, ERA Forum 16 (2015) 119, 120; Recital 27 SR.

[97] The wording of Art. 6(1) RIR is a codification of the case law of the ECJ with regard to Art. 3 IR (cf. Art. 3 RIR): see for example ECJ 4 December 2014 – Case C-295/13 (*H v. H.K.*), ECLI:EU:C:2014:2410, paras. 23, 24. Further clarified in Recital 35. Cf. *Wolf-Georg Ringe*, in: Bork / van Zwieten, Commentary on the European Insolvency Regulation (2016) Art. 6, paras. 6.01–6.51; *Garcimartín*, EU Insolvency Regulation (n. 61) 23–25.

[98] See e.g.: *Maria-Thomais Epeoglou*, Down the Slippery Slope: Insolvency Related Actions According to Decisions C-641/16 & C-649/16, BULA 39 (2018) 88, 92.

their conduct and their closure" (Article 7(2) RIR, first sentence) and the examples of matters summed up in Article 7(2) RIR.[99] A topic falls under its material scope if the right or obligation which forms the basis of the action has its source in the provisions of insolvency law.[100] Although the rules on jurisdiction and the applicable law slightly vary from each other (at least formally), scholarly authors assume that the Recast Insolvency Regulation also uses the concept of *Gleichlauf*.[101] Due to Articles 6 and 7 RIR, the material scope of the Recast Insolvency Regulation may include succession law topics which are not listed in the Recast Insolvency Regulation as such.

3. Succession topics not covered by insolvency proceedings

Some topics are only covered by the scope of the Succession Regulation. They are related purely to the succession of the deceased and are *not* covered by the Recast Insolvency Regulation. Those are the following. *First*, the causes, times and place of the opening of the succession (Article 23(2) lit. a SR), assuming that these topics do not say anything about the legal effects of the insolvency proceedings on the opening of the succession. *Second*, the determination of the heirs and their respective shares (Article 23(2) lit. b SR) and, in line with this, the acceptance or waiver of the succession, of a legacy or of a reserved share, as far as these are not and/or do not constitute rights or obligations (Articles 13, 28 SR), the capacity to inherit (Article 23(2) lit. c SR), disinheritance and disqualification by conduct (Article 23(2) lit. d SR) and commorientes (Article 32 SR). The inheritance of the estate is, in our view, unrelated to the insolvency proceedings. In particular, the competent court to rule on a declaration concerning the acceptance or waiver of the succession, a legacy or a reserved share, or the limited liability of heirs, will be determined pursuant to the Succession Regulation (Article 13 SR). *Third,* the sharing out of the estate (Article 23(2) lit. j SR), under the assumption that the heirs' sharing out of any remaining assets happens only after the closure of the insolvency proceedings and after distribution of the proceeds to the creditors.

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[99] ECJ 10 December 2015 – Case C-594/14 (*Kornhaas v. Dithmar*), ECLI:EU:C:2015:806, Jurisprudentie Onderneming en Recht 4 (2016) no. 104, annot. *Veder*, para. 10.

[100] Cf. ECJ 10 December 2015 – *Kornhaas*, ECLI:EU:C:2015:806, para. 17; *Bob Wessels*, CJEU Case Note: CJEU 10 December 2015, Case C-594/14 (*Kornhaas / Dithmar*), European Company Law 13 (2016) 82 f.; ECJ 20 December 2017 – Case C- 594/14 (*Valach v. Waldviertler Sparkasse*), ECLI:EU:C:2015:806, para. 29; ECJ 9 November 2017 – Case C-641/16 (*Tünkers v. Expert France*), ECLI:EU:C:2017:847, para. 22.

[101] Cf. ECJ 10 December 2015 – *Kornhaas*, ECLI:EU:C:2015:806, Jurisprudentie Onderneming en Recht 4 (2016) no. 104, annot. *Veder*; *Geert van Calster*, COMIng, and here to stay: The Review of the European Insolvency Regulation, European Business Law Review 27 (2015) 735–753, subsections 2, 7.

