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The Rome I Regulation in EU cross-border insolvency and restructuring

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Abstract

The Rome I Regulation on the law applicable to contractual obligations plays a key role in cross-border insolvency and restructuring proceedings. The paper outlines the reasons why and the occasions in which the Regulation bears such significant importance. The paper also addresses the much-debated issue of the recognition of out-of-court restructuring arrangements, proposing the inclusion of a European Certificate of Restructuring in the next recast of the European Insolvency Regulation.

Keywords: Contractual obligations, Conflict of laws, Preventive Restructurings, Insolvency Proceedings, Regulation (EU) 593/2008, Regulation (EU) 2015/848, Directive (EU) 2019/1023

1 Introduction

1. When it comes to inquiring into the use of the Rome I Regulation in EU cross-border insolvency, one immediately looks at its scope.[1] The general exclusion of 'procedure' as per Article 1(3) evidently prevents the Regulation from applying to procedural issues of insolvency proceedings. As regards substantive profiles, the only obstacle seems to derive from Article 1(2)(f), which excludes from the Regulation's scope 'questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or *winding-up of companies* and other bodies, corporate or unincorporated, and the personal liability

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1 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177.

of officers and members as such for the obligations of the company or body' (emphasis added). The reference to 'winding-up' appears to cover winding-up insolvency proceedings and, consequently, supports the suspicion that the Rome I Regulation does not apply to insolvency matters.

2. However, at closer inspection, but not even so close, that reference to 'winding-up' is intended as an example of matters falling under the 'company law'. Insolvency and insolvency-related topics are not directly addressed. Thus, one may generally assume the Rome I Regulation's eligibility to apply to restructuring and insolvency substantive issues.

3. This paper seeks to explain what this entails precisely. It clarifies whether and to what extent the *lex contractus*, as determined by the Rome I Regulation, applies in insolvency and restructuring contexts and, accordingly, what its interplay is with the *lex concursus*. Such an inquiry aims to understand in what exact terms the European Insolvency Regulation ('EIR'[2]) provides for a *lex specialis* in comparison to the Rome I Regulation.

4. Special attention is then paid to contractual restructuring arrangements. At that stage, the paper engages with the use of the Rome I Regulation as an instrument that determines the law applicable either to contracts subject to restructuring schemes or to the very contractual arrangements that lead to restructuring.

5. Finally, the issue of recognition of out-of-court restructuring arrangements is considered and elaborated on with a proposal to equip the EIR with a European Certificate of Restructuring.

2 Overview of the interplay between the *lex concursus* and the Rome I Regulation

6. The EIR remits the insolvency proceedings and their effects to the law of the Member State where the proceedings are opened (*lex concursus*). This rule is mainstream in the private international law of insolvency. On the other hand, legal certainty, demand for predictability, protection of third party/creditors' legitimate expectations and the stability of transactions concluded outside

2 Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L141. The latest consolidated version dates 1 May 2025.

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the Member State of the proceedings or under a different law from the *lex fori concursus*, are all drivers that lead the EIR to deviate from the direct application of the *lex concursus* in some circumstances encapsulated in Articles 8 through 18.[3]

7. Techniques vary in this respect. Some provisions lay down pure conflict-of-laws rules, while others implicitly resort to national, international or EU conflict-of-laws provisions as applied in the forum. There are also uniform substantive rules that become 'uniform *lex concursus*' (for instance, regarding the regime of obligations honoured after the opening of the proceedings[4]). As a result, depending on the circumstances of the case, the Rome I Regulation may apply to process these exceptions.

3 The law applicable to preliminary issues concerning the treatment of claims

8. Even the treatment of claims entails resorting to the Rome I Regulation when it comes to cross-border claims whose existence needs to be assessed either as a driver relied upon to request the opening of the proceedings or for the purposes of verification. This sounds quite surprising as the 'conditions' for the opening, the 'lodging, verification and admission' and other profiles of the claim's treatment are governed by the *lex concursus* (Article 7 of the EIR).

9. Actually, irrespective of its theoretical *rationale*, the dominium of the *lex concursus* accepts that the existence, effectiveness and validity of acts, rights and obligations falling under the insolvency proceedings that neither arise within the proceedings nor are based on insolvency law, are governed by the law determined through the conflict-of-laws system of the insolvency courts, including the Rome I Regulation should the proceedings be opened by courts of EU Member States.[5] This is particularly true when the claim's existence is

3 See Case C-527/10 *ERSTE Bank Hungary Nyrt v. Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt* ECLI:EU:C:2012:417, para 39; Case C-557/13 *Hermann Lutz v. Elke Bäuerle* ECLI:EU:C:2015:227, paras 34-35.

4 See the recent clarification from the CJEU about the interplay between *lex concursus* and Article 31: Case C-186/24 *Auto1 European Cars BV* ECLI:EU:C:2025:211. The Court states that Article 31 applies to acts that the insolvent debtor concludes after the opening of the insolvency proceeding, but the creditors regain protection because Article 31 works as long as such acts are enforceable against them under the *lex concursus*.

5 The Rome I Regulation also applies in the United Kingdom through the retained provisions (see The Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020). The 1980 Rome Convention instead still applies in Denmark.

functional to the claim's treatment in the insolvency proceedings. In other words, this is particularly true when the Rome I Regulation serves to settle the preliminary issue of assessing the existence of the claim for the subsequent insolvency-law-based purposes and effects.

10. Overall speaking, the EIR does not prevent courts from resorting to other regimes than the *lex concursus* during the verification process. Thus, just as the existence of claims may be assessed in lawsuits (or arbitral proceedings) pending abroad at the time of the opening and then verified through the recognition of foreign judgments and awards within the insolvency proceedings,[6] even only for evidentiary purposes, so claims may be directly ascertained by the insolvency courts under the *lex contractus* (as determined by the Rome I Regulation) as a preliminary issue to the treatment that the claims undergo within the insolvency proceedings under the *lex concursus*.

