

Rights in rem of third parties
under the EU Insolvency Regulation

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Introduction

The text that follows below has been taken from the book 'International Insolvency Law', which is the second edition of my 2003 Dutch book, again published by Kluwer, Deventer, the Netherlands. It will be available after Summer 2006.

For the abbreviations used and the literature mentioned I refer to said book.

The literature used in the book will be available in a Bibliography, available via www.bobwessels.nl.

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Rights in rem of third parties

10639. Article 5 InsReg provides that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets (both specific assets and collections of indefinite assets as a whole which change from time to time) belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. Article 5 aims to protect holders of security rights, (such as mortgages or pledges), who have acquired their rights in the context of providing finance to a debtor who is now subject to foreign insolvency proceedings, from an unexpected attack by the *lex concursus*.

Article 5

Third parties' rights in rem

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;

(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;

(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;

(d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

10640. *The objective of the exception.* 'There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be

affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security', see InsReg, recital 23. For present purposes the English terminology of the InsReg text is used despite the fact that a direct translation from Dutch provides different accepted terminology ('restricted right', 'moveable thing', 'immoveable property'). Generally, with regard to the treatment of rights in rem in international insolvency cases the Regulation establishes a rule of 'non-alteration' of the rights in rem which fall under the scope of Article 5 (see Virgós/Garcimartín (2004), 92). For a general discussion of the clash between insolvency and security rights see Liersch (2001); Bahar (2004).

System. Article 5 InsReg is, as indicated, the first exception of a list of issues which exclude – in some form – the enforcement of the *lex concursus* (applicable to the main proceedings and instrumental in governing which assets belong to the estate in the main proceedings, see Article 4(2)(b) InsReg). The general rule is that when assets (moveable assets, real estate, a bank account) are situated in another Member State, they belong to the estate of the main proceedings. Some of these assets may be the subject of a creditor's or another third party's rights in rem. The InsReg does not explicitly provide that these assets belong to the main proceedings, but it explicitly respects (at the moment the proceedings are opened) existing rights over certain assets belonging to the debtor which are located or situated within the territory of another Member State at the time of the opening of proceedings. The same approach respecting existing rights has been applied to Article 6 (set-off) and Article 7 (reservation of title).

Rights in rem existing prior to opening. Article 5 is only applicable to rights which are in existence at the time of the opening of insolvency proceedings. In the event that these rights have been created after the opening of proceedings, Article 4 is fully applicable, see Virgós/Schmit Report (1996), nr. 96. It is questionable whether the division is as clear as the Report seems to suggest since it cannot be excluded that the national law of a Member State contains a right, which between certain parties (e.g. between a borrower and a bank) has certain 'rem' elements, but only at the moment that the holder of the right effectively pursues his right. In such a situation the interpretation followed in the specific jurisdiction, will prevail, albeit that this interpretation should be considered within the context of the InsReg as a Community measure. For further discussion see Eidenmüller (2001), 6 and Veder (2001), 103.

Assets belonging to the debtor. A further uncertainty may arise in relation to the definition of 'assets.....belonging to the debtor'. Dirix/Sagaert (2002), 111, and Veder (2004), 337, follow the rule that 'belonging' not only covers legal ownership, but also forms of 'economic ownership' and certain 'propriety rights' in assets, which according to the governing law are attributed to the estate. This interpretation follows from the given policy considerations and is justified when e.g. retention of title (not a right in rem in the Netherlands) or a right recorded in a public register as set forth in Article 5(3) is shielded from the applicability of the *lex concursus*. However, it should be noted that the rapporteurs defend a restrictive interpretation of the norm 'right in rem', see the following paragraphs.

Article 5 and Article 9. For the relationship between Articles 5 and 9, see Berends (2005), 396ff.

10641. Article 5(2) InsReg enumerates several rights which are considered to be rights in rem as per Article 5(1). The decision of whether a certain right is a right in rem shall be made in accordance with the rules of the national law which governs such rights, prior to the insolvency. Usually this will be the *lex rei sitae*.