4. Succession topics covered by insolvency proceedings

There are several topics which fall within the scope of both the Succession Regulation and the Recast Insolvency Regulation. On the whole, they are covered by the following five categories.

The first category is formed by the estate and possible other debtors against which insolvency proceedings may be brought on account of their capacity (Article 7(2) lit. a RIR). It includes the conditions for the opening of the insolvency proceedings, their conduct and (the conditions for and the effects of) their closure (Article 7(2) and Article 7(2) lit. j RIR). The causes, time and place of the opening of the succession (Article 23(2) lit. a SR) are unrelated, in so far as these issues have nothing to do with the insolvency proceedings relating to the estate as such. The question whether a declaration concerning an acceptance or a waiver is valid or not (cf. Articles 13, 28 SR) falls within the scope of the Succession Regulation. However, the outcome of such determination may affect the liability of the debts under the succession (Article 23(2) lit. g SR), which may be of importance to the insolvency proceedings as such. For example, if the heirs have accepted the succession and are liable for the debts, in certain jurisdictions the estate cannot be declared insolvent.

The second category deals with the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the insolvent estate after the opening of the insolvency proceedings (Article 7(2) lit. b RIR). Within this category are a reservation of title (Article 10 RIR), the effects on rights subject to registration, relating to objects such as immovable property, ships and aircraft (Article 14 RIR) and European patents with unitary effect and Community trade marks (Article 15 RIR). These issues are not addressed in the Succession Regulation. When it comes to third parties' rights *in rem*, both regulations contain provisions on different aspects of such rights (cf. Article 31 SR and Article 8 RIR). Depending on the nature of the rules, special rules imposing restrictions concerning or affecting the succession in respect of certain assets (Article 30 SR) may also be covered by Article 7(2) lit. b RIR.

The third category is the management of the estate and the respective powers of the heirs and the insolvency practitioner, in particular as regards the sale of property and the payment of creditors (Articles 23(2) lit. f, 29 SR and Articles 7(2) lit. c, 21 RIR; cf. Article 46 RIR). These issues will fall within the scope of the Recast Insolvency Regulation. The same is true with respect to estates without a claimant (Article 33 SR); if they are insolvent, they will fall within the scope of the Recast Insolvency Regulation.

The fourth category concerns the rights of creditors, the obligations of debtors and these two parties' underlying relations (such as contracts) within the insolvency proceedings, including the distribution of proceeds, the

ranking of claims and the partial satisfaction of creditors after the opening of the insolvency proceedings through a right *in rem* or set-off. This category contains many issues, including the following, which are generally not addressed in the Succession Regulation:

- The set-off of a claim against the insolvent estate with a claim of the insolvent estate, including the conditions under which set-offs may be invoked (Articles 7(2) lit. d, 9 RIR).
- The effects of insolvency proceedings on contracts to which the "debtor" (the insolvent estate or the heirs) is a party (Article 7(2) lit. e RIR), including contracts relating to immovable property (Article 11 RIR), the rights and obligations of parties to a payment or to a financial market (Article 12 RIR) and contracts of employment (Article 13 RIR).
- The effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits (Article 7(2) lit. f RIR); and the effects of the insolvency proceedings on pending lawsuits or arbitral proceedings (Article 18 RIR).
- The claims which are to be lodged against the debtor's insolvent estate and the treatment of claims arising after the opening of insolvency proceedings (Article 7(2) lit. g RIR); and the rules governing the lodging, verification and admission of claims (Articles 7(2) lit. h, 53–55 RIR).
- The honouring of an obligation to a debtor (Article 31 RIR).
- The rules governing the distribution of proceeds from the realization of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off (Article 7(2) lit. l RIR), including return and imputation (Article 23 RIR).
- Creditors' rights after the closure of insolvency proceedings (Article 7(2) lit. l RIR).