4 Set-off

11. The foregoing observations are also valid vis-à-vis claims that are the object of set-off exceptions. Set-off represents a method to reciprocally extinguish two or more claims, albeit at times only partially, and is governed differently from one State to another, starting with its admissibility in insolvency proceedings.[7] Should set-off be prohibited, the unsecured creditor is due to pay off its debt and receive a *pari passu* repayment on the cross-claim.

12. However, the EIR looks favourably at set-off, recognizing in its *rationale* 'a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises' (Recital 70). Put differently, creditors may rely on set-off vis-à-vis the debtor's cross-claim as a guarantee. The Rome I Regulation enters the scene because Articles 7(2)(d) and 9 of the EIR trigger a comparison between the *lex concursus* and the law applicable to the debtor's claim, allowing creditors to demand set-off under the

6 Corte di cassazione (sezione I) 15 April 2019 no 10540 www.dejure.it accessed 15 May 2025.

7 For example, national laws could diverge as to whether set-off works with respect to claims that fall due before the opening of the proceedings or also to those that, although falling due subsequently, result from acts occurred before (this is the Italian approach: see Corte di cassazione (sezione I) 30 December 2021 no. 42008 www.italgiure.giustizia.it/sncass accessed 15 May 2025).

latter when the former prohibits it or imposes more restrictive conditions.[8] The Rome I Regulation determines the other law in question in the case of contractual cross-claims. More in detail, according to the EIR, the *lex concursus* governs 'the conditions under which set-offs may be invoked' (Article 7(2)(d)), but 'the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim' (Article 9). Since Article 9 refers to the 'right to demand set-off [...] where such set-off is permitted' by the *lex contractus*, there is a case to argue that the provision protects the *substantive* right to trigger the set-off, with the *lex concursus* retaining competence as to the *procedural* 'conditions' under which set-off can be invoked before the insolvency courts.

13. Notably, the EIR establishes a set-off-friendly regime inspired by the so-called *Passivforderung* theory, which also marks the treatment of set-off within the Rome I Regulation in general (Article 17).[9] Despite being identical in wording, the regime of the EIR works as a *lex specialis* as it fosters set-off whenever it is restricted by the *lex concursus*, thereby protecting the creditors, while Article 17 of the Rome I Regulation aims to shield the party against whom the set-off is invoked as an alternative way to the payment.

14. Leaving aside the specificities of 'clearing houses' and set-offs carried out within payment systems and financial markets,[10] set-off agreements referring

8 See Matthias Lehmann, 'Article 9', in Gilles Cuniberti and Antonio Leandro (eds), *The European Insolvency Regulation and Implementing Legislations. A Commentary* (Edward Elgar 2024) 211 ff., also for further references.

9 See Antonio Leandro, *Circolazione ed estinzione dei crediti commerciali nei conflitti di legge dell'Unione europea. Il regolamento «Roma I» tra mercato interno e mercati dei capitali* (Giappichelli 2023) 91 ff., also for further references. Lacking this special rule, since set-off generates partial or entire extinction of different contractual claims, it would have been governed by the law applicable to each claim (reasoning under Article 12(1)(d) of the Rome I Regulation), with risk of cumulative application of both laws to determine validity and effectiveness of set-off.

10 For the purposes of this paper, it is sufficient to note that the Rome I Regulation and the EIR aim to protect participants' reliance on the integrity of the system or market and the uniformity of the legal framework governing the rights and obligations arising therefrom. The shared approach of the two regulations reflects the special nature of the private international law rules applicable to payment systems and financial markets—rules generally aimed at mitigating systemic risk and, more specifically, at ensuring legal certainty and security of transactions, with regard to the uniform treatment of contract settlements and set-off operations. Needless to say, certain undertakings involved in markets and payment systems fall outside the EIR's scope. See Francisco J Garcimartín Alférez, Miguel Virgós Soriano, 'Article 12', in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2nd edn, OUP 2022); Matthias Lehmann, 'Article 12' in *The European Insolvency Regulation and Implementing Legislations. A Commentary* (n 8).

to cross-claims governed by different laws are worth a final remark as they may be used for restructuring purposes irrespective of their falling within or outside the EIR.

15. It seems straightforward to argue that debtors in possession and insolvency practitioners may conclude cross-border set-off agreements after the opening of the insolvency proceedings if the *lex concursus* permits so. Should the agreement be concluded, or in the case of pre-opening agreements, the question arises as to what their applicable law is (an issue also bearing importance for the purposes of set-aside actions that trigger a comparison between *lex concursus* and *lex contractus* as will be noted in section 7). There is no obstacle to applying the Rome I Regulation. As will be remarked in section 9, the Regulation may work in the 'perimeter' of mandatory provisions arising in insolvency contexts, let alone when it comes to preventive restructurings.

16. Since set-off agreements are separated from the contracts (or other legal relationships) generating the claims at stake, it is reasonable for the parties to choose the same law for the agreement and the extinguishing effects. Otherwise, the law governing each claim will determine the extinguishing effect resulting from the set-off agreement as per Article 12(1)(d) of the Rome I Regulation, irrespective of the law chosen for the agreement.

17. Problems arise in the rare scenario in which parties fail to choose the law applicable to the set-off agreement. Since no specific entry of Article 4(1) of the Rome I Regulation can encapsulate the agreement *per se*, the law should be determined having regard to the habitual residence of the characteristic performer (Article 4(2)). Still, identifying the characteristic performer is not easy, as set-off agreements create symmetrical obligations all equally indicative of the agreement's 'centre of gravity'. Therefore, resorting to the closest connection criterion under Article 4(4) seems to be the sole realistic option.