10642. *Which rights in rem?* Article 5 refers to ‘rights in rem’, but it does not define what these rights are. Article 5(2) provides an enunciative list of such rights. The InsReg deliberately abstains from providing its own definition of a right in rem, as this may differ from the definition given to ‘rights in rem’ by the specific country in which the assets are located. Article 5(2) states that rights in rem ‘in particular’ mean a concentrated group of legal powers; the characterization of a right as a right in rem shall be determined by the national law which, according to the normal pre-insolvency conflict of law rules, governs these rights in rem, which in general will be the *lex rei sitae* at the relevant time, see Virgós/Schmit Report (1996), nr. 100. The aforementioned rights ‘in particular’ mean:

- (a) the right to dispose of assets or to have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
- (d) a right in rem to the beneficial use of assets.

10643. *Indication through national law.* According to the Report, op. cit., the characterization of a right as a right in rem should be sought within the national law which governs rights in rem as according to the normal pre-insolvency conflict of law rules. The InsReg adopts, what the rapporteurs call, a ‘*lege causae*’ characterisation. It appears that this observation is not reflected in the text of Article 5(1) and 5(2). See para. 10650.

Article 5(1) merely states that the opening of (main) insolvency proceedings ‘shall not affect the rights in rem of creditors’. The provision precludes the enforcement of the (universal effect of the) *lex concursus*, it does not specifically provide when a ‘right’ is a ‘right in rem’. Nevertheless, the opinion in the Report, op. cit., nr. 102, which is also mentioned in the preamble (see InsReg, recital 25, quoted in para. 10640) appears to be logical. For further discussion on rights in rem see Virgós/Garcimartin (2004), 96 and, specifically in relation to Spanish law, see Presoly (2001). For comments relating to some ten other countries see Watté/Marquette (1999), 287ff. and for the Netherlands see Veder (1998), 178ff; Veder (2004), 330ff; Berends (2005), 374ff.

It should be noted that the rapporteurs defend a restrictive interpretation of the ‘right in rem’ as follows; (i) Article 5 is itself an exclusion to the general rule of applying the *lex concursus* of the ‘main’ Member State, (ii) secondary proceedings may only be opened when the debtor possesses an establishment in the specific country, and (iii): ‘An unreasonably wide interpretation of the national concept of a right in rem to include, for instance, rights simply reinforced by a right to claim preferential payment, as is the case for a certain number of privileges, would make the [Regulation] meaningless, and such a wide interpretation is not to be attributed to Artikel 5.’ In the opinion of the rapporteurs (Report, op. cit., nr. 103) a right in rem (i) is directly and immediately related to assets covered, (ii) the absolute nature of which right can be enforced against all third parties. In countries where a fiduciary transfer of title (resulting in ‘legal ownership’ for the creditor) is possible, such ownership is to be regarded as a right in rem. The (Dutch) right of retention however, as indicated, should not be characterised as a right in rem, see Dirix/Sagaert (2001), 597; Dirix/Sagaert (2002), 111. Van Wechem, NILR 2000, 372, however, is not convinced of this contention. With regard to the somewhat autonomous concept of rights in rem in the Regulation, see Veder (2004), 332.

1045110644. *Which assets?* In order for Article 5 InsReg to apply, said rights in rem, which remain unaffected by the opening of the main insolvency proceeding, exist ‘.....in respect of

tangible or intangible, moveable or immovable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings', see Article 5(1). The quotation carries a substantive component (in terms of which particular assets fall within the ambit of the exception) and a territorial component (in terms of where such assets are situated).

Which specific assets are covered by Article 5(1) depends on the provisions and conditions the internal law of the Member State (not being the one where the proceedings are opened) dictates as being subject to certain rights in rem, e.g. – as the provision recognises – tangible and intangible goods.

Collection of indefinite assets. In addition to establishing rights in rem towards certain specific goods a right may exist in respect of 'collections of indefinite assets as a whole which change from time to time'. For the purposes of the InsReg, rights which exist in the UK and Ireland known as 'floating charges' are characterised as 'rights in rem,' see Smart (1998), 12; Fletcher (2002), 845; Verhagen, NIPR 2002, 3. Following the introduction of the Enterprise Bill at the end of 2002 in England the possibility to have an 'administrative receiver' appointed (by the 'holder' of the 'floating charge') is limited. See Fletcher (2005), 7.94.