The fifth category consists of legal acts that are detrimental to the general body of creditors. The rules relating to the voidness, voidability or unenforceability of legal acts that are detrimental to the general body of creditors (Articles 7(2) lit. m, 16 RIR) as well as to the protection of third-party purchasers (Article 17 RIR) will fall within the scope of the Recast Insolvency Regulation. They are, as such, not addressed in the Succession Regulation.

5. Succession topics which may be closely related to insolvency proceedings

Some succession topics may seem very distinct from the scope of the Recast Insolvency Regulation, but they are in fact closely related upon further inspection. We will give examples below.

First, all of the following may seem typical succession topics: the determination of the beneficiaries, of their respective shares and of the obligations which may be imposed on them by the deceased, and the determination of other succession rights, including the succession rights of the surviving spouse or partner (Article 23(2) lit. b SR); the transfer to the heirs and, as the case may be, to the legatees of the assets, rights and obligations forming part of the estate, including the conditions and effects of the acceptance or waiver of the succession or of a legacy (Article 23(2) lit. e SR); and the disposable part of the estate, the reserved shares and other restrictions on the disposal of property upon death as well as claims which persons close to the deceased may have against the estate or the heirs (Article 23(2) lit. h SR). However, in some legal jurisdictions, succession rights (including the succession rights of the surviving spouse or partner, the rights of legatees and the reserved shares) are claims, making the spouse, partner, legatee or child a creditor of the insolvent estate, in which case it can be argued that the determination of these claims will fall within the scope of Articles 6(1) and 7(1) RIR.

Second, the Succession Regulation does not address contracts in general. However, it contains provisions on dispositions of property upon death other than agreements as to succession (Article 24 SR), provisions on agreements as to succession (Article 25), and also provisions on the substantive and formal validity of dispositions of property upon death (Articles 26–27 SR). These dispositions and agreements are also or may also be contracts. In our opinion, it will first have to be determined whether such dispositions or agreements are valid as such under the Succession Regulation, before then determining the effects of the insolvency proceedings on such contracts, in so far as the insolvent estate or the heirs can be considered to have an obligation to perform under such a disposition agreement. It can also be argued that as the rights arising out of these contracts determine the position of creditors of an insolvent estate, they concern actions deriving directly from insolvency proceedings and closely linked therewith.

Third, according to the Succession Regulation, the succession as a whole also includes "any obligation to restore or account for gifts, advancements or legacies when determining the shares of the different beneficiaries" (Article 23(2) lit. i SR). Such obligations may be covered by the insolvency proceedings not only because they are obligations towards the estate, but also because the legal acts which constitute such obligations may also, according to succession law, constitute legal acts detrimental to the general body of creditors, as meant in Articles 7(2) lit. m and 16 RIR.

6. Only Recast Insolvency Regulation: companies and legal entities

The issues that are covered only by the Recast Insolvency Regulation and that are not included within the scope of the Succession Regulation are, in principle, unrelated to insolvent estates of deceased persons. Those are issues regarding the insolvency of companies and legal entities, including insolvency proceedings of members of a group of companies (Articles 56–77 RIR) and the possibility to propose restructuring plans (cf. Article 47 RIR), and also regarding opening secondary proceedings (Articles 34–52 RIR). If the insolvent estate contains shares in one or more legal entities and companies, such shares are assets that form part of the insolvent estate. If the legal entity or company itself is insolvent, it can be declared bankrupt separately, in which case the Recast Insolvency Regulation directly applies. In our opinion, it should be possible to apply the provisions on the insolvency proceedings of members of a group of companies *by analogy* to the insolvency proceedings of an insolvent estate combined with insolvency proceedings of a group of companies that belonged to the deceased person.

