Introduction

Shopping for an insolvency forum within the EU appears to have become a rather popular topic of debate in the recent years. In particular after the entry into force of the European Insolvency Regulation (hereafter 'EIR'),¹ which has been designed to prevent forum shopping. Forum shopping is often stigmatized and can sometimes bring a company into disrepute. The starting questions of this book are therefore: How is forum shopping perceived from the perspective of the EU? What are considered to be the problems of forum shopping? And what has been proposed to solve these problems? Now that the Recast of the EIR (hereafter ‘EIR Recast’)² has been adopted, it is interesting to ask how the EIR Recast responds to these problems and propositions. Is it going to solve the problems of forum shopping? If not, what might be a more correct approach?

With regard to the final question, this book will seek to establish an hypothesis on the current key problem(s) of forum shopping and a theory on how one might be able to solve it.

Demarcation

This book will examine the forum shopping of companies within the area of insolvency law. The forum shopping of individuals will not be discussed. The focus of this book will lie on forum shopping within the EU, more specifically, under the EIR and its Recast. Reference will be made to the Member States of the EU towards which the EIR applies. It should be noted that Denmark has opted out of the area of judicial cooperation in civil matters pursuant to protocol (no 22) of the TFEU on the position of Denmark. The EIR therefore does not apply to Denmark. The UK and Ireland have the possibility to opt-in to the instruments in the area of judicial cooperation in civil matters on the basis of protocol (No 21) of the TFEU on the position of the UK and Ireland in respect of

¹ Regulation (EC) 1346/2000 on insolvency proceedings (OJ 2000, l 160/1) [hereafter ‘EIR’].
area of freedom security and justice. They have opted in to the EIR, and it therefor also applies to them.

Although forum shopping for insolvency law within the EU relates to many jurisdictions, this book will focus mainly on the EU as a whole, and more specifically discuss forum shopping with respect to England, Germany and the Netherlands.

**Terminology**

The terms used in this book and their intended meanings are as follows.

*Economic distress or financial distress*

This book makes a distinction between financial distress and economic distress. When using the term ‘economic distress’, this study refers to the situation in which a company cannot earn sufficient revenues to cover its costs. When using the term ‘financial distress’, this book refers to the situation in which a company would have positive earnings, were it not required to service its debt.³

*Company or business*

This book can use the term ‘company’ or its ‘business’. When using the term ‘company’, this book refers to the legal entity including its business, unless specifically mentioned otherwise. When using the term ‘business’, this book refers to the business within a company, which can be separated from the legal entity of the company.

*Corporate rescue*

When using the term ‘corporate rescue’, this book refers to the rescue of either the company or its business.

*Insolvency*

A company can find itself in a financial state of insolvency. When using the term ‘insolvent’ or ‘insolvency’, this book refers to the financial state in which a company is not able to pay its debts as they become due. The term ‘insolvency’ can also be used in the context of an insolvency procedure, in which case, reference is made to the legal procedure which regulates the legal status of insolvency.

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³ On this distinction, see Schwartz, p. 1200; Kammel 2008, p. 64.
Bankruptcy
When using the term ‘bankrupt’ or ‘bankruptcy’, this book refers to the legal status of a company which has been declared bankrupt as a result of a bankruptcy (liquidation) procedure. The term ‘bankruptcy procedure’ can also be used, in which case, reference is made to the legal procedure (liquidation) which regulates the legal status of bankruptcy.

Insolvency law or bankruptcy law
This book will generally use the term ‘insolvency law’. When using the term ‘insolvency law’, this book refers to law(s) regulating the procedures possible in cases of insolvency. However, the term ‘bankruptcy law’ will be used when referring to the specific law(s) of a state in which such laws regulate bankruptcy (liquidation) and are commonly referred to as ‘bankruptcy laws’.

The collective
When using the term 'the collective' this book refers to the general body of creditors which are involved and have an interest in the insolvency proceedings.

The common welfare
This book uses the term 'common welfare' as a synonymous for the welfare of 'the collective'.

COMI concept or COMI Model
When using the term 'COMI concept', this book refers to the legal concept of the 'centre of main interest', which will be described in paragraph [1.2.2]. When using the term 'COMI model', this book refers to a legal model which is based on the COMI concept.

EU legislature
The term 'EU legislature' is used to refer to the law-making bodies of the EU, according to the ordinary or special legislative procedure, as a whole. Although the law-making bodies of the EU could vary depending on the circumstances, when using the term 'EU legislator', this book refers generally to the law-making bodies which decide within the context in which the term is used.