18. Assuming that the extinguishing function is the beacon in the search for the closest connection, since the law governing a claim applies to its extinction, the same law would govern the set-off agreement under Article 4(4). In the case of claims governed by different laws, all such laws should apply, unless a connection lies between the claims (more precisely, between the contracts from which they arise) that triggers the exception clause in Article 4(3) in favour of one law or the other. However, the cumulative application of laws must be rejected. The legal uncertainty it generates is evident. Moreover, it is challenging to establish the 'closest connection' between *one* agreement and *two* States. Indeed,

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assuming that the claims are put on equal footing in set-off arrangements, the agreement would not have the 'closest connection' to either State.

19. Thus, it is better to abandon the extinguishing function of set-off as a criterion for establishing the closest connection and instead focus on the context in which the agreement has been concluded. In the case of set-off agreements concluded in insolvency or restructuring proceedings, such context conveys the closest connection with the State whose courts have opened the proceedings. In the case of preventive out-of-court schemes, where the spectrum of the Rome I Regulation's applicability is broader, as will be noted in section 10, the connection would be with the State where the insolvency proceedings would be opened if the preventive attempt failed.

5 Current contracts: immoveables

20. The other field deserving attention is the treatment of current contracts. The *lex concursus* determines the effects of the insolvency proceedings on such contracts (Article 7(2)(e) of the EIR). Yet, the effects of the insolvency proceedings on specific contracts are remitted to other laws, including the *lex contractus* as determined by the Rome I Regulation. In particular, the effects of the proceedings on contracts conferring the right to acquire or make use of immoveable properties are governed by the *lex rei sitae* (Article 11(1) of the EIR), i.e., the law of the Member State where the immoveable is located. In other words, the fate of sale or lease contracts concerning immoveables is determined by the *lex rei sitae* even in insolvency proceedings opened in other countries.

21. This law generally coincides with that governing the contract, especially in the absence of a choice of law; according to the Rome I Regulation, in fact, the *lex rei sitae* applies, but for the qualified exception of tenancy of immoveable properties concluded for temporary private use for no more than six consecutive months (Article 4(1)(c)). On the other hand, parties may choose a different law pursuant to Article 3 of the Rome I Regulation. Be that as it may, Article 11 of the EIR compels courts to apply the *lex rei sitae* to determine the effects of the insolvency proceedings. Additionally, Article 11(2) enables the court which has opened the main proceedings to retain jurisdiction to approve the termination or modification of the contracts if the *lex contractus* requires that such effects depend on the insolvency court's approval and no insolvency proceedings have been opened in the Member State of the same law. The mainstream

idea is that *lex contractus* matches the *lex rei sitae* as termination and continuation of the contract always account for effects of the insolvency proceedings that Article 11(1) allocates to the *lex rei sitae*.[11]

22. Yet, there is a case to interpret the provision literally. As anticipated, parties may choose other laws than the *lex rei sitae* to govern their relationships concerning 'immoveables', even more considering that contracts on 'immoveables' are wide-ranging. Other laws may be preferred because they make the effects of the insolvency proceedings conditional upon fewer requirements than the *lex rei sitae*, or because *ipso facto* effects are considered better options than court approvals, or vice-versa. Ultimately, while the *lex rei sitae* is statutorily set to determine the effects of the insolvency proceedings, the *lex contractus* may be chosen by parties and, if different, will determine if court approvals are needed.

23. To rule on the approval requirement, the insolvency court should find in the *lex contractus/lex rei sitae* the proceedings most comparable to those it has opened. What matters is, in fact, to terminate or modify the contract in compliance with such law in order to achieve the primary goal underlying the derogation to the direct applicability of the *lex concursus* consisting in the protection of legal certainty and the legitimate expectations of third parties who have rights and interests on the immoveable in question under a different law. It is worth recalling that the *lex concursus* applies to any profile other than termination or modification based on judicial approval.

6 Current contracts: employment

24. Regarding employment contracts, Article 13 of the EIR calls on courts to apply the *lex contractus* to the effects of the insolvency proceedings. The *lex contractus* is presumably determined under Articles 3 and 8 of the Rome I Regulation. Parties may choose such law without depriving the employee of the protection afforded by overriding provisions of the law that would apply in the absence of choice. The law in question is that of the State where the employee habitually carries out his work or, if such law cannot be determined, the law of the State where the place of business through which the employee

11 See recently Zeno Crespi Reghizzi, 'Article 11', in *The European Insolvency Regulation and Implementing Legislations. A Commentary* (n 8), para 11.030, also for further references.

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has been engaged is situated. Another law may displace the laws above if it is more closely connected with the contract considering all the circumstances of the case. Remarkably, the *lex contractus* and its insolvency provisions come into play to govern the effects of the insolvency proceedings on the contracts. Other issues, such as the ranking of the employees' claims, remain subject to the *lex concursus* in accordance with Article 7 of the EIR.[12]

25. Article 13(2) EIR singles out for jurisdictional purposes the case of employment contracts performed in the Member State where the debtor has an establishment. The provision confers jurisdiction to that State's courts to approve the termination or modification 'even if no secondary insolvency proceedings have been opened' therein.[13] In doing so, the EIR reinforces the protection of employees who perform activities in States other than the State of the main proceedings, whose law requires judicial or administrative approval for the contract to be terminated or modified. The protective purpose mostly arises when the COMI's law does not provide comparable court intervention.[14]

26. Article 13 gives jurisdiction to the courts of the State of the would-be secondary insolvency proceedings, whether the law of that State or other laws establish the approval of termination or modification of the contracts. Hence, since the *lex contractus* governs the effects of the insolvency proceedings, and parties have a limited choice of law under the Rome I Regulation, the employment contract may be governed by the same law as applies to the main insolvency proceedings if the choice goes in favour of the latter. Accordingly, and perhaps quite paradoxically, the courts of the establishment might apply a foreign law to establish if the contract's termination or modification needs their approval, and that law may belong to the State of the main insolvency proceedings pursuant to a choice of law sanctioned by the Rome I Regulation.