7. Temporal dimension

If insolvency proceedings opened by a court of one Member State under the Recast Insolvency Regulation involve the same cause of action or related actions in succession proceedings opened by a court of another Member State under the Succession Regulation, and the insolvency proceedings have been opened after the succession proceedings – because, for example, only at a later stage did the tax authorities discover the tax liabilities of the deceased person – one could argue that the rules laid down in Articles 17 and 18 SR should apply by analogy. The court of the latter-mentioned Member State will have to stay its succession proceedings; if the jurisdiction of a court in a different Member State is established under the Recast Insolvency Regulation (Articles 3 and/or 6 RIR), it will have to decline jurisdiction in favour of that other court. This follows from Article 76 SR.[102] However, if the action concerns a succession issue only, Article 18 RIR applies, which means that the effects of the insolvency proceedings on this pending lawsuit, or on pending arbitral proceedings concerning an asset having a right which forms a part of a debtor's insolvent estate, is to be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.

[102] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, paras. 8 f.

IX. Situations where the Succession Regulation applies, but not the Recast Insolvency Regulation

1. Introduction

In most Member States the administration of the insolvent estate of a deceased person is subject to insolvency proceedings listed in Annex A of the Insolvency Regulation. However, in some States, the applicable proceedings are not listed in Annex A. This is for example the case in the Netherlands (subsection III.2. above). In those Member States, only the Succession Regulation applies – not the Recast Insolvency Regulation – and Article 76 SR seems to have no relevance.

However, if only the Succession Regulation applies in a Member State, and both the Succession Regulation and the Recast Insolvency Regulation apply in another Member State in which assets are situated and/or where a court may also have jurisdiction, this raises several questions with regard to the interrelation between the regulations as to jurisdiction, the applicable law, and if permitted by the regulation, the choice of courts and of the applicable law. In general, we subscribe to the general rule proposed by the Max Planck Institute that as soon as insolvency proceedings on estates become effective, the administration of succession in another Member State is to be stayed.[103] In particular, three cases can be distinguished, as further described below. We will use Germany and the Netherlands as examples of Member States in which both regulations apply or, alternatively, where only the Succession Regulation applies.

2. First case: COMI and habitual residence both in the Netherlands

If the COMI and the habitual residence are both situated in the Netherlands (a Member State in which only the Succession Regulation applies), the Succession Regulation will be the only applicable regulation. The Dutch courts have jurisdiction to open succession proceedings that govern the succession as a whole (Article 4 SR). Any decision given must be recognized in the other Member State without any special procedure being required (Article 39 SR). Dutch law will apply. Due to the non-application of the Recast Insolvency Regulation, a debtor's choice of law remains valid. The debtor can therefore choose the law of a Member State whose nationality he possesses. A debtor may make his choice at any moment prior to his death. This

[103] *Max Planck Institute*, RabelsZ 74 (2010) 522, 711.

gives the debtor more options to choose a legal system for his own benefit and possibly to the detriment of all creditors.

3. Second case: COMI in Germany, habitual residence in the Netherlands

If the COMI is situated in Germany (a Member State where the Recast Insolvency Regulation applies), while the habitual residence is situated in the Netherlands (a Member State where only the Succession Regulation applies), the courts in Germany have jurisdiction to open the main insolvency proceedings. Succession proceedings opened in the Netherlands must be terminated or suspended.[104] In so far as the administrator has already taken action, his acts are subject to Article 16 RIR.[105] Pursuant to the German Insolvency Act, insolvency proceedings ("Insolvenzverfahren") are to be commenced in respect of a deceased's estate.[106] Those proceedings are listed in Annex A. The Netherlands must recognize proceedings listed in Annex A and their effects (Articles 19–20 RIR),[107] even though the Netherlands does not recognize the application of insolvency proceedings to insolvent estates under its own legal system. Consequently, assets located in the Netherlands are included in the insolvency proceedings opened in Germany, and creditors situated in the Netherlands must lodge their claims in those proceedings. German law will apply.[108]

4. Third case: COMI in the Netherlands, habitual residence in Germany

If the COMI is situated in the Netherlands, the Recast Insolvency Regulation does not apply. Because the habitual residence is located in Germany, the Succession Regulation applies in Germany. Yet in Germany special provisions of *insolvency* law govern the administration of an insolvent estate of a deceased person.[109] As noted, the scope of the Succession Regulation is

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[104] Pamboukis / *Pamboukis* (n. 3) Art. 76, paras. 8f.