Future assets. The criterion to be applied to qualify a right as a right in rem requires that the 'assets' 'belong' to the debtor and are 'situated' within the territory of another Member State at the time of the opening of proceedings. Therefore, there must be an 'asset' 'situated' in a Member State. Future assets, e.g. future instalments of a lease, must exist at the time at which the main proceedings are opened abroad, which rule can only be the result of an interpretation of the national law of the other Member State, see Fletcher (2005), 7.88. The same is true for the question of whether such an asset 'belongs' to the debtor, an additional criterion being that this asset must be capable of being 'situated' in another Member State. It is not the national law which is decisive with regard to this latter question but the location rules of Article 2(g) InsReg, see para. 10646.

The InsReg acknowledges, as described, the interest for each State of protecting trade, in the form of respecting those rights in rem acquired over assets of the debtor located in that country under the law that is applicable before the opening of the insolvency proceedings, see Virgós/Schmit Report (1996), nr. 100.

10645. *Article 5(3) InsReg: rights with equal status.* By virtue of Article 5(3) the right, recorded in a public register and enforceable against third parties, under which a right in rem pursuant to Article 5(1) may be obtained, shall be considered a right in rem. The provision deviates from the conflict of law rule of the *lex rei sitae* and determines that for the application of Article 5 the said right is a right in rem directly, without referring to a particular national law. See Report Virgós/Schmit (1996), nr. 101. Such a recorded right should also exist prior to the opening of the main proceedings, see Report, op. cit., nr. 96 and nr. 103. An example of such a right is the German '*Vormerkung*', see Kolmann (2001), 303, and its Dutch equivalent in Article 7:3 of the Netherlands Civil Code.

10646. The rights in rem in respect of the aforementioned assets belonging to the debtor '..... which are situated within the territory of another Member State at the time of the opening of proceedings' are not affected by the opening of the main insolvency proceedings. The Article 2(g) localisation rule determines whether an asset is indeed situated in the other Member State.

10647. *Where is an asset?* Article 5 provides that such rights are unaffected by the *lex concursus* when the relevant assets are situated within the territory of another Member State at the time of the opening of proceedings. Such other Member State may be the State within which an asset is physically located. The property rights and rights of ownership or entitlement to such asset must be entered in a public register in the Member State under the authority of which the register is kept, (and for claims the Member State within the territory of which the third party is required to meet such claims) has the centre of his main interests, as determined by Article 3(1), see Article 2(g). When in the latter case this ‘centre’ is in a Member State other than the State in which the proceedings are opened, Article 5 applies; if this centre is in the same place as the State in which the main proceedings are opened (because this is the debtor’s centre of main interest), then Article 5 does not apply. In the light of the rationale of the Insolvency Regulation there is no reason in this latter case for an exclusion of the applicability of the *lex concursus* because the holder of the credit line, concerning which a right in rem is established, is located in the State of the (now insolvent) debtor or at least will have entered into the ‘legal environment’ of the debtor. He therefore cannot be surprised by a sudden attack of foreign law. The ‘situs’ of the asset therefore is not determined by for example an applicable contractual clause, providing that the repayments of a (secured) loan must be paid in a certain country or the place where the court is located, which contractually has been chosen as the forum. See Fletcher (2005), 7.91.

Third State. If an asset is located in a third State, the effects of the opening of main proceedings will not be determined by Article 5. In general the *lex concursus* will be applicable, including its private international law provisions. See Fletcher (2005), 7.91, and for a more general discussion see Scherber (2004).

10648. It follows from the Preamble to the Insolvency Regulation and the Virgós/Schmit Report (1996), nr. 97ff, that a certain right in rem shall not be affected by the opening of the main proceedings. Under the system of the Regulation the liquidator in the latter proceedings is able to influence the rights of the holder of the right in rem by initiating, in the other Member State (when the debtor possesses an establishment there) a secondary proceeding.

