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MAXIMISATION OF THE VALUE OF ASSETS AS THE PRINCIPLE OF CROSS-BORDER INSOLVENCY PROCEEDINGS

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Abstract. Maximisation of the value of assets is one of the general principles of insolvency law, though its application in cross-border insolvency proceedings remains obscure. This article focuses on the importance of this principle and its effects when main and secondary insolvency proceedings are opened. Since insolvency law should not only establish the legal framework of debt enforcement but also provide effective mechanisms to maximise creditors' returns, the question arises of how value maximisation should be attained when the assets of a debtor are located in different jurisdictions. This article analyses how the existing European legal framework of cross-border insolvency proceedings addresses the questions of treatment of assets, and whether it allows effective administration and realisation of the assets. In addition, it deals with challenges in the formation of insolvency estates when both main and secondary insolvency proceedings are opened; in particular, the powers of insolvency practitioners to recover assets that are removed from the respective insolvency estates of such proceedings. The research revealed that maximisation of the value of assets guides cross-border insolvency proceedings, and is important in resolving the questions pertaining to the treatment of assets which arise in these proceedings.

Keywords: Cross-border insolvency proceedings, European Insolvency Regulation, Assets, Estate, an Insolvency practitioner

Introduction

Cross-border insolvency proceedings can be understood as national insolvency proceedings with an international element. In the traditional example of cross-border insolvency proceedings, main and secondary insolvency proceedings may be opened in different states by different courts and consequently involve multiple insolvency practitioners that deal with the insolvency case of a single debtor (UNCITRAL, 2013, p. 19.). Absence of coordination between the proceedings may lead to divergent views of courts and insolvency practitioners on how insolvency proceedings should be handled. Thus, the rules on cross-border insolvency

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law should provide an effective mechanism to coordinate both sets of proceedings (UNCITRAL, 2013, p. 20-21).

One of the main challenges in insolvency proceedings is the effective treatment of the assets belonging to the debtor's estate. Insolvency proceedings as a collective debt enforcement mechanism should focus on effective administration and realisation of a debtor's assets (Madaus, 2018, para. 3.1, Jackson, 1986, p. 14; UNCITRAL 2004, p. 10-12). However, attaining this aim is more complicated in international insolvency matters when the assets of the debtor fall under the scope of different insolvency proceedings regulated by different national laws. The development of cross-border insolvency proceedings leads towards the modified universalisms approach, where main insolvency proceedings have universal effects and apply to the assets of the debtor worldwide (Virgós & Schmidt, 1996 Air Berlin, para. 70). The law of the state where the main insolvency proceedings have been opened (lex concursus) determines how the debtor's assets should be treated and the powers of an insolvency practitioner to recover and realise the assets. Nevertheless, if secondary insolvency proceedings are opened in another state, the effects of the lex concursus is restricted and assets located in the state where the secondary insolvency proceedings have been opened are subject to the national insolvency law of that state. Opening of secondary insolvency proceedings means that a separate insolvency estate is formed from the assets located in that country, which are excluded from the insolvency regime of the state where main insolvency proceedings have been opened (Art. 3(2) and 34 EIR).

Since main and secondary insolvency proceedings are regulated by different national insolvency laws, different insolvency practitioners are appointed and they (may) pursue different goals. The questions of how to treat the debtor's assets may therefore also be decided differently in each insolvency proceeding. For instance, how is it determined which assets fall to the insolvency estate of the main or secondary insolvency proceedings? How should they be administered and realised to achieve maximum value? How should the insolvency proceedings be coordinated?

In the last few decades, several international soft law instruments on cross-border insolvency proceedings have been adopted (Wessels & Gert-Jan, 2015). The adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997) (hereinafter MLCBI) reflects the importance of cooperation in cross-border insolvency proceedings and establishes rules on access of foreign practitioners to the court of a state implementing the MLCBI, the recognition of main and non-main insolvency proceedings, relief for recognised foreign insolvency proceedings, and the ground rules for cooperation and communication in cross-border insolvency cases. In addition, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2019) (hereinafter MLIRJ) provides rules on recognition and enforcement of insolvency-related judgments, which seeks effective circulation of judgments rendered in international insolvency cases. Currently, UNCITRAL's Working Group V on insolvency is preparing a Model Law on Applicable Law in insolvency proceedings. Although the general emergence of soft law international instruments provides more legal certainty and predictability about how they should be conducted, they are in principle non-binding legal instruments which do not necessarily provide a harmonious legal framework of international insolvency law. For instance, although the UNCITRAL model laws that have already been adopted, and the MLCBI in particular, emphasise the importance of value maximisation, they remain almost silent on how the debtor's assets should be treated worldwide to effectively attain it (UNCITRAL, 2013, p. 3, 20-21, 77, 95 and 103).

To address the intrinsic gaps and lack of binding rules governing cross-border insolvency proceedings, the general principles of insolvency law may be applied to provide a more predictable legal framework to fill these gaps. One of the major principles of insolvency law is maximisation of the value of the assets, which is related to the various actions that can be undertaken in insolvency law, primarily tracing, recovery, administration and realisation of assets (UNCITRAL, 2025). Not only is the principle related to the treatment of the existing debtor's assets, but also the recovery of removed assets, for instance by application of the rules

on transaction avoidance which can return unlawfully removed assets to the insolvency estate before the opening of insolvency proceedings. The goal of this principle is to maximise the returns for creditors, since their claims are satisfied from the proceeds of the realisation of the debtor's assets. Furthermore, the implementation of this principle may significantly contribute to the principle of equal treatment of creditors. Insolvency proceedings are collective, meaning that they involves all the debtor's creditors, which should provide for equal opportunities for them to participate. Maximising the returns for all creditors is more likely when the debtor's assets are realised for the highest market value (UNCITRAL 2004, p. 10-13).

The MLCBI and MLIRJ both mention the principle of the maximisation of the value of assets as one of their main aims. However, the principle scarcely deals with the question of treatment of assets, and provides only a few provisions on how the assets of the debtor should be preserved and protected by the mechanism of provisional measures and a stay. The European Union (hereinafter EU) Regulation on Insolvency Proceedings (hereinafter EIR) (2015) provides a rather extensive legal regime on cross-border insolvency proceedings. It establishes the aim of effective cross-border insolvency proceedings within the EU and provides certain rights and duties for the insolvency practitioner (and debtor in possession) and the court, requiring effective cooperation when main and secondary insolvency proceedings have been opened. Nevertheless, none of these instruments provide thorough guidance on the treatment of assets in cross-border insolvency proceedings.