27. Apart from such 'paradoxical' detour, the regime provided in Article 13(2) of the EIR finds reasons in the close vicinity between the courts of the establishment and the contractual performance. Moreover, local courts are better positioned than others to address the interests of local employees, especially when the

12 See recently Joined Cases C-765/22 and C-772/22 *Air Berlin* ECLI:EU:C:2024:331, para 55.
13 Recital 72.
14 Francisco J Garcimartín Alférez, Miguel Virgós Soriano, 'Article 13', in *Commentary on the European Insolvency Regulation* (n 10), para 13.14.

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crisis has a significant impact on the local economy.[15] This is why, using the word 'retain', the provision moves from the premise that the *proper* jurisdiction in such circumstances belongs to local courts.[16] In the same vein, Article 13(2) reinforces the employees' access to justice, as they can more easily access courts in the State where they perform their activities.[17] It is understood that Article 13(2) works in the absence of genuine secondary proceedings. If the debtor has no establishment (i.e., if not even abstractly may the jurisdiction over secondary proceedings be determined), the approval is for the courts of the State where the main insolvency proceedings have been opened, to the extent that the *lex contractus* requires judicial approval.[18]

7 The law applicable to detrimental acts in avoidance disputes

28. It is well known that the functional linkage between avoidance actions and proceedings' purposes explains why the *lex concursus* determines the 'rules relating to the voidness, voidability and unenforceability of legal acts detrimental to the general body of creditors' (Article 7(2)(m) of the EIR). The *lex concursus* applies irrespective of whether the detrimental act generates rights that are immune from the opening of the insolvency proceedings, such as rights *in rem*, the right to set-off and rights based on a reservation of title. Articles 8(4), 9(2) and 10(3) ensure that the *lex concursus* applies to acts that bring about such rights, even when a different law governs them.

29. On the other hand, the EIR provides for two exceptions. The first subjects 'avoidance actions' concerning payments and financial markets transactions to the law governing the system or the market concerned (Article 12(2)). The second one, enshrined in Article 16, excludes the application of Article 7(2)(m) whenever the person who benefited from a detrimental act provides evidence that both the act is governed by the law of a Member State other than that of

15 Zeno Crespi Reghizzi, 'Article 13', in *The European Insolvency Regulation and Implementing Legislations. A Commentary* (n 8), para 13.029.

16 Christoph Paulus and Tom Smith, 'Commentary on the Original Insolvency Proceedings Regulation and the Recast Insolvency Proceedings Regulation', in Stuart Isaacs, Tom Smith and Christoph Paulus (eds), *Moss, Fletcher and Isaacs on The EU Regulation on Insolvency Proceedings* (4th edn, OUP 2023), para 8.595.

17 Francisco J Garcimartín Alférez, Miguel Virgós Soriano (n 14), para 13.16.

18 Stefan Reinhart, 'Article 13', in Rolf Stürner, Horst Eidenmüller, Heinrich Schoppmeyer and Ursula Schlegel (eds), *Munchener Kommentar zur Insolvenzordnung* (4. Aufl., Beck 2021), para 26.

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the proceedings, and that law 'does not allow any means of challenging that act in the relevant case'.

30. The rule concerning payment and financial markets transactions is self-evident, owing to the specificity of the system in which the detrimental effect arises. The Rome I Regulation may enter the scene to determine the law governing the market or the system to the extent that the latter falls under its scope.[19]

31. Article 16 amounts to a general exception instead. It is intended to protect the legitimate expectations of third parties who, before the opening of the insolvency proceedings, have concluded transactions with the debtor under a law other than the *lex concursus*, to rely on the validity and effectiveness of the transaction in accordance with such law, notwithstanding the opening of the proceedings.[20]

32. The EIR does not determine the *lex causae*; its scope is confined to insolvency issues. Courts will resort to the conflict-of-laws rule that applies in relation to the disputed act. When the act amounts to a contract, the Rome I Regulation comes into play to disclose the *lex causae*. The EIR, in fact, provides beneficiaries with a means to demonstrate that the act was, and still is, valid and effective according to its *lex causae*, even though their counterparty has been declared insolvent under the *lex concursus*. The EIR does not determine the other law eligible to freeze the effects of the *lex concursus*. It only impedes the latter to adversely affect contracts that are unchallengeable under their *lex contractus*.[21]

33. The task of coordinating the two laws is not easy, notwithstanding the CJEU has provided clarification. For instance, since beneficiary parties bear the burden of establishing the content of the *lex causae* 'in the relevant case', it has been disputed whether they may rely only on insolvency rules of the *lex contractus* or need to provide evidence that the act is unchallengeable according to that

19 See extensively Francisco J Garcimartín Alférez, 'New Issues in the Rome I Regulation: The Special Provisions on Financial Markets Contracts' (2008) Yearbook of Private International Law 245; Francisco J Garcimartín Alférez, Miguel Virgós Soriano, 'Article 12', in *Commentary on the European Insolvency Regulation* (n 10); Matthias Lehmann, 'Article 12' in *The European Insolvency Regulation and Implementing Legislations. A Commentary* (n 8).

20 Recital 67; Miguel Virgós and Etienne Schmit, *Report on the Convention on Insolvency Proceedings* (European Council, doc no 6500/96, 3 May 1996), para 138.