[105] *Andrea Bonomi / Patrick Wautelet*, in: Le droit européen des successions: Commentaire du règlement n° 650/2012 du 4 juillet 2012 (2013) Art. 76, para. 20.

[106] Section 11 para. 2 no. 2 German Insolvency Code. Sections 315 to 331 of the German Insolvency Code provide provisions which specifically deal with insolvent estates. Cf. *Max Planck Institute*, RabelsZ 74 (2010) 522, 712f.

[107] Cf. *Virgos / Schmit*, Report (n. 59) paras. 146–151.

[108] It is highly questionable in this case whether a German insolvency practitioner can open (synthetic) secondary insolvency proceedings in the Netherlands in order to protect local interests or to effectively administer the estate as a unit.

[109] See above, subsection 3.: Under German law, insolvency proceedings may be opened

broad: the applicable law includes "all civil-law aspects of succession to the estate of a deceased person".[110] It is very probable that the provisions of the German Insolvency Code, although based in insolvency law, fall under "all civil-law aspects of succession to the estate of a deceased person". This assumption leads to a peculiar situation: although the same procedure governing the insolvent estate applies, the rules on jurisdiction and applicable law may differ since the Succession Regulation, instead of the Recast Insolvency Regulation, will apply. Consequently, a choice of court (Article 5 SR) or a choice of law (Article 22 SR) made by the debtor remains valid. It is to be expected that in most instances this will be to the benefit of the debtor. Conversely, instruments of the Recast Insolvency Regulation that are beneficial to the creditors, such as avoidance actions, are not applicable.

X. Concluding remarks: Article 76 SR and policy recommendations

1. Meaning of Article 76 SR

The administration of insolvent cross-border estates within the European Union is covered by both the Succession Regulation and the Recast Insolvency Regulation. In this respect, Article 76 SR determines that the Succession Regulation does not affect the application of the Recast Insolvency Regulation. For the application of Article 76 SR, it is first required that both regulations are applicable to the insolvent estate.[111] The Recast Insolvency Regulation applies only to procedures listed in Annex A. The Recast Insolvency Regulation does not apply to an insolvent estate in a Member State if the particular procedure is not listed in Annex A (subsection III.2. above). Because different rules are used, the regulations may have different outcomes as to jurisdiction (subsection IV.4.) and applicable law (subsection V.4.). If the debtor's COMI is outside the territory of the European Union, but assets of the deceased person are located in a Member State, only the Succession Regulation applies (subsection IV.4.). The recognition, enforceability and enforcement of decisions follow the same pattern (section VI.).

concerning the estate of a deceased person. In addition to the general provisions, the German Insolvency Act contains special provisions dealing with insolvent estates. The applicable insolvency proceeding ("Insolvenzverfahren") is listed in Annex A of the Recast Insolvency Regulation.

[110] Cf. *Dennis Solomon*, The Boundaries of the Law Applicable to Succession, Anali Pravnog fakulteta Univerziteta u Zenici 18 (2016) 193–220.

[111] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, paras. 4–9, who states in this respect: "The first self-evident requirement for the application of the rule of precedence in favour of the Insolvency Regulation is that the latter is applicable […]". See also Caravaca / Davi / Mansel / *Zanobetti* (n. 3) Art. 76, para. 1.

Although the insolvency practitioner should not need an ECS, if issued, it should refer to the particular insolvency proceedings, the applicable law and the powers of the insolvency practitioner (section VII.).