This article analyses the principle of maximisation of the value of assets from the standpoint that it is an independent principle of cross-border insolvency proceedings. The scientific presumption of this research is based on the idea that this principle is not only a general principle of insolvency law but should also be perceived as a separate principle of cross-border insolvency law which fills the existing gaps in this area of law and provides the basis for the interpretation of the rules. The practical implication of such a presumption is significantly related to the function of cross-border insolvency law as a separate legal system.

To achieve the main aim of this research, this article raises a few questions. First, it seeks to determine what the principle of maximisation of the value of assets entails. Second, it questions whether this principle also exists as an independent principle in cross-border insolvency law or whether it is merely relevant for national rules of substantive insolvency law. Third, how should the insolvency estate be formed in cross-border insolvency proceedings? Fourth, how should proper cooperation between insolvency practitioners and courts affect the treatment of assets? These questions have, surprisingly, not been addressed extensively by scholars so far. Nevertheless, these questions have great novelty and importance. The judgment of the CJEU in the Air Berlin case reveals the challenges that insolvency practitioners face in the treatment of assets in main and secondary insolvency proceedings, and the importance of normative foundations to address these questions. To achieve the aim of this research a few legal research methods were used, namely, comparative, logical and systematic analysis. The methods were employed to analyse the relevant sources, draw implications, and progress towards the coherent application of the relevant international insolvency law instruments.

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1. Maximisation of the value of assets as the principle of insolvency law

The role of insolvency law in the market economy depends on the economic and social relations surrounding policymaking and the persons who make decisions in these proceedings (Jokubauskas, 2024). In the traditional sense, insolvency law seeks to solve the problem of coordination between the competing interests of the creditors and other participants in the insolvency proceedings, and thus establishes the coercive mandatory rules to regulate the questions of treatment of assets and enforcement of creditors' claims. To achieve this aim, an insolvency practitioner is appointed to manage the assets of the debtor, and creditors are prohibited from the employment of individual debt enforcement mechanisms to satisfy their claims. Instead,

all their claims have to be lodged in collective insolvency proceedings (Bork, Mangano, 2024, p. 8). Appointment of an insolvency practitioner to take care of the debtor's assets and the establishment of collective enforcement mechanisms of creditors' claims based on an established ranking reveals that, at least in formal insolvency proceedings, the state significantly intervenes in debtor-creditor relations regarding the enforcement of claims. Such an active role of the state in debtor-creditor relations show the social and economic importance of collective debt enforcement, and is based on the presumption that an insolvent company and creditors may not otherwise coordinate their behaviours (Bork, Mangano, 2024, p. 8).

Effective insolvency proceedings, however, require more than just the accumulation of all creditors' claims and the transfer of the debtor's assets into the hands of an insolvency practitioner. The obligation of the state is not only to provide the legal framework of a collective debt enforcement mechanism (including trained professional judges and insolvency practitioners to deal with insolvency matters), but also to provide the mechanism to maximise creditors' returns. This obligation derives from the need to provide the effective protection of the creditors' right to property. Since all creditors in insolvency proceedings exercise their rights under the regime of the insolvency proceedings set by the state to enforce the right to property (right to demand payment of debt under the claim that they hold), it affects creditors' property rights under Article 1 of the European Convention on Human Rights (hereinafter the Convention), which protects the right to property and establishes restrictions on how the state can infringe on this right.

Article 1 of Additional Protocol 1 to the Convention establishes that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This article sets three rules on the protection of the right to property, namely, the first rule, set out in the first sentence of the first paragraph, is of a general nature and states the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, prohibits the deprivation of possessions, while also introducing the exception and conditions to deviate from this prohibition. The third rule, stated in the second paragraph, recognises that the Contracting States are generally entitled, among other things, to control the use of property in accordance with the general interest (Beyeler v. Italy, para. 98). The right to property under the Convention establishes for the states the positive obligations to ensure the effective exercise of this right (Vujović and Lipa D.O.O. V. Montenegro (No. 2), para. 103). Thus, the effective protection of the right to property, which is based on general requirements on how the right should be exercised, requires the state to take effective measures to provide a regime of effective insolvency law.

In the case of Boyadzhieva and Gloria International Limited Eood v. Bulgaria, the European Court of Human Rights faced the question whether Article 1 of the Additional Protocol No. 1 to the Convention also protects the interests of a contractual counterparty of an insolvent company. Based on a transaction avoidance action, the contractual party was ordered to return the received property from an insolvent company (money payment for goods delivered before the commencement of the insolvency proceeding). However, the contractual counterparty disputed that this complied with the protection of their right to property. The question before the court was whether the national law provision which established transaction avoidance rules provide a proper balance between the interests of the counterparty to the transaction and the debtor's creditors.

The court found that the state enjoys discretion in regulating economic and social matters, such as in insolvency proceedings where a number of competing private interests are at stake (Boyadzhieva and Gloria International Limited Eood v. Bulgaria, para. 45). However, due to the absence of an effective legal instrument against action for transaction avoidance in the national law, the court held that the applicant's right to property was violated. This case reveals not only that the protection of the right to property is applicable to the creditors' claims in insolvency proceedings, but also that violations of the general right to property require

a careful balance in the application of insolvency law actions, as the reconciliation of the rules on transaction avoidance with effective legal defence mechanisms.

The creditors' right to enforce their claims relates to the protection of their right to property and requires establishing insolvency proceedings which substitute individual enforcement of creditors' claims with the effective collective debt enforcement instruments that are provided by insolvency proceedings. This relates not only to determining how a debtor's insolvency problems should be tackled (bankruptcy or restructuring), but also how all of a debtor's assets should be accumulated and used to maximise their value in order to increase the creditors' chances of attaining satisfaction of their claims. Some authors even argue that the primary goal for a judge hearing an insolvency case is the proper application of this principle: "more important than any of the other objectives that judges have to keep in mind are the main purposes of maximising the value of the debtor's assets, providing chances for reorganisation of a debtor's business, and ensuring that all creditors are to be treated equally" (Grant, p. 39). The obligation to maximise the value of the assets rests not only on the shoulders of the judge hearing the insolvency case, but also the insolvency practitioner whose task it is not only to recover and accumulate the debtor's assets, but also to realise them in the best possible way.