21 *Lutz* (n 3), para. 31.

law as a whole. The CJEU upheld the latter view in the *Nike European Operations* judgment, stating that: 'a person benefiting from a detrimental act must prove that the act at issue cannot be challenged either on the basis of the insolvency provisions of the *lex causae* or on the basis of the *lex causae*, taken as a whole.'[22] Subsequently, the Court has clarified that 'the party bearing the burden of proof must show that, where the *lex causae* makes it possible to challenge an act regarded as being detrimental, the conditions to be met in order for that challenge to be upheld, which differ from those of the *lex fori concursus*, have not actually been fulfilled'.[23] This interpretation fits better with Article 16. In fact, the *lex contractus* is not called to block avoidance effects generally and abstractly, but only whether and to the extent that avoidance is not possible under it in the relevant case, where it would be instead possible under the *lex concursus*. In other words, 'a concrete assessment of the specific act in question must be undertaken'.[24]

34. Moreover, in order to preserve the EIR's uniform application, the Court holds that Article 16 also covers limitation periods or other time-bars as well as both substantive and procedural requirements under which avoidance actions are to be exercised.[25] Assuming that the *lex contractus* applies because of Article 16, the coverage of limitation periods or other time-bars is consistent with the approach taken by the Rome I Regulation. In fact, on the one hand, it does not affect the principle whereby the *lex fori* governs the procedure as a law that oversees the entire judicial proceeding in which contractual obligations are disputed, but, on the other hand, it uniformly takes over prescriptions and limitation of actions in the *lex contractus* under Article 12(1)(d).[26] The major difference lies in the fact that such uniform characterisation in the contractual sphere does not directly apply in avoidance disputes processed under Article 16 of the EIR. The CJEU maintains that, when it comes to avoidance disputes, it is for the *lex causae* to establish the substantive or procedural

22 Case C-310/14 *Nike European Operations Netherlands BV v. Sportland Oy* ECLI:EU:C:2015:690, para 34.

23 Case C-54/16 *Vinyls Italia SpA v. Mediterranea di Navigazione SpA* ECLI:EU:C:2017:433, para 39.

24 Felicity Toube, Jennifer Marshall and Francisco J Garcimartín Alferez, 'Cross-Border security and Quasi-Security', in *Moss, Fletcher and Isaacs on The EU Regulation on Insolvency Proceedings* (n 16), para 6.31.

25 *Lutz* (n 3), paras 44-49.

26 Mario Giuliano, Paul Lagarde, *Report on the Convention on the law applicable to contractual obligations* [1980] OJ C 282, *sub* Article 14, 36. See Richard Garnett, *Substance and Procedure in Private International Law* (OUP 2012), para 7.01 ff.

nature of prescriptions or limitations as the EIR constitute *lex specialis* in respect of the Rome I Regulation.[27]

35. The latter consideration holds true in matters of evidence. The Rome I Regulation carves out from the *lex fori* 'certain questions of evidence' (Article 18). Presumptions and burden of proof are remitted to the *lex contractus* insofar as they are absorbed into the contractual matter according to the same law. Moreover, the Regulation triggers an alternative between the law of the forum and the law governing the formal validity under Article 11 regarding the modes of proof as long as the court can 'administer' the foreign mode in the concrete case. However, this regime does not work when the *lex contractus* applies for the purposes of Article 16 of the EIR. The CJEU made clear that Article 16 of the EIR 'does not set out, inter alia, the ways in which evidence is to be elicited, what evidence is to be admissible before the appropriate national court, or the principles governing that court's assessment of the probative value of the evidence adduced before it'.[28] In accordance with the procedural autonomy, the *lex concursus qua fori* governs such matters.[29] This different regime is not surprising, as the issue at hand is not resolving the interplay between procedural rules and contractual rules in the context of a *contractual dispute*. It is rather an issue concerning *avoidance disputes* falling within the *vis attractiva* of insolvency courts, in which the *lex contractus*, as *lex causae*, only serves to establish the requirements to trigger the protection offered by Article 16.

8 The Rome I Regulation and the harmonisation of avoidance rules with a look at the 2022 Proposal

36. Admittedly, the more national legal systems differ about avoidance rules, the more they compete with one another when parties choose the law applicable to their transaction. Parties may even choose the law because it proves to be more convenient in terms of an '*anti-avoidance* shield', irrespective of being the most appropriate *lex contractus* compared with the substance of the transaction. Such a choice does not reveal abusive tactics aimed at evading the *lex concursus*, as it is commonplace for parties to prefer laws under which the contract is effective and enforceable. Parties may legitimately choose a law to protect their expectation about the contract's stability. The *rationale*

27 *Lutz* (n 3), para 46; *Vinyls Italia SpA* (n 23), para 48.
28 *Nike European Operations* (n 22), para 27.
29 Ibid, para 28.

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of Article 16 of the EIR rests, in fact, on the abstract difference between legal orders from which the parties pick out the one that strengthens the transaction's effectiveness even in the case of insolvency proceedings. In brief, the rationale of Article 16 assumes, among other things, the far-reaching scope of the parties' freedom in private international law and protects the final transaction as described above.

37. However, the scenario features specificities when the choice of law entirely sidesteps any consideration of the connection between the contract and the *lex contractus*. Such a choice is legitimate to the extent Article 3 of the Rome I Regulation permits parties to select a law that would not be otherwise connected to the contract were it not for the choice. The party autonomy is again indisputable and deserves protection.[30]

38. Yet, parties cannot evade the imperative provisions of the law that is entirely connected with the contract (Article 3(3)). Thus, the question arises as to whether avoidance rules of the *lex concursus* acquire mandatory nature for the purpose of Article 3 of the Rome I Regulation and, consequently, may not be derogated by the chosen *lex contractus*. This question makes only sense if the State in which 'all other elements relevant to the situation at the time of the choice are located' corresponds to the State where the insolvency proceedings have been opened, otherwise the clash between chosen law and mandatory rules would not regard insolvency matters.