English law
When using the term 'English law', this book refers to the law or legal system of England and Wales.
FORUM SHOPPING IN INSOLVENCY LAW

Structure of the book

The structure of this book can essentially be divided into three main parts. The first part is introductory and provides for the building blocks essential to the understanding of the issues at hand. This part is contained in Chapter 1, which analyses the EIR and seeks to clarify the logic behind forum shopping within this Regulation. The second part is aimed at providing an insight in forum shopping and establishing its key issues. It starts in Chapter 2 and consists of a glance over the practice of forum shopping within a few jurisdictions, which is pursued by an assessment of the current problems and propositions on forum shopping. In order to review the legal developments, the EIR Recast will be examined in Chapter 3, reflecting upon the established issues and demands from its original. The final part of this book will analyse the key obstacles of regulating forum shopping, and seek to overcome them. Therefore, this book will finish with an insight into the incorporation theory in Chapter 4 and establish an hypothesis on a possible solution to the key problems of forum shopping in Chapter 5.
CHAPTER 1

The European Insolvency Regulation

1.1 Purpose of the European Insolvency Regulation

1.1.1 Historical background

Within the internal market of the EU, internationalisation has been stimulated by eliminating obstacles for companies to cross national borders. For some 45 years it has been common for large companies to vest themselves in multiple jurisdictions, taking advantage of its laws, customs and markets. Throughout the years it can be said that the EU has successfully achieved its goal of creating a common market, built upon the free movement rights and upheld by the Court of Justice of the European Union (hereafter 'CJEU'). However, as in any normal functioning economy, there are also losses. While the EU has been active in its promotion of a successful European economy, it has been rather fruitless in the creation of European insolvency legislation. Although, as early as the 1960s efforts have been made to regulate this area of law, they have unfortunately been rather unsuccessful. Still, the EU remained determined, acknowledging the importance of harmonisation, and the need to address cross-border...
issues arising in the event of European insolvencies. As appropriately stated in the Virgós-Schmit report:

'It seems hard to accept that undertakings’ activities are increasingly being regulated by Community law while national law alone continues to apply in the event of the failure of an undertaking.'

The EU legislature acknowledged from an early stage that the area of insolvency law is one which should be dealt with separately. It is for this reason that insolvencies were excluded from the scope of the 1968 Brussels Convention, which dealt with the recognition and enforcement of court judgements within the EU. It has thus been the intention of the EU legislature to create a separate convention dealing with the recognition of European cross-border insolvency proceedings. In 1970 and subsequently in 1980 drafts for a Bankruptcy Convention have been proposed. These proposed conventions, however, proved to be quite complex and irrational at certain areas, leading to a discreet abandonment of any further attempts to promote the adoption of the drafts. Consequently, in 1989 the Council of Ministers established a new Working Party on the Bankruptcy Convention, dedicated to the creation of a more simplified, practical and politically acceptable set of rules. The persistency of the EU, through the efforts of the Working Party, resulted in the creation of the 1995 Convention on Insolvency Proceedings. Ostensibly, the 1995 Convention on Insolvency Proceedings contained many positive virtues, however, it was regrettably not signed in time by all fifteen Member States due to reasons that only subsequently became overt. Hence, the 1995
Convention on Insolvency Proceedings never came into force. Following this unfortunately narrow shortcoming, it was on the initiative of Germany and Finland that a slightly reconstructed version of the 1995 Convention on Insolvency Proceedings was proposed and ultimately developed into the EIR as we know it today.\(^{19}\)