Maximisation as a legal and economic concept is not properly defined in insolvency law. The word "maximisation" is generally described as the process of making something as great in amount, size, or importance as possible (Cambridge dictionary, n.d.). Therefore, maximising an object can be interpreted as a process which realises its highest amount or value. In the case of insolvency proceedings, the object of collective debt enforcement mechanisms is to maximise the satisfaction of creditors' claims. Creditors' claims are satisfied from the assets which are collected during insolvency proceedings by the appointed insolvency practitioner and later realised. The need for maximisation of the value of the assets is directly related to the aims of insolvency law and provides the general requirements governing how assets should be handled. Maximisation should be considered when making decisions related to the treatment of assets, such as tracing and recovery of assets, their governance, and later realisation. It relates not only to single actions, but also the combination of the actions and various procedures in insolvency proceedings which may have a direct impact on maximising asset value for creditors. These considerations include, for instance, the costs of administration of insolvency proceedings, the actions of an insolvency practitioner, the court and others.

The open notion of maximisation of the value of assets may also present challenges for insolvency practitioners in determining the requirements deriving from this principle, and what concrete actions should be taken. Within the limitations of the estate, the decisions in insolvency proceedings regarding the treatment of assets require balancing how various sources and efforts are used to achieve the optimal result in insolvency proceedings. For instance, a decision to file a claim to challenge a transaction of the debtor, to set it aside and apply restitution, may be a mechanism to collect the assets, but the litigation costs and the challenges related to the enforcement of a judgment (particularly in a cross-border cases) may pose greater costs than the value of the recovered assets. Such assessments may also include a lack of predictability about what may be the most beneficial actions in the insolvency estate. The assessment of risks related to the actions that impact the recovery of asset value is an important criterion when deciding how certain instruments established in insolvency law should be employed.

The UNCITRAL Legislative Guide on Insolvency Law, Parts I and II (hereinafter Guide) lays down the substantive guiding rules for insolvency proceedings. The Guide acknowledges maximisation of the value of the assets as one of the main aims of insolvency law. The Guide establishes that participants in insolvency proceedings should have strong incentives to realise the maximum value of assets, as this will facilitate higher distributions to creditors overall and reduce the burden of a debtor's insolvency. The achievement of this goal is often furthered by achieving a balance of the risks between the parties involved in insolvency proceedings

(UNCITRAL, 2004, p. 10). To this end, the Guide proposes two main approaches to maximise the returns to the creditors, namely the application of rules on transaction avoidance and the choice between (fast) liquidation of the assets and restructuring (reorganisation) of businesses (UNCITRAL, 2004, p. 10-11). In addition, the Guide notes the possibility of a stay in order to maximise the value of assets (UNCITRAL, 2004, p. 12).

Maximisation of the value of assets is also recognised in the UNCITRAL Legislative Guide on Insolvency Law, Part five: Insolvency law for micro- and small enterprises, which was published in 2022 (hereinafter the Guide on MSE). The Guide on MSE establishes recommendations for simplified insolvency proceedings for micro and small enterprises, to enhance their effectiveness. The major policy aim established in this guide is related to this need to establish a simplified insolvency regime to address the particular needs of small and medium sized enterprises. Though it does not mention maximisation of the value of assets as one of the major aims of the Guide, the principle is recognised in various provisions. For instance, the Guide acknowledges that a simplified insolvency regime shall aim to ensure that avoidance mechanisms available under the insolvency law can be used in a timely and effective manner to maximise returns in simplified insolvency proceedings (UNCITRAL, 2022, p. 18). In addition, it states that a stay should be applied to protect the insolvency estate from individual actions by creditors as well as actions by the debtor (UNCITRAL, 2022, p. 112). The Guide on SME therefore aims to further the effective treatment of assets, namely, that the returns for the creditors should be maximised and that assets should be protected from depletion by imposing the stay of individual enforcement actions.

Establishing a common legal regime for insolvency law has been on the agenda of the EU legislature for some years. The aim of maximising the value of assets can also be found in current EU insolvency laws. Although there are few explicit references to maximisation of the value of assets in insolvency proceedings, in a dispute related to the application of the rules of state aid under EU law, the General Court found that "one of the objectives of any insolvency proceedings is to maximise the assets of the insolvent undertaking, including by bringing an action challenging the debts that reduce those assets" (Oltchim v Commission, para. 74). Such recognition emphasises the importance of this principle not only in national law, but also in EU law.

In more recent years, the development of EU insolvency law acknowledges that insolvency proceedings should be directed towards maximising returns for creditors. In 2014, the European Commission published its Recommendation on a New Approach to business rescue and failure (hereinafter the Recommendation). It presented a policy shift of EU policymakers to rescue viable companies facing financial difficulties and avoid unnecessary liquidation. The Recommendation establishes that early restructuring frameworks should "maximise the total value to creditors, employees, owners and the economy as a whole" (Commission Recommendation, Recital 1). Also, it mentions that "greater coherence and increased efficiency in those national insolvency rules would maximise the returns to all types of creditors and investors and encourage cross-border investment." (Commission Recommendation, Recital 11) Recognition of the maximisation of value and returns shows that this principle plays an important role for the EU Commission and should be regarded as an objective for such restructuring frameworks.

The Directive on Restructuring and Insolvency (hereinafter the Directive)[3] also recognises maximisation of value as the aim of preventive restructuring frameworks and establishes the core common elements of preventive restructuring frameworks and the procedure of discharge of debts of insolvent entrepreneurs which

[3] Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L. 172.

should be harmonised among the Member States. The Directive requires that preventive restructuring frameworks should aim to maximise the total value to creditors in comparison to what they would receive in the event of the liquidation of the debtor's assets (Recital 2 of the Directive), and notes that the reduction of the fragmentation of legal rules on restructuring should maximise the returns to all types of creditors and investors (Recital 15 of the Directive). However, besides these general aims, the Directive provides no guidance on how to understand the maximisation of value.

The Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law (2022) is the latest legislative proposal in for EU insolvency law. The aim of the proposal to harmonise rules on insolvency law in the Member States is coupled with the goal of maximising the recovery of value from the insolvent company. The maximisation of creditors' recovered value is also linked to the special legal instruments related to maximisation of the value of the insolvency estate, namely the rules on tracing of assets, transaction avoidance, sale of business as a going concern, and the duty of the director to file timely for the opening of insolvency proceedings. The proposed elements of harmonisation of insolvency law reveals that maximisation of the value of the assets is also regarded as one of the main aims of a harmonised regime of insolvency law in the EU.