10649. *Secondary proceedings.* ‘Where assets are subject to rights in rem under the *lex situs* in one Member State but the main proceedings are being carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there’, InsReg, recital 25, fourth line. The Virgós/Schmit Report (1996), nr. 98, demonstrates that the term ‘not affected’ does not immunize rights in rem against the debtor: ‘If the law of the State where the assets are located allows these rights in rem to be affected in some way, the liquidator (or any other person empowered to do so) may request secondary insolvency proceedings be opened in that State if the debtor has an establishment there.’ These secondary proceedings are conducted according to national law and will allow the liquidator to affect these rights under the same conditions provided for purely domestic proceedings.

It also follows from the preamble and the Report that the liquidator in the main proceedings can only affect rights in rem which are in existence elsewhere by initiating secondary proceedings in that other country. It is then necessary for the debtor to possess an establishment, pursuant to Article 2(h), in that Member State. This approach does not avoid the possibility that the debtor will abuse this situation, by, for example, taking and transferring certain assets, which are the subject of a right in rem of a third party in one

Member State to another Member State within which these assets do not form an establishment. In doing so the debtor removes these assets from the main liquidator's legal reach, see Balz (1996b), 950; Taupitz (1998), 338; Van Galen (2002), 141.

Gap. It should also be noted that if there is no establishment in the other Member States the applicability in Europe of the *lex concursus* is halted by Article 5 in a situation in which secondary proceedings cannot be opened. The assets will be beyond the reach of the liquidator and the secured creditor may exercise his right as if there were no insolvency. See Israël (2005), 279.

Surplus. The InsReg system contains some minor protection against abuse as described (aside from the application of Article 5(4) InsReg). The opening of the insolvency proceedings does not affect certain rights in rem, but this does not mean that the assets involved are also fully unaffected. If the value of the assets exceeds the value of the related claim, the creditor is obliged to hand over any surplus to the main liquidator: 'If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings', see InsReg, recital 25, fifth line and the Virgós/Schmit Report (1996), nr. 99. Virgós/Garcimartín (2004), nr. 166(b) refer to a creditor's obligation to surrender a surplus. This appears to be a logical consequence of the principle which dictates that main proceedings have universal effect. Article 5 introduces an exception to the application of the *lex concursus* with regard to certain rights in rem, but not with regard to the actual assets which are subject to these rights. The asset itself (the ownership of it) belongs to the estate and the size of the estate is determined by the *lex concursus* of the main proceedings, see Article 4(2)(b) and Virgós (1998), 20; Fletcher (1998), 130; Flessner (1998), 284; Kolmann (2001), 305; Dirix/Sagaert (2002), 113; Moss/Smith (2002), 8.90; Naumann (2004), 359; Haubold (2005), nr. 119.

10650. The basis, validity and extent of a right in rem, pursuant to Article 5, will normally be determined according to the law of the Member State within the territory of which the property is situated (the *lex situs* or *lex rei sitae*). This right in rem shall not be affected by the opening of the main proceedings. The question of which law is decisive with regard to the basis, validity and consequences of said right in rem will be determined by the applicable rules of international private law.

10651. *Lex rei sitae.* Article 5 states that the opening of the main insolvency proceedings does not affect the rights in rem described in, and under the conditions of, Article 5. As has already been stated, Article 5 is silent on the question of which law determines the basis, validity and extent of said right in rem. The link in Article 5(1) between the point in time (at which main proceedings are opened) and the place (territory where the property is located (Article 2(g) InsReg)) enables the determination of which rights in rem are 'not affected'. Article 5 does not contain an indication with regard to the question of which law is applicable to these rights. See also Taupitz (1998), 334; Veder (2001), 103; Van Galen (2002), 140. For an alternative view see Gottwald (1997), 33. The creation, validity and scope of these rights in rem are governed by their own applicable law, which, generally, will be the *lex rei sitae* at the relevant time. In principle the consequence will be that the holder of the assets, although a part of the estate, will retain all his rights in respect of the assets in question. He may therefore exercise the right to separate the security from the estate and, where necessary, realize the asset individually to satisfy his claim, see Virgós/Schmit Report (1996), nr. 95. The *lex rei sitae* approach is the approach which best satisfies the expectations of the holders of such right, see Prütting, ZIP (1996), 1284; Garrido (1999), 87. The rapporteurs comment that the liquidator, even if he is in possession of the asset, cannot