1.1.2 Outset of forum shopping

As mentioned before, the EIR is substantially similar to the 1995 Convention on Insolvency Proceedings. Most of its articles are reproduced word-for-word.\(^{20}\) In this way, one could analogically reason that guides explaining the articles of the 1995 Convention on Insolvency Proceedings, similarly annotate on the articles of the EIR. Considering the fact that there are no explanatory guides to the EIR, scholars often consult the explanatory Report to the 1995 Convention on Insolvency Proceedings, or the so-called ‘Virgós-Schmit Report’.\(^{21}\) The Virgós-Schmit Report provides for an annotated guide to the text, giving background information and explaining the reasoning behind the text. Although, some reticence is appropriate,\(^{22}\) for the purpose of this book, it will be assumed that it is correct to acknowledge the text of the Virgós-Schmit Report as a proper source for a better understanding of the EIR. In support of this assertion, it should be noted that the wording of the Virgós-Schmit Report has been used in the recitals of the EIR.\(^{23}\) In addition, the Virgós-Schmit Report has also been acknowledged by Advocate General Jacobs in the delivery of his Opinion on the Eurofood case\(^{24}\) of the European Court of Justice (hereafter ‘ECJ’), as providing for useful guidance when interpreting the EIR.\(^{25}\) When studying the Virgós-Schmit Report, the connection between the EIR and forum shopping becomes more clear. It mentions the necessity of a legal framework in order to avoid parties from transferring...
their disputes or goods to a different Member State, where they would have a more favourable legal position.\textsuperscript{26} Subsequently, it states that only a multilateral agreement among Member States could discourage this opportunistic behaviour of debtors or creditors and allow for an efficient administration of a company in financial distress.\textsuperscript{27} In this respect, one could argue that the EIR seeks to avoid forum shopping by providing for cooperation between Member States through universal recognition of insolvency proceedings.\textsuperscript{28} A transfer of assets from one Member State to another would consequently become useless, as it would invariably fall under a main, EU recognised, insolvency proceeding. In this way, a Regulation could nullify incentives to forum shop within the EU. This notion is thus principally focused on asset transfer, and understandably so. At that time, forum shopping ineluctably required a transfer of assets. Once the assets of a company were transferred to a different jurisdiction, it would generally become subject to its rule of law through \textit{in rem} jurisdiction.\textsuperscript{29} Consequently, the debtor could misuse its power of disposal and forum shop to a more favourable jurisdiction, making the recognition of established security rights questionable due to the new jurisdiction. Relocation could also have isolated these assets completely from foreign proceedings which were not recognised under the new jurisdiction. Outside of insolvency, there is very little harmonisation with respect to these rules of private international law. Thankfully however, in case of insolvencies the EU has established the EIR, regulating: International jurisdiction; applicable law; recognition of insolvency proceedings; and coordination of parallel proceedings.\textsuperscript{30} These rules of private international law seek \textit{inter alia} to address the issue of forum shopping by establishing connection criteria which are difficult to manipulate.\textsuperscript{31} In addition, it has been expressed that the EIR reduces the possibilities of opportunistic behaviour on the part of Member States by removing regulatory competition and protectionism in these areas.\textsuperscript{32} Albeit that manipulation of applicable law has been limited by the creation of rules on private international law through the EIR, it cannot be said that forum shopping has been put completely at a halt.\textsuperscript{33}

\textsuperscript{26} Virgós-Schmit Report, par. 7.
\textsuperscript{27} Virgós-Schmit Report, par. 7.
\textsuperscript{28} See further paragraph \[1.2.4\].
\textsuperscript{29} Before the EIR, territorialism prevailed over Europe, making a simple transfer of assets sufficient to forum shop in most cases, see Bufford 2005, p. 137; see more generally, Pottow 2007, p. 800.
\textsuperscript{30} Virgós 2004, par. 5; see further paragraph \[1.2\].
\textsuperscript{31} Virgós 2004, par. 6.
\textsuperscript{32} Virgós 2004, par. 6.
\textsuperscript{33} Virgós 2004, par. 6; Torremans 2002, p 139; Hoek 2014, p. 82.
1.2 System of the European Insolvency Regulation

The EIR provides for a legal framework which should be considered holistically when discussing its relevance to forum shopping. However, certain recitals and articles deserve extra attention. These recitals and articles shall be dealt with sequentially.

1.2.1 Recital (4)

Recital (4) stipulates the necessity to avoid incentives for forum shopping in order to ensure a proper functioning of the internal market. The Recital relates to incentives of forum shopping as such. It also explicitly mentions the transfer of assets or judicial proceedings between Member States. Recital (4) is based on paragraph 7 of the Virgós-Schmit Report, which (similar to the Recital) outlines forum shopping as the transfer of disputes or goods, seeking to obtain a more favourable legal position. Luckily, the Virgós-Schmit Report goes further in explaining that institutional cooperation (by way of the EIR) is necessary in order to prevent this 'opportunistic conduct' of forum shopping at the detriment of 'the creditors as a whole'.34 Professor Virgós has subsequently expanded on this notion of opportunism in forum shopping, describing that forum shopping could be used to the detriment of (unsophisticated) creditors.35 Advocate General Colomer describes the issue of forum shopping similarly in his Opinion on Staubitz-Schreiber,36 where he prompts that forum shopping could lead to 'unjustified inequality'.37 In this way, the rationale behind Recital (4) and its distaste for forum shopping can be delineated more clearly. Although, the text of Recital (4) describes the objective to avoid incentives for forum shopping as such, one could argue that this ostensibly general objective should be nuanced.38

34 See in this regard also, Arnold 2013, p. 252.
35 Virgós 2004, par. 12(a); on the distinction between sophisticated and unsophisticated creditors, see paragraph [2.4.1].
36 ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber).
37 Opinion of Advocate General Colomer, delivered on 6 September 2005, ECJ EU 17 January 2006, C-1/04 (Staubitz-Schreiber), par. 70-77.
38 Opinion of Advocate General Colomer, delivered on 16 October 2008, ECJ EU 12 February 2009, C-339/07 (Seagon v Deko Marty), under note 49, ('The Community legislation counters the opportunistic and fraudulent use of the right to choose a forum, which is very different to the demonisation for the sake of it of a practice which on occasions it is appropriate to encourage'); also discussed more elaborately in paragraph [1.3.3].