39. The CJEU somehow addressed the issue in the *Vinyls* case, making clear that Article 16 'may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated [under Article 3 of the Rome I Regulation] the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine'.[31] The Court adds that Article 16 'may be disregarded only in a situation where it would appear objectively that the objective pursued by that application, in this context, of ensuring the legitimate expectation of the

30 On the subject, Stefania Bariatti, 'Party autonomy and internationality of the legal relationship: recent developments in the case law of the EU court of justice on the European Private International Law Regulations', in Pilar Domínguez Lozano (ed. by), *Derecho internacional privado europeo. Diálogos con la práctica* (Tirant Lo Blanch 2020) 189.

31 *Vinyls Italia* (n 23), para 56.

parties in the applicability of specific legislation, has not been achieved, and that the contract was made subject to the law of a specific Member State artificially, that is to say, with the primary aim, not of actually making that contract subject to the legislation of the chosen Member State, but of relying on the law of that Member State in order to exempt the contract, or the acts which took place in the performance of the contract, from the application of the *lex fori concursus*'.[32] In other words, the point the Court has made clear is not whether Article 3(3) of the Rome I Regulation may be relied upon to derogate from the *lex concursus*, but that Article 3 let parties choose any law so long as the choice searches for the contract law and does not aim primarily at abusive ends, such as seeking the protection of Article 16 of the EIR.

40. The applicability *per se* of the insolvency avoidance rules is not affected by the freedom of choice governed by the Rome I Regulation (and vice versa). The Rome I Regulation can be applied in insolvency contexts without compromising its intention to govern contractual obligations. Put differently, the choice under Article 3 of the Rome I Regulation cannot correspond to the choice of insolvency rules that apply or do not apply in the insolvency proceedings. The fact that the *lex contractus* comes into play under Article 16 of the EIR is immaterial because Article 16 assumes that a different law from the *lex concursus* exists; it does not establish how to designate such law, instead relying on the Rome I Regulation. Whether the *lex contractus* has been selected for abusive purposes is not an issue to be processed under Article 16. Rather, it is a limitation to party autonomy that must be processed under the Rome I Regulation.

41. The fact remains that avoidance rules still lack such harmonisation in the EU space that might reduce competition among the various legal orders and the uncertainty of transactions falling within the spectrum of insolvency proceedings. The process to harmonise the matter is underway after the European Commission launched in 2022 the proposal for a 'Directive harmonising certain aspects of insolvency law'.[33] However, it is a process of minimum harmonisation, with member States retaining the 'gold-plating' right, i.e., the right to maintain or adopt provisions that provide for a greater level of creditors'

32 Ibid., para 54.

33 COM (2022) 702 final. See in particular Article 4-12. On the subject see extensively Reinhard Bork and Michael Veder, *Harmonisation of transactions avoidance laws* (Intersentia 2022). The Council adopted a General Partial Approach on 29 November 2024 (ST-16283/24-INIT) that modifies the original rules without altering their rationale.

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protection.[34] As a result, even after the adoption of this new Directive, there will still be leeway to normative competition and, thus, to law-shopping tactics in search for *leges contractus* shielding the contract (or specific contractual obligations) from the avoidance effects of foreign *lex concursus*.

9 Contractual arrangements in pre-insolvency and insolvency proceedings

42. If debtors in possession or insolvency practitioners conclude cross-border contracts, the Rome I Regulation may apply to determine their law. Whenever the transaction is not directly based on insolvency law, and discloses a contractual nature, the fact that it is processed within pre-or insolvency proceedings does not sway *per se* on the chance to apply the Rome I Regulation (as it does not with respect to other applicable regimes, including those that establish uniform rules rather than private international law provisions[35]).

43. Yet, the 'insolvency perimeter' may not be overlooked, given that, depending on the circumstances of the case, either the debtor in possession or the insolvency practitioner is always arranging contracts with the aim of liquidating, rescuing, or restructuring in a preventive way. In particular, just as the law governing the pre-insolvency or insolvency proceedings sets the boundaries of the substantive party autonomy, so it does with respect to the choice of law.

44. One might argue that the limitations above work in the Rome I Regulation as overriding mandatory provisions pursuant to Article 9 so that the *lex contractus* steps back where those provisions apply and irrespective of whether the *lex contractus* is chosen or determined under Article 4 or special provisions that work in the absence of a choice of law.

45. That could be a valid reading. There is also a case for qualifying such limitations as rules that settle the powers and tasks of debtors and insolvency practitioners when approaching and concluding their transactions. Moreover, they

34 See Article 3a of the Proposal as amended according to the General Partial Approach (n 33).

35 For example, nothing impedes parties from resorting to the UN Convention on Contracts for the International Sale of Goods provided that the sale is not performed 'on execution or otherwise by authority of law' (Article 2(c)). Likewise, parties may decide to shape the contractual regulation upon the UNIDROIT Principles of International Commercial Contracts. Either way, parties would be aware that resorting to such instruments does not exclude the supplementary role of state law.

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may represent obstacles to applying foreign *leges contractus* that blatantly conflict with the interests of the stakeholders involved in the proceedings and, thus, work under the guise of public policy. Suppose, for example, that contractual negotiations begin with the purpose of preventive restructuring, with parties seeking to choose a foreign law to make the transaction more attractive to foreign creditors. Recital 10 of the 2019 Preventive Restructuring Directive recalls that '[a]ny restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders. That dialogue should cover the choice of the measures envisaged in relation to the objectives of the restructuring operation, as well as alternative options, and there should be appropriate involvement of employees' representatives as provided for in Union and national law'.[36] Consequently, if the contract above were governed by a chosen law that manifestly clashes with the interests of the relevant stakeholders, and such interests amount to critical values in the forum, that law might not be applied under Article 21 of the Rome I Regulation because of its contrariety with the forum's public policy.