In summary, the principle of maximisation of the value of assets stands as one of the main elements of insolvency proceedings. It derives not only from the general obligation of the state to establish effective protection and defence mechanisms of the right to property (Article 1 of the Additional Protocol No. 1 to the Convention), but also the need for effective treatment of cross-border insolvency proceedings. The main international soft law instruments in the field of insolvency law recognise the importance of maximisation of the value of assets. They require that the most effective decisions for maximisation of value are taken in treating the debtor's assets. A similar position is acknowledged in EU insolvency law, which requires maximising the returns to creditors as the aim of preventive restructuring proceedings.

2. Locating the principle of maximisation of the value of assets in cross-border insolvency proceedings

The principle of maximisation of the value of assets is recognised in international soft-law insolvency law instruments and EU insolvency law, but the role and the means of applying this principle in cross-border insolvency proceedings is rather obscure. Do the states (courts, insolvency practitioners) seek to maximise the value of a debtor's assets when main and secondary insolvency proceedings have been opened? Does the state maintain the obligation to provide an effective exercise of the right of creditors to enforce their claims when insolvency proceedings cross national borders?

Though the MLCBI establishes the maximisation of the value of assets as one of its main aims, it provides few provisions related to the treatment (protection) of assets and lacks any guidance on how the insolvency estate should be formed and the assets administered and realised to attain the optimal satisfaction of creditors' claims. Article 19 of the MLCBI establishes that relief may be imposed in case it is urgently needed to protect the assets of the debtor or the interests of the creditors. Such relief may be a stay of two kinds, namely, (a) staying execution against the debtor's assets; (b) entrusting the administration or realisation of all or part of a debtor's assets located in one state to a foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy. Article 20 of the MLCBI recognises the effects of the recognition of main insolvency proceedings which are related to the stay of the realisation of assets. The establishment of these rules aims primarily to ensure the effectiveness of main insolvency proceedings and avoid depletion of assets. The application of the stay of execution against the debtor's assets and their realisation provides the possibility to free the existing assets of the debtor, thus avoiding their depletion when

enforcement against the assets are applied outside the state where the main insolvency proceedings have been opened.

The MLCBI provides no guidance on how the debtor's assets should be treated when main insolvency proceedings are recognised and/or secondary insolvency proceedings are opened. The absence of rules on the treatment of assets in the model law may be explained by its rather limited scope and the acknowledgment that national insolvency law determines how a debtor's assets should be treated.

EU insolvency law provides more guidance and even mandatory rules related to the treatment of a debtor's assets. The EIR establishes the rules on cross-border insolvency proceedings when the COMI of the debtor is found in the Member States. The framework of cross-border insolvency proceedings in the EIR is based on a modified universalism approach, meaning that the regulation acknowledges the main insolvency proceedings as dominant, while also providing the possibility to open secondary insolvency proceedings to protect the interests of local creditors. The major aim of EU insolvency law is to enhance the effectiveness of the administration of cross-border insolvency proceedings (Recital 1 of the EIR). The proper functioning of the EU internal market also requires that cross-border insolvency proceedings are handled efficiently and effectively (Recital 3 of the EIR).

The aim of effective insolvency proceedings is mentioned in some recitals of the regulation. It seems that the main policy aim of the administration of assets in cross-border insolvency proceedings is established in Recital 48 of the EIR, which states that main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. Recital 48 of the EIR relates to one of the major challenges for the effectiveness of cross-border insolvency proceedings when main and secondary insolvency proceedings have been opened. The opening of main and secondary insolvency proceedings requires the coordination of both sets of proceedings, which should contribute to the attainment of the primary aim of effectiveness of the proceedings. The main actions related to the treatment of assets in cross-border insolvency proceedings are the administration of a debtor's insolvency estate and the effective realisation of assets. Nevertheless, the EIR does not establish how either of these aims should be achieved. The regulation merely acknowledges that the treatment of assets is an important aim but surprisingly provides no concrete guidance as to how it should be achieved.

The EIR establishes only a few provisions related to the treatment of assets. The notion of effective governance of cross-border insolvency proceedings is mentioned only in Chapter V of the EIR, establishing the rules on insolvency proceedings of a member of a group of companies, and it is not even mentioned in provisions regulating other aspects of cross-border insolvency proceedings. Nevertheless, it establishes some rules related to the treatment of assets. The rules on the treatment of assets in the EIR should be perceived as additional rules to those established in national law governing this matter. The regulation is based on the premise that lex concursus governs the questions of the treatment of assets. Article 7(2)(b) establishes that the law of the state wherein proceedings are opened shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings. Certain guidance of the application of the rights in rem are established in Article 8(2) of the EIR regulating the rights of the holders of security rights as exceptions to the general rules on lex concursus.

The main set of rules related to the treatment of assets in the EIR relates to the powers of insolvency practitioners and the coordination and cooperation of insolvency proceedings. Subject to Articles 8 and 10, the insolvency practitioner may, in particular, remove the debtor's assets from the territory of the Member State in

which they are situated (Article 21(1) of the EIR.). The removal of the assets to the insolvency estate of the main insolvency proceeding means that the insolvency practitioner has the right to recover the assets in question. Furthermore, the right to recover assets is also granted to the insolvency practitioner in secondary insolvency proceedings. The insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors (Article 21(2) of the EIR). EU insolvency law also requires that in exercising its powers, the insolvency practitioner shall comply with the law of the Member State within the territory of which it intends to take action, in particular with regard to procedures for the realisation of assets. Those powers may not include coercive measures, unless ordered by a court of that Member State, or the right to rule on legal proceedings or disputes (Article 21(3) of the EIR). Through such powers, insolvency practitioners have the right to apply the tools needed to remove assets from the state where the assets are located and bring them to the respective insolvency estate. Such powers of insolvency practitioners are therefore granted to maximise the value of the assets in the insolvency proceedings to which they are appointed.

The EIR also addresses the intrinsic challenges of cross-border insolvency proceedings by establishing mandatory rules for cooperation between insolvency practitioners in main and secondary insolvency proceedings (Article 41 of the EIR). Though the duty to cooperate is mandatory, the exact content of such a duty to cooperate is rather vague. Article 41(2)(c) of the EIR establishes that when implementing their duty to cooperate the insolvency practitioner shall coordinate the administration of the realisation or use of the debtor's assets and affairs; the insolvency practitioner in the secondary insolvency proceedings shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realisation or use of the assets in the secondary insolvency proceedings. Such requirements establish that the insolvency practitioners shall not act in isolation but rather consider how the totality of a debtor's assets shall be treated effectively.