take any decision on that asset which might affect the right in rem created on it, without the consent of its holder. With good reason Berends (1999), 131, considers this observation to be confusing. It is possible that the Report refers to the liquidator's power (Article 18, second sentence) to remove the debtor's assets from the territory of the Member State in which they are situated, 'subject to Articles 5 and 7'. Under this approach only the taking back of property to another Member State will not affect the right in rem. The consent referred to may be required as, without it, execution by the liquidator in the State in which the main proceedings are opened will be unauthorised or may be grounds for personal liability on the liquidator's behalf.

10652. *Conflict of law rules.* Elaborating on the question of which 'right' is the right in rem - under Dutch private international law a distinction must be made between the obligatory legal act which forms the basis of the right in rem (the legal act to establish, e.g. by contract) and the legal act of establishing (legal act of establishment) the right in rem itself. The legal act to establish the right will be governed by domestic law, including private international law, and therefore - between the Member States - the Rome Convention. It is this law which will determine whether the legal act will be nullified because of a vitiated consent or whether a certain contractual clause may be nullified as being unreasonably onerous. The *lex rei sitae* (the law of the country within the territory of which the property was located at the time of concluding the legal act of establishment) is decisive with regard to the law applying to the establishment of the right itself. This right in rem will continue to have full effect even if the property is transferred to another country. The law of the country within which the right in rem is executed against immoveable property will in principle determine the powers of the holder of the right and the ranking of his claim, see Bertrams en Verhagen, WPNR 6088 (1993); Verder (2004), 361.

Claims. With regard to rights in rem concerning claims, it should be noted that Article 2(g) provides that a claim will be situated in the Member State within the territory of which the third party required to meet this claim (the debtor, being the counter-party of the insolvent debtor) has the centre of his main interests, as determined by Article 3(1). Main insolvency proceedings opened in the Netherlands will cover all claims of the debtor irrespective of in which Member State the debtor has his centre of main interests. By virtue of Article 5 however the holder of a pledge may recover his claim without any limitation when the third party debtor has his registered office in another Member State and the law of this State allows collection of the debt by the holder of the pledge. The question of whether the law will allow this shall, in a European context, be decided by Article 12 of the Rome Convention. See Vonken 2002 (T&C Vermogensrecht), Art. 12 EVO; Dirix/Sagaert (2002), 113, and - with regard to the well-known Hansa-case - Netherlands Supreme Court 16 May 1997, NJ 1998, 585; Veder (2004), 362, and lower case law: Vlas/Van Der Weide, WPNR 6479 (2002).

10653. Article 5(1) states that the opening of insolvency proceedings 'shall not affect' the rights in rem of creditors or third parties. The rationale of Article 5 dictates that the basis, validity and extent of such a right in rem should normally be determined according to the *lex situs* (or: *lex rei sitae*, the law of the territory where the assets are located) and not be affected by the *lex concursus* (the law of the State of the opening of insolvency proceedings). The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. The exception to the main principle of applicability of the *lex concursus*, provided by Article 5, is worded as such: the 'opening' of insolvency proceedings 'shall not affect' ('*onverlet*' *laat*; '*nicht berührt*',