46. In order to determine the forum in question, much depends on whether the restructuring is contingent upon judicial approval or is already part of in-court insolvency proceedings. In such cases, the forum ruling on the issues above would be the COMI's if the scheme 'contractual arrangement + approval' falls within the scope of the EIR. Conversely, suppose the arrangement remains in the pure contractual realm, thereby not disclosing features that trigger the 'insolvency exception' under the Brussels Ibis Regulation. In that case, the latter applies to determine, among other things, the jurisdiction of the *forum contractus* under Article 7, unless parties have concluded a choice of court agreement. On the other hand, should the arrangement fall outside both Regulations, the domestic rules of the seized forum apply to assess or negate its jurisdiction. This highlights the urgency of addressing the current uncertain jurisdictional framework regarding preventive restructurings. We will return shortly to this topic when focusing on out-of-court arrangements.

47. Conclusively, the Rome I Regulation may apply to international contracts along with the protective tools it provides in defence of general interests as applied in the forum in restructuring or insolvency contexts.

36 Directive (EU) 2019/1023 of 20 June 2019 on preventive restructurings frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debit and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) [2019] OJ L172/18.

10 Recognition of out-of-court contractual arrangements

48. The cross-border recognition of out-of-court arrangements warrants considerable attention in an analysis addressing the interplay between the Rome I Regulation and restructuring schemes. The topic has sparked much interest after the adoption of the 2019 Preventive Restructuring Directive. It is well known that the Directive lays down rules on pre-insolvency restructuring frameworks and prompts parties to use out-of-court tools so that debtors may keep their activity ongoing while facing a crisis or the likelihood of one. Regarding out-of-court workouts neither sanctioned by courts nor encapsulated in authentic instruments, we may assume that no issues of recognition of 'judgments' arise that require assessing whether the EIR or the Brussels Ibis Regulation applies.

49. The Rome I Regulation offers solutions.[37] Whether in the case of debt restructurings or other non-sanctioned transactions, the workout is likely to be *enforced* as a contract, with the Rome I Regulation being paramount in determining the cross-border effects of the contractual obligations arising from the transaction or, conversely, the effects of the restructuring transaction on existing contractual obligations.[38] This scenario is clear, as the courts of any Member State must resort to the Regulation to establish the contractual legal framework even in such cases. Put differently, the 'enforcement' boils down to recognizing the contractual obligations and related liability as determined by the contract and its applicable law.

37 See *Study on the issue of abusive forum shopping in insolvency proceedings*, Final Report, JUST/2020/JCOO/FW/CIVI/0160 (DG JUST February 2022) 81 ff.

38 In *DTEK Energy BV* [2021] EWHC 1551 (Ch), the English High Court recognised as evidenced 'a generally accepted principle of private international law that a variation or discharge of a contractual right in accordance with the governing law of the contract will generally be given effect in other countries' (para 39). This principle, which somehow echoes the Rule in Gibbs, expands in terms of recognition thanks to Article 12(1)(d) of the Rome I Regulation according to which the *lex contractus* governs 'the various ways of extinguishing obligations'. Both the principle and Article 12 assume, though, that the law governing the extinguishing effects by way of restructuring is the same as that applicable to the contract to be partially or entirely extinguished.

50. However, Pandora's box opens as the final restructuring depends on many drivers, such as
    a. the presence of a choice of law or a partial choice either for the restructuring transaction itself or for the affected contracts,
    b. the way the objective connecting factors work in the absence of choice of law,
    c. the one- or multi-contract nature of the transaction, which entails that different laws may apply to the respective obligations or contracts that move the transaction forward to restructuring purposes or are affected by discharge effects,
    d. the chance to use the 'closest connection factor' under Article 4(3) of the Rome I Regulation when, for instance, it is clear that, notwithstanding the choice of law or the functioning of objective connecting factors, the transaction or its parts are 'manifestly' more closely connected with the State in which the debtor has its COMI or the establishment (i.e., the State in which the insolvency proceedings may be opened should the confidential restructurings fail),
    e. the exigence to apply overriding mandatory provisions of the forum as described above or the law of the place of performance according to the theory of 'illegality of performance' under Article 9(3) of the Rome Regulation or because regard shall be had to that law under Article 12(2),
    f. the need to coordinate the law of assignment of claims and the law(s) of assigned claims under Article 14, taking account of the broad concept of assignment including 'outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims'.

51. Moreover, certain drawbacks arise. Firstly, the restructuring agreement would not bind third parties, especially dissenting creditors. Moreover, 'new money' claims resulting from the agreement could trigger rank issues if the debtor were subsequently to fall into insolvency proceedings. The *lex concursus* then applicable will set the rank, irrespective of the claim's source. Yet, the agreement might have constituted or be backed by collateral or other legal rights that the EIR protects from the effects established by the *lex concursus* … with the lodged creditors picking up again the card 'Go to Article 8 or 16' of the EIR to know how the transaction affects their rights within the opened insolvency proceedings.

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11 Filling in the gaps through a European Certificate of Restructuring

52. In light of the foregoing, it appears that confidential out-of-court transactions generally require a new regime that enhances their cross-border recognition beyond what the Rome I Regulation may provide. In this respect, it makes little sense to dwell on whether the workout enters the Brussels Ibis Regulation or the EIR once it is understood that some national pre-insolvency schemes lack such a public nature as the EIR requires, do not align with the procedural model for which the Brussels Ibis Regulation is designed, or are handled by authorities lacking the features of 'courts' as intended in the Brussels Ibis Regulation.

53. The new general premise should be that some schemes fall under insolvency rules as a result of a renewed, broader concept of insolvency law broken out across the EU. This premise suggests updating the 'insolvency exception' of the Brussels Ibis Regulation with a view to broadening the EIR's scope. Because of the CJEU, scholars and practitioners are used to saying that the EIR 'must not be interpreted broadly', and the 'insolvency exception' of the Brussels Ibis Regulation is to be interpreted restrictively.[39] However, this sounds like an old saying that does not stand with all preventive restructuring schemes, especially those lacking judicial features. This is why any future revision of the EIR that wished to avoid gaps between the two Regulations while retaining the insolvency exception as it literally stands in the Brussels Ibis Regulation should consider broadening the scope of the EIR.