If both regulations apply, a question of particular importance is whether a specific issue falls within the material scope of both regulations (section VIII.). If a topic is related purely to the succession of a deceased person, such as the capacity to inherit, Article 76 SR will not apply. In respect of those topics, an insolvency practitioner is obliged to apply the Succession Regulation. If, however, a matter falls within the scope of both regulations, the Recast Insolvency Regulation prevails over the Succession Regulation. This is the case, for example, with third parties' rights *in rem*: the Recast Insolvency Regulation will determine the applicable rules. The same is true with regard to succession topics which may be closely related to insolvency proceedings. Succession proceedings opened in respect of those matters must be suspended or terminated.[112]

2. Policy recommendations

As discussed in section IX., there are cases in which the Recast Insolvency Regulation does not apply in some Member States, whereas it does in others. This is undesirable. The primacy of the Recast Insolvency Regulation over the Succession Regulation is dictated by the specific desire for effective creditor protection. The non-application of the Recast Insolvency Regulation could impair the interests of creditors. First, insolvency laws generally provide for proceedings that better safeguard the interests of creditors than succession proceedings.[113] Second, certain instruments of the Recast Insolvency Regulation that facilitate the effective administration of cross-border insolvency proceedings are not applicable. This applies to the concept of COMI,[114] set-off, detrimental acts, pending lawsuits and arbitral proceedings, the lodging of creditors' claims and the possibility of opening secondary insolvency proceedings.[115] Third, it is conversely the case that certain instruments of the Succession Regulation which are more likely to

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[112] Cf. Pamboukis / *Pamboukis* (n. 3) Art. 76, paras. 4–9.

[113] *Max Planck Institute*, RabelsZ 74 (2010) 522, 711–714; Pamboukis / *Pamboukis* (n. 3) Art. 76, para. 3; see also Caravaca / Davi / Mansel / *Zanobetti* (n. 3) Art. 76, para. 3.

[114] Cf. *Max Planck Institute*, RabelsZ 74 (2010) 522, 712: "[…] the Institute advocates the application of the insolvency statute: The concept of COMI achieves the protection of the creditors much more adequately: It creates a foreseeable and objective forum which is more closely connected with the relations between the deceased and his creditors".

[115] A good example of this is an (unpublished) Dutch case in which the executor of the will of the deceased had stolen € 1.2 million from the deceased's estate, which he invested in foreign real estate. The appointed administrator was forced to file for the personal bankruptcy of the executor in order to utilize Art. 7(2) lit. m in conjunction with Art. 32 RIR.

benefit the debtor, such as choice of court and a choice of law, remain available to the debtor.

In general, as shown by ECJ case law, there is an incentive for debtors to move to a Member State with a favourable insolvency regime. It is not unthinkable that a debtor may also consider choosing the law of a Member State where the Recast Insolvency Regulation does not apply in order to avoid the application of this regulation. With regard to creditors, the risk of the *non*-application of the Recast Insolvency Regulation could similarly lead to an undesirable incentive. As discussed earlier, the perspective of creditors is crucial in determining the place of the COMI. There is a risk that creditors will "adjust" their perception in order to ensure the application of the Recast Insolvency Regulation.

The fact that in some Member States, such as the Netherlands, the Recast Insolvency Regulation does not apply to insolvent estates increases the possibility of forum shopping by debtors and also the risk that creditors will falsely "adjust" their perception of the COMI, both of which are contrary to the objectives of the European Union. To create a level playing field for the administration of cross-border insolvent estates, we propose that, in so far as this is applicable, insolvency proceedings that are not yet listed in Annex A of the Recast Insolvency Regulation be added to this Annex. Member States like the Netherlands should list succession proceedings that cover the administration of insolvent estates in Annex A. In order to list proceedings in Annex A, it is required that the proceedings in question fall within the scope of the Insolvency Regulation (see section III.). For Dutch law, this may require the Netherlands to specify in which situations the *vereffening van nalatenschappen* applies. As another possible solution, the Recast Insolvency Regulation could amend its scope such that succession proceedings which govern the administration of insolvent estates are included, for example by clarifying in the Recitals that those proceedings should be considered to be "based on laws relating to insolvency" (Article 1 in conjunction with Recital 16 RIR).