Nevertheless, though the existing legal framework of cross-border insolvency proceedings (the MLCBI and the EIR) scarcely regulates the details of the treatment of assets, its admission as one of the main goals of these proceedings reveals that it also plays a significant role. The rules of the EIR related to the powers and duties of insolvency practitioners in main and secondary proceedings reveal that the proper exercise of their functions is the primary basis for the effective treatment of a debtor's assets. The need for the effective treatment of a debtor's global assets reveals that the principle of the maximisation of the value of assets is also found in cross-border insolvency proceedings. The recognition of this principle fills the existing legislative gaps in the regulation of international insolvency proceedings and requires that courts and insolvency practitioners dealing with international insolvency matters should consider not only the questions of the treatment of the assets in their respective main and secondary insolvency proceedings, but also the global effectives of the administration and realisation of the debtor's assets.

3. Formation of insolvency estate in cross-border insolvency proceedings

One of the main consequences of the opening of insolvency proceedings is the creation (formation) of an insolvency estate. All the assets of the debtor existing at the moment of opening the insolvency proceedings and those acquired (recovered) during insolvency proceedings form the insolvency estate which is later used to satisfy creditors' claims and reimburse the expenses of administering the insolvency proceedings. In essence, the insolvency estate comprises the assets of the debtor which are subject to insolvency proceedings (UNCITRAL, 2013, p. 12). The estate is created when the stay is applied, meaning that control of all the debtor's property is transferred to an insolvency practitioner (Criddle et al., 2019), p. 206). The formation of

the insolvency estate is one of the fundamental elements of collective insolvency proceedings. Deciding which assets form an insolvency estate is a crucial element for the treatment of assets since it determines whether the special rules of insolvency law for the treatment of assets are applied to them or not. Hence, it is important to understand which assets are subject to insolvency proceedings and which are excluded. This is determined by the rules of lex concursus.

The challenges of cross-border insolvency proceedings raise the issue of how the insolvency estate is to be formed when main and secondary insolvency proceedings have been opened. In such cases, is only one insolvency estate formed or is one formed in each state where insolvency proceedings (main or secondary) have been opened? When multiple insolvency proceedings are opened in different states, the question arises of how to determine which assets fall under the respective insolvency estates Is an insolvency estate formed automatically when insolvency proceedings are opened or does it require additional actions?

The formation of the insolvency estate depends on the nature of the main and secondary proceedings. The formation of the insolvency estate when main and secondary insolvency proceedings are opened is linked to the application of lex concursus to the debtor's assets worldwide. However, the opening of secondary insolvency proceedings creates an autonomous insolvency proceeding in the state of the debtor's establishment. Assets located in the Member States where secondary insolvency proceedings have been opened are excluded from the insolvency estate of other secondary insolvency proceedings. This exclusion is based on the idea that secondary insolvency proceedings are autonomous and primarily seek to protect the interests of local creditors. In a truly universal proceeding the role of an insolvency practitioner in secondary proceedings should be to collect the assets and hand them over to the insolvency practitioner in the main insolvency proceedings. These assets should later be distributed by the insolvency practitioner of the main insolvency proceeding (McCormack, 2022, p. 70-71). The accumulation of all relevant assets and the formation of an insolvency estate is one of the main tasks of an insolvency practitioner.

The formation of an insolvency estate and the determination of whether certain assets belong to the insolvency estate of main and/or secondary insolvency proceedings has been addressed by the CJEU in the Nortel Network AS (NNSA) case. This case concerned the worldwide insolvency proceedings of the multinational Nortel Networks group. Nortel Networks Limited, established in Canada, held the majority of the shares in Nortel group's worldwide subsidiaries, including NNSA, established in France (Nortel Network AS (NNSA), para. 9). Insolvency proceedings for the Nortel Group were opened across the world, including in EU Member States. The main insolvency proceedings of NNSA were opened in the United Kingdom under English law (at that time still part of the EU and therefore subject to the EIR). Later, secondary insolvency proceedings were opened in France (Nortel Network AS (NNSA), para. 11-12).

Seeking effective administration of the assets of NNSA, the insolvency practitioners negotiated an agreement on selling the assets of the company. They agreed that the sale should be carried out on a global basis, encompassing each branch of Nortel's activities, in order to 'secure a better price' for the assets ((Nortel Network AS (NNSA), para. 14,15). A mechanism was established under a separate agreement for distribution of the proceeds of the sale (Nortel Network AS (NNSA), para. 16). However, the works council and former employees of NNSA brought an action before the court in France demanding a declaration that the secondary proceedings gave them an exclusive and direct right over a share of the proceeds from the sale of the Nortel group's assets, as far as it related to NNSA ((Nortel Network AS (NNSA), para. 17-18). This claim was disputed by the joint administrators in the main insolvency proceedings for a lack of jurisdiction, in particular over assets not located in France (Nortel Network AS (NNSA), para. 19-20).

The principal questions raised by the national court in this case was whether the courts of the Member State where main or secondary insolvency proceedings have been opened have jurisdiction to determine (hear the

question) whether certain assets of the debtor belong to secondary insolvency proceedings, and which national law determines this matter. The outcome of such court proceedings should be a declaratory judgment which should establish to which insolvency estate certain assets belong, and which national law should be applied to determine the formation of the insolvency estate. Since the creditors and insolvency practitioners may have conflicting interests with respect to which insolvency estate certain assets belong, the answer to this question has a great importance for the effectiveness of such proceedings (Jokubauskas, Świerczyński, 2022).

The case was brought before the CJEU for a preliminary decision with respect to the matter of jurisdiction of the court in the Member State of the secondary insolvency proceedings, and to hear the request of the works council and former employees (Nortel Network AS (NNSA), para. 21). The CJEU found that the courts of the Member State in which secondary insolvency proceedings have been opened have jurisdiction over the determination of the debtor's assets falling within the scope of those proceedings (Nortel Network AS (NNSA), para. 38). However, the court had to analyse whether such international jurisdiction is concurrent or exclusive. The court considered that the effects of such a declaratory judgment rendered by the court which opened secondary insolvency proceedings would also have a direct effect on the main insolvency proceedings, since such a declaration means that certain assets would not fall under the scope of the main insolvency proceedings ((Nortel Network AS (NNSA), para. 41).