54. Yet, it would not be sufficient to state clearly that contractual arrangements then 'sanctioned' by courts or other authorities fall under the EIR's regime of recognition. In fact, the would-be new EIR ought to open to the recognition of confidential workouts whose 'court approval' is not needed or proves to be excessively time-consuming and costly. Parties, on the one hand, may wish for certain confidential agreements to remain confidential; on the other hand, they may need to enforce the agreements without incurring the costs and time associated with judicial approvals. How to do so? Since the *inter partes* scope of

39 Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* ECLI:EU:C:2009:544, para 25; Case C-157/13 *Nickel & Goeldner Spedition GmbH v 'Kintra' UAB* ECLI:EU:C:2014:2145, paras 22-23; Case C-649/13 *Comité d'entreprise de Nortel Networks SA and others v Cosme Rogeau* ECLI:EU:C:2015:384, para 27; Case C-641/16 *Tünkers France, Tünkers Maschinenbau GmbH v Expert France* ECLI:EU:C:2017:847, para 18; Case C-649/16 *Peter Valach* [and others] *v Waldviertler Sparkasse Bank AG* [and others] ECLI:EU:C:2017:986, para 25.

confidential agreements can hardly be overcome without court homologation, the EU legislator may make good on providing parties with an instrument that at least ensures *erga omnes* clarity on where, how and to what extent out-of-court workouts are to be enforced.

55. A designated authority that promptly and efficiently 'certifies' the workouts as 'enforceable' might do the trick. The EU law is not new to 'designated authorities' that issue certificates encapsulating private acts. Whether those 'designated authorities' are judicial bodies, or other entities would be for Member States to decide.

56. In consistency with its role, such authority should issue a document that ensures certainty and publicity regarding the effects that the arrangement aims to achieve. In this respect, the most comparable fitting document is the European Certificate of Succession.[40] Drawing on Article 69 of the Succession Regulation, the future EIR could be equipped, in fact, with a 'European Certificate of Restructuring' ('ECR') with the task of 'accurately' demonstrating elements that have been established by a contractual agreement that parties have concluded for restructuring purposes. Put differently, the ECR would demonstrate elements that have been established under the law applicable to the restructuring schemes and under the law applicable to the single contracts through which the restructuring materialises or are affected by the latter. The ECR would contain information about the terms of the agreement, the debtor's data, its power to enter into contracts, the creditors involved, the law applicable to the claims affected by the restructuring and to the transactions specifically aiming at restructuring purposes, such as assignments, transfers of properties, new financing, etc.

57. The ECR would be for use by debtors, creditors and other stakeholders involved in the agreement who, in another Member State, need to invoke rights and obligations flowing from the agreement. Thus, any person who, acting on the basis of the information certified in the ECR, makes payments or passes on property or transfers financing to a person mentioned in the ECR as authorised to accept payments, properties and financing, shall be considered to have transacted with a person with authority to receive payments, properties and

40 See Articles 62 through 73 of the 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 [2012] OJ L201/107.

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financing. Such effects would be effective vis-à-vis third parties throughout the entire EU, beyond the *mere* quality of contractual effects.

58. Since the ECR would be part of the new EIR, it could be issued in the Member State whose courts have jurisdiction under the EIR to open or supervise the insolvency or restructuring proceedings with respect to the interested debtor.

59. Needless to say, the ECR may be challenged 'at the request of any person demonstrating a legitimate interest'.[41] However, in order to avoid depriving the ECR of effectiveness as a smooth means for the cross-border recognition of *former* confidential arrangements, such a 'legitimate interest' should be limited to dissenting creditors or other entities that are not included in the original agreement and may demand the opening of the insolvency proceedings according to the EIR and/or the COMI's or the establishment's *lex concursus*.

60. It is quite evident that the ECR's feasibility and usefulness depend on the circumstances of the case, starting with the number and size of potential dissenting creditors and relevant stakeholders, as well as the debtor's bargaining power. Ultimately, it would serve not as a mandatory, but as an alternative option for debtors and creditors, thus becoming part of the available tools for cross-border preventive restructurings.

12 Concluding Remarks

61. The paper has clarified that the *lex contractus* as determined by the Rome I Regulation plays different roles in insolvency and restructuring contexts and is well combined with the *lex concursus* along the chain of procedural steps and substantive issues that fall under the latter according to the EIR.

62. A systemic integration between the two sets of rules arises that makes it possible to govern the treatment of contractual obligations in compliance with the various interests underlying the opening and the conduct of cross-border insolvency proceedings.

41 Quoting Article 71 of the Succession Regulation.

63. This systemic integration finds room at the onset of the proceedings, e.g. when it comes to assessing the existence of the claims as a preliminary issue and goes through the proceedings whenever the expectation by contracting parties about the enjoyment of their respective contractual rights deserves protection against the opening of the insolvency proceedings and the adverse effects flowing from the *lex concursus*.

64. Cross-border restructurings give special prominence to contractual tools and, accordingly, to the Rome I Regulation. This may apply not only to determine the applicable law, but also to provide authorities and stakeholders with the necessary tools to secure critical values and interests revolving around or affected by the restructuring proceedings.

    Both the contracts concluded in restructuring schemes and the contractual restructuring arrangements *per se* require recognition abroad for the cross-border restructuring outcomes to work efficiently within the EU space. Much debated is the recognition of out-of-court arrangements. The way of recognising them as 'contractual obligations' features some drawbacks that the European Certificate of Restructuring proposed in this paper might remedy.

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