'*n'affecte pas*') the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

10654. As previously explained, the meaning of 'shall not affect' according to the prevailing view in legal commentary is the hard and fast rule: the holder of a right in rem (secured creditor), when he exercises his rights, will be able to do so, fully undisturbed by the *lex concursus*. This will also be the case in the event that the applicable national law (*lex rei sitae*) imposes restrictions on secured creditors in the context of national insolvency proceedings. The approach laid out in the Virgós/Schmit Report (1996), nr 96ff, is extended to preventing other creditors from being hampered in connection with property located in a Member State and subject to a right in rem. The consequences of the universal effect of the *lex concursus* of the main proceedings apply throughout the Community, but rights in rem of third parties (and the rights as laid down in Article 6 and 7) in other Member States remain unaffected. An individual attachment to an asset which is subject to a right in rem contradicts the general principle of the universal effect of the *lex concursus* (see Van Galen (2002), 140). Under the system of the Regulation, if a liquidator in the main proceedings desires to prevent execution of goods, which are situated in another Member State and are subject to a right in rem, he should initiate secondary proceedings in that other Member State (under the presumption that the debtor has an establishment there and that the national law of the latter Member State indeed contains limitations with regard to secured creditors and individual attachments). See Virgós/Schmit Report (1996), nr. 98. See also Virgós (1998), 20; Kortmann/Veder (2000), 770; Van Galen (2001), 291; Dirix/Sagaert (2001); Kolmann (2001), 308; Van Galen (2002), 140.

10655. The hard and fast rule ('shall not affect') may appear to be clear-cut. However, it raises the question of precisely which elements of a right in rem will not be affected. Recital 25, second and third line, provide: "The basis, validity and extent of such a right in rem should therefore normally be determined according to the *lex situs* and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security." Does the hard and fast rule protect the right in rem itself or does it also protect all the powers that are, according to the *lex situs*, attached to it. For instance, will the holder of the right be protected against all those rules which may not interfere with the right in rem, but do interfere with the exercising of this right? For example, the *lex concursus* contains certain forms of postponement or dissolution of rights, e.g. the power of the liquidator to redeem the right in rem. The Dutch cooling-off period can be used as an example of a form of postponement.

10656. *Right to redeem*. The Virgós/Schmit Report (1996), nr. 99, submits that - without affecting the economic value of the right or its immediate realisability - Article 5 gives the liquidator the power to decide on the immediate payment of a guaranteed claim, thus avoiding the loss in value that certain assets could suffer if realized separately. Full payment of the claim would have the consequence of ending the right in rem (see Flessner (1997a), 8; Taupitz (1998), 339; Kolmann (2001), 306 and Haubold (2005), nr. 119). Berends (1999), 131, however, doubts whether this conclusion is correct as the powers of the main liquidator to pay the claim, in full, to which the right in rem relates, are determined by the *lex concursus*. In the Netherlands the main liquidator possesses such a power ('The liquidator may, redeem the pledged or mortgaged property against payment of the amount for which the pledge or mortgage serves as security and the foreclosure costs already incurred,')

Article 58(2) *Fw*); the domestic law of other Member States should provide the same. The next question raised is whether, when a right to redeem exists, and such a right is exercised by the main liquidator, the right in rem *is affected* when the claim, on which the right in rem is based, is fully paid up, with the consequence that the right in rem lapses. Losbl. *Fw* (Van Galen), Art. 5, nt. 4, Dirix/Sagaert (2002), 113; Reinhart (2003), Art. 5, nr. 3 and Haubold (2005), nr. 120 are of the opinion that a liquidator's right to redeem does not affect the rights of the holder of a right in rem. In his approach to Article 5 as a *règle pur et simple* Berends (2005), 411, opines that the main liquidator's right to redeem is not a direct consequence of the opening of the insolvency proceedings and therefore Article 5 does not protect the holder of the right against the use of it by the liquidator.