Considering the different interests in main and secondary insolvency proceedings, the court found that "the Member State in which secondary insolvency proceedings have been opened have jurisdiction, concurrently with the courts of the Member State in which the main proceedings have been opened, to rule on the determination of the debtor's assets falling within the scope of the effects of those secondary proceedings." (Nortel Network AS (NNSA), para. 46). Thus the court supported the view that the question of whether assets fall under the scope of secondary insolvency proceedings is not the exclusive international jurisdiction of the court which opened the secondary insolvency proceedings, and such international jurisdiction is divided between the courts of different Member States.

Turning to the second question related to the applicable law for the formation of an insolvency estate, the court was asked which national insolvency law should be applied to determine whether certain assets belong to the insolvency estate of secondary insolvency proceedings. The court had to deal with the application of Article 2(g) of the Regulation No 1346/2000,[4] which established the rules determining the location of assets. Considering the scope of the application of the Regulation No 1346/2000 and exclusion of the application of national law to address this matter (Nortel Network AS (NNSA), para. 50), the court found that to determine which assets fall under the scope of secondary insolvency proceedings, it is sufficient to establish if certain assets were situated within the territory of the Member State when those proceedings were opened, and it is not relevant in that regard to determine, as the case may be, in what other State those assets were situated at a subsequent stage (Nortel Network AS (NNSA), para. 53). Thus, the court found that Article 2(g) of the Regulation No 1346/2000 should be applied to determine whether the debtor's assets fall within the scope of the effects of secondary insolvency proceedings (Nortel Network AS (NNSA), para. 55).

The rationale of the court in this case reveals that the main and secondary insolvency proceedings are separate proceedings, where the main insolvency proceedings play a dominant role. While the decision confirmed, with respect to international jurisdiction, that courts have concurrent jurisdiction, the main practical solution to the

[4] Article 2(g) of the Regulation No 1346/2000 established that "the Member State in which assets are situated" shall mean, in the case of: (i) tangible property, the Member State within the territory of which the property is situated, (ii) property and rights of which ownership or entitlement must be entered in a public register, the Member State under the authority of which the register is kept, (iii) claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1).

challenges emerging from the concurrent jurisdiction of the courts in different Member States suggested by the CJEU was the need for proper cooperation between the courts and insolvency practitioners in insolvency proceedings. At the same time, the decision affirming concurrent jurisdiction on determining which assets belong to secondary insolvency proceedings may lead to a situation, in case of a lack of cooperation, of irreconcilable judgments (Nortel Network AS (NNSA), para. 44). However, the effectiveness of cross-border insolvency proceedings requires that assets should be treated in a way that maximises the value of the insolvency estate. It would be contrary to the aim of effectiveness if each insolvency practitioner simply froze the assets under their control. The assets should either be realised or used for commercial purposes, depending on the nature of insolvency activities.

Thus, looking from the perspective of the maximisation of the value of assets, the judgment in the Nortel Network AS (NNSA) case may be regarded as a compromise over the jurisdictions in insolvency proceedings, but not as providing guidance on the formation of an insolvency estate. The acknowledgement that the courts in main and secondary insolvency proceedings have jurisdiction to determine whether assets belong to the insolvency estate of secondary insolvency proceedings does not establish priority between main and secondary proceedings, but suggests that even a foreign court may decide over an insolvency estate in another jurisdiction.

The more recent example of the CJEU in the Air Berlin case also reveals the challenges of the formation of an insolvency estate and the "division" of assets between main and secondary insolvency proceedings. In this case, the main insolvency proceedings had been opened against Air Berlin in Germany, and a few years later secondary insolvency proceedings were opened in Spain. When the main insolvency proceedings were opened against Air Berlin in 2017, the company had assets in Spain. Furthermore, some claims of the local creditors in Spain were secured by rights in rem. Later, after a claim from the insolvency practitioner in the main insolvency proceedings, the court in Spain transferred around 1 mln. EUR to the fiduciary account of the insolvency practitioner in payment of the claim. The employees of the establishment of Air Berlin in Spain brought an action before the court in Spain for annulment of the act by which the assets had been removed from the territory of Spain. In that action, the employees claimed that the insolvency practitioner of the main insolvency proceedings had abusively removed the assets located in the Member State in which, due to the presence of an establishment, secondary insolvency proceedings could be opened.

Thus, the principal legal question regarding the formation of an insolvency estate was whether the only assets which fall under the scope of secondary insolvency proceedings (and so form the insolvency estate in this state) are those which were situated in that Member State when the proceedings were opened, or whether they also encompass assets which had been located in that Member State, but were removed before the opening of proceedings by the insolvency practitioner of the main insolvency proceedings.

The question raised in the Air Berlin case differs from that of the Nortel Network AS (NNSA) case. In the Nortel Network AS (NNSA) case, the central question related to the determination of whether certain assets belong to the insolvency estate of main or secondary proceedings when both sets of insolvency proceedings have been opened, while in the Air Berlin case the main question related to the problem of which assets form the insolvency estate of secondary insolvency proceedings.

The court, following the interpretation in the Nortel Network AS (NNSA) case, found that "the effects of secondary insolvency proceedings are restricted to the assets of the debtor which, on the date of the opening of those proceedings, were situated within the territory of the Member State in which those proceedings were opened" (Air Berlin, para. 66). To support such an approach, the court noted that the powers of an insolvency practitioner in secondary insolvency proceedings to remove assets under Article 21(2) of the EIR is limited only to removals performed after the opening of those proceedings (Air Belin, para. 66). It found that the

unilateral undertaking given under Article 36 of the EIR is related to the right of an insolvency practitioner in the main insolvency proceedings to preclude opening of secondary insolvency proceedings, thus limiting the consequences of the opening of secondary insolvency proceedings (Air Berlin, para. 67-68). Thus, the court established that "the assets situated in the State of the opening of the secondary insolvency proceedings comprise only the assets which are situated within the territory of that Member State at the time of the opening of those proceedings" (Air Berlin, para. 71).

The rationale of the CJEU in the Air Berlin case provides an important explanation of the time element for the formation of an insolvency estate in secondary insolvency proceedings. The proposed rule is that irrespective of where certain assets were located before the opening of secondary insolvency proceedings in a Member State, the insolvency estate of these proceedings consists only of the assets located in that state at the time when proceedings are opened. Therefore, when the main insolvency proceedings are opened, an insolvency practitioner has the right to remove assets from any other Member State, even though later secondary insolvency proceedings are opened in that state. This means that the insolvency estate of the main insolvency proceedings is formed at the opening of these proceedings, and lasts until secondary insolvency proceedings are opened. Only from the moment of opening of secondary insolvency proceedings is the insolvency estate of the assets located in that state formed.

The formation of an insolvency estate in main and secondary proceedings is crucial for the effectiveness of each of those proceedings. The case law of the CJEU in the Nortel Network AS (NNSA) and Air Berlin cases reveal the dominant position of the main insolvency proceedings and the separate formation of an insolvency estate in both sets of proceedings. The positions of the court in both judgments suggest that main insolvency proceedings play the dominant role since the court in the Member States where main insolvency proceedings are opened enjoy jurisdiction to determine whether certain assets belong the insolvency estate of secondary insolvency proceedings, and all the assets worldwide which belong to the debtor form the insolvency estate of the main insolvency proceedings and may be recovered by them until secondary insolvency proceedings are opened.

4. Recovery of assets as the measure to maximise insolvency estate

Insolvency practitioners are the main actors that ensure the effectiveness of cross-border insolvency proceedings. Though the specific rules on the recovery of assets are established in national insolvency laws, exercising these duties may require insolvency practitioners to apply the rules of cross-border insolvency law. The formation of separate insolvency estates in main and secondary insolvency proceedings may lead to a situation where the insolvency practitioners seek to maximise the value of the insolvency estate in their respective jurisdictions while at the same time this decreases (minimises) the value of the insolvency estate of another. For instance, if the practitioner from the main insolvency proceedings removes assets which belong to the insolvency estate of secondary insolvency proceedings, this may promote the interests of the main insolvency proceedings but harm the interests of creditors in secondary insolvency proceedings. In such scenarios, does an insolvency practitioner in secondary insolvency proceedings have the right to bring an action to the court and claim that an insolvency practitioner in other insolvency proceedings abroad has failed to exercise the duty to cooperate under Article 41 of the EIR? Are there other actions they are entitled to perform? Does EU insolvency law provide a legal standing for insolvency practitioners in secondary insolvency proceedings to challenge the actions performed by the insolvency practitioner of the main insolvency proceedings, and make requests to return removed assets? Would such litigation between the persons tasked with ensuring the effectiveness of insolvency proceedings be compatible with the effectiveness of these proceedings?

The right to remove assets and bring them to an insolvency estate is recognised in the EIR. Article 21(1) of the EIR establishes that an insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise powers conferred by the law of the State of the opening of proceedings, in another Member State, as long as no other insolvency proceedings have been opened there, and no preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. This provision confirms the modified universalism doctrine in the EIR and the scope of the powers of an insolvency practitioner. Under Article 21(2) of the EIR, the insolvency practitioner appointed by a court which has jurisdiction pursuant to Article 3(2) may in any other Member State claim through the courts or out of court that moveable property was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. The insolvency practitioner may also bring any action to set aside which is in the interests of the creditors.

Article 21(2) of the EIR is concerned with the tracing and recovery of assets and the principle of maximisation of the value of the assets. This general principle of insolvency law requires the accumulation of all assets and their most effective use in the insolvency proceedings (UNCITRAL, 2023). The powers of the insolvency practitioner are given under this provision irrespective of whether such powers are established under the national law of the Member State in which secondary insolvency proceedings are opened. Thus, it gives the right to an insolvency practitioner in secondary insolvency proceedings to take actions related to the maximisation of the value of a debtor's assets, irrespective of whether such a right is established under the national insolvency law.

In contrast to the rule under Article 21(1) of the EIR, the rule found in Article 21(2) of the EIR establishes the actions which an insolvency practitioner may perform with respect to the treatment of assets. First, it provides the right to file a claim in the courts or out of court, basically meaning that an insolvency practitioner has the right to file a claim before any tribunal or pre-trial dispute settlement institutions. Second, it establishes that the subject matter of such claims is the demand to return moveable property which was removed from the territory of the State of the opening of proceedings to the territory of that other Member State after the opening of the insolvency proceedings. Such action is linked with the accumulation of all a debtor's assets in the Member State in which the secondary insolvency proceedings have been opened. Third, it gives the right to an insolvency practitioner to file any action to set aside which is in the interests of the creditors. In summary, these rights in essence relate to the accumulation of a debtor's assets. However, while the first and second powers to file a claim for the challenging of the removal of movable property are clearly established, the third power only establishes that an insolvency practitioner has the right to demand to set aside any action according to the interests of the creditors.

The powers of insolvency practitioners to recover assets that were moved from the Member State where secondary proceedings where opened were raised in the Air Berlin case. The court faced the question of whether an insolvency practitioner in secondary insolvency proceedings has the right under Article 21(2) of the EIR to file a claim against the insolvency practitioner in the main insolvency proceedings to set aside the removal of assets. In other words, the question before the court was whether the power to recover assets also includes the right to file a claim against the insolvency practitioner of the main insolvency proceedings.

The CJEU found that 21(2) of the EIR does not establish the class of persons against whom such an action may be brought, and is thus in no way limited (Air Berlin, para. 83). The court also held that nothing in the wording of that provision supports an interpretation of it that would prevent the insolvency practitioner in the secondary insolvency proceedings from bringing an action to set aside against an act of the insolvency practitioner in the main insolvency proceedings, if it considers that action to be in the interests of the creditors ((Air Berlin, para. 84). Thus, the court found that "the insolvency practitioner in the secondary insolvency

proceedings may bring an action to set aside against an act that was performed by the insolvency practitioner in the main insolvency proceedings" (Air Berlin, para. 86).

Though the arguments of the CJEU on this question are rather succinct, the principal idea of the judgment reveals that the powers of an insolvency practitioner in secondary insolvency proceedings to demand the recovery of removed assets can also be applied against the actions of the main insolvency practitioner. The rationale of the court is based on the premise that since EU law does not prohibit an insolvency practitioner in secondary insolvency proceedings from filing a claim against an act that was performed by the insolvency practitioner in the main insolvency proceedings, then they have a right to do so.

The position expressed by the CJEU in the Air Berlin case regarding the powers of an insolvency practitioner in secondary insolvency proceedings raises questions. First, the acknowledgment that the insolvency practitioner in the secondary insolvency proceedings has the right to bring an action to set aside an act that has been performed by the insolvency practitioner in the main insolvency proceedings may impede the effectiveness of the main insolvency proceedings. If an insolvency practitioner in the main insolvency proceedings has already transferred assets to the insolvency estate in these proceedings, the separation of assets may be difficult or even impossible, especially in bankruptcy (liquidation) proceedings. Such assets may already have been realised, and the restitution of assets to the insolvency estate of the secondary insolvency proceedings may hardly be possible. Thus, even if such action is legally successful, its practical effect is doubtful.

Second, the lack of arguments in the judgment and the requirement of effectiveness in cross-border insolvency proceedings raise doubts as to whether an insolvency practitioner in the secondary insolvency proceedings indeed has the power to bring an action against the insolvency practitioner in the main insolvency proceedings. The rationale of the CJEU was based on the assumption what such rights exist since there is no direct prohibition of such actions. Nevertheless, since the EIR is the instrument of harmonisation of insolvency law in the EU, the powers of an insolvency practitioner should be clearly recognised. The argument which the court employed that related to the protection of local interests may indeed seem to be more persuasive, since this is the primary aim of opening secondary insolvency proceedings.

The judgment also omits discussion of certain points. The CJEU is limited to the questions raised by preliminary rulings and the formulation of legal problems by the national courts. However, this judgment provides only limited remedies against the actions of insolvency practitioners, and leaves open the questions of whether alternative actions may be taken in such circumstances, and also how such situations may be prevented in the first place. Conflicts may also arise, not strictly as in the Air Berlin case, but when, for instance, both main and secondary insolvency proceedings are opened and disagreement between the insolvency practitioners arises. Furthermore, the judgement does not specify in which Member State a claim should be filed, and what law would govern such action.

Conclusions

The existing legal framework of cross-border insolvency law acknowledges the principle of maximisation of the value of assets. It requires that courts and insolvency practitioners dealing with international insolvency matters consider not only the treatment of the assets in the estates of main and secondary insolvency proceedings separately, but also the cross-border effects of the administration and realisation of a debtor's assets. However, since secondary insolvency proceedings are autonomous, their commencement also means that a separate insolvency estate is formed.

The main instruments to achieve maximisation of the value of assets in cross-border insolvency proceedings are laid down in the EIR and MLCBI. They are based on the recognition of measures related to stay of individual enforcement actions against the debtor, the powers of insolvency practitioners to recover wrongly removed assets located in foreign jurisdictions, and cooperation in decisions over the treatment of assets. In the EU, such measures that contribute to the most effective treatment of a debtor's assets are governed by both EU law and national insolvency laws.

One of the fundamental questions in insolvency proceedings is the formation of the insolvency estate. Even though the formation of insolvency estates in national insolvency do not normally cause difficulties, challenges do arise in international insolvency matters. Cross-border insolvency law does not result in a global insolvency estate, because with the opening of both main and secondary proceedings, multiple estates are created. The judgments of the CJEU in the Nortel Network AS (NNSA) and Air Berlin cases reveal that main insolvency proceedings maintain the dominant role over the treatment of a debtor's assets. Not only does the court which opened the main insolvency proceedings have jurisdiction to determine whether assets belong to the main insolvency estate, but also whether assets which had been removed from the state before secondary insolvency proceedings were opened form the insolvency estate of those proceedings.

The maximisation of the value of assets may also trigger disputes between insolvency practitioners in the main and secondary insolvency proceedings. The judgment in the Air Berlin case reveals that an insolvency practitioner in a secondary proceeding has the right granted under Article 21(2) of the EIR to file an action against the insolvency practitioner of the main insolvency proceeding, and demand recovery of assets removed prior to the opening of secondary insolvency proceedings. Though this right may significantly increase the effectiveness of these secondary proceedings, such potential litigation and its consequences, such as a judgment to recover removed assets to the insolvency estate of secondary insolvency proceedings, can impair the effectiveness of main insolvency proceedings in maximising overall value.

References

Bob Wessels & Gert-Jan Boon, Cross-Border Insolvency, International Instruments and Commentary (Alphen aan den Rijn: Kluwer Law International 2015).
Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency.
Commission Recommendation 2014/135/EU of 12 March 2014 on a new approach to business failure and insolvency.
Directive (EU) 2019/1023 of the European Parliament and the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L. 172.
EU Cross-Border Insolvency Court-to-Court Cooperation Principles.
Evan J. Criddle, Paul B. Miller ed. The Oxford Handbook of Fiduciary Law (Oxford University Press, 2019), p. 206.
Gerard McCormack, EU Insolvency Law. Cross-border Insolvency Law in Comparatve Focus (Edward Elgar Publishin, 2022).
Jeniffer L. L. Grant, Harmonisation of European Inolsvency Law (Insol Europe, 2017).
Judgment of the CJEU 18 April 2024 in joined cases Air Berlin, C 765/22 and C 772/22.
Judgment of the CJEU of 11 June 2015 in case Nortel Network AS (NNSA), C-649/13.
Judgment of the General Court of 15 December 2021 in case Oltchim v Commission, T-565/19.
Judgment of the ECHR of 2 July 2018 Vujović and Lipa D.O.O. V. Montenegro (No. 2), petition No. 18912/15.
Judgment of the ECHR of 5 January 2000 in the case Beyeler v. Italy, petition No. 33202/96.
Judgment of the ECHR of 5 July 2018 in case Boyadzhieva and Gloria International Limited Eood v. Bulgaria, petitions No. 41299/09 11132/10.
Judgment of the General Court of 15 December 2021 in case T-565/19.
Miguel Virgós & Etienne Schmidt, Report on the Convention on Insolvency Proceedings (1996), OJ L 6500/96;
Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 149/19.

Remigijus Jokubauskas, Cross-Border Insolvency Proceedings Policies and Directives in the European Union (Routledge, 2024).
Remigijus Jokubauskas, Marek Świerczyński, The Coordination of Main And Secondary Insolvency Proceedings in European Union Insolvency Law, International Comparative Jurisprudence 8(1)(2022).
Stephan Madaus, "Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law", EBOR 2018.
Thomas H. Jackson, The Logic and Limits of Bankruptcy Law (Cambridge: Harvard University Press 1986).
UNCITRAL Asset Tracing and Recovery in Insolvency Proceedings (2025).
UNCITRAL Legislative Guide on Insolvency Law with Guide to Enactment and Interpretation (2013).
UNCITRAL Legislative Guide on Insolvency Law, Part five: Insolvency law for micro- and small enterprises (2022).
UNCITRAL Legislative Guide on Insolvency Law, Parts I and II (2004).
UNCITRAL Working Group V Civil asset tracing and recovery tools used in insolvency proceedings (2023) A/CN.9/WG.V/WP.186

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