10657. *Cooling-off period.* In several countries, a cooling-off period or moratorium is set in place, either by operation of law or based on a request. For instance, in the Netherlands on the application of each interested party or on his own motion, the supervisory judge may issue a written order stipulating that, for a period of two months at most, '... each right of third parties to recourse against property belonging to the estate or to claim property under the control of the bankrupt or the liquidator may only be exercised with his authorisation', see Article 63a *Fw*, Article 241a *Fw* and Article 309 *Fw*. Does a moratorium 'affect' a right in rem within the meaning of Article 5 InsReg? I agree with Berends' contention (Berends (1999), 133; Berends (2005), 402) that a temporary postponement of the enforcement of a right in rem can be defended as leaving the right in rem unaffected. The right may be used to its full extent, albeit that the enforcement is postponed to make way for the realisation of another, more important interest (in the Netherlands to provide some breathing space for the liquidator to assess the estate and to consider his position). The order itself is a judgment deriving directly from the insolvency proceedings and which is closely linked with it, as pursuant to Article 25(1), third sentence InsReg. Not every influence on the exercise of a right in rem has an inherent affect on the right itself. It was previously noted that the text 'shall not affect' ('*onverlet*' *laat*; '*nicht berührt*', '*n'affecte pas*', *etc.*) may be interpreted to mean - in 14 languages - either 'no affect whatsoever on the right in rem' or 'not to be influenced to the detriment of the holder of the right in rem' and that a systematic analysis of Article 5 and related texts of EU Directives, such as Directives 2001/17 and 2001/24 on the winding-up and reorganisation of insurance undertakings and credit institutions, results in the interpretation that 'in its core Article 5 dealt with the protection against substantial impediments. Rights in rem must be realisable without hindrances and without noticeable devaluation', see Naumann (2004), 238. However, I agree that (temporary) 'postponement of some sort' contradicts, to a certain extent, Recital 25, third line: "The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security," particularly with respect to the word 'continue.' Segal (1997), 63; Veder (2001), 104; Veder (2004), 249, have an alternative view, generally based on the argument that a moratorium is an inherent limitation of the right in rem itself. See also Dirix/Sagaert (2002), 113, and possibly Virgós (1998), 20, who, very generally states, between brackets '(..... no bankruptcy stay may be imposed)'; Losbl. *Fw* (Van Galen), Art. 5, nt. 2, and probably Hyde/White (2002), 16; Declercq (2002), 30; Marshall (2002), 19. For a general discussion of the subject see Trunk (1994b).

10658. *Other questions.* Some other questions raised in literature follow:

- Based on Article 4(2)(g) and (h) a secured creditor will have a duty – providing the *lex concursus* allows – to lodge his claim. The notice the main liquidator must send known creditors contains specific information, prescribed in Article 40(2), including an indication

of whether creditors whose claims are preferential or secured in rem need to lodge claims. The secured creditor is therefore not fully 'free' as a result of the Article 5 hard and fast rule;

- In the event that the *lex concursus* contains a rule prescribing that secured creditors must also pay towards the costs of the insolvency administration (such as Article 170-172 of the German Insolvency Act), it must be questioned whether this affects the secured creditor's right. According to Berends (2005), 412ff, this rule results *ipso iure* from the opening of the insolvency proceedings and affects the creditor's rights. I agree. For an alternative view see Van Bismarck/Schümann-Kleber (2005), 149;

- In literature it has been discussed whether the main liquidator (in the context of the main insolvency proceedings) may realise the asset. Paulus NZI (2001), 512 and Virgós/Garcimartín (2004), nr. 166(a), answer in the affirmative rightly submitting that the Article 5 rule of 'non-alteration' protects the right but not the asset. Huber ZZP (2001), 159, has an opposing view. Confirming that in this situation the creditor will not realise his right, see *Circulaire* March 2003 from France. Haubold (2005), nr. 120 provides a conditional confirmation of the same view;

- It should be noted that Duursma-Kepplinger (2002), Art. 5, nr. 37, under the heading 'limitations of unaffectedness', defends the proposition that Article 5 does not protect against any legal effects of the proceedings, which occur during the insolvency proceedings, e.g. a rebate of claims or the influence of a rescue plan. The *Circulaire* March 2003 from France refutes the influence of such a rebate. Duursma-Kepplinger contends that this interpretation follows from Article 4(2)(j) and Article 34 InsReg, which places the rescue plan at the close of the insolvency proceedings rather than at the opening of the proceedings. This is, I believe, an expression of the *règle pur et simple*. Most authors have a different opinion, e.g. Veder (2004), 352; Garašić (II, 2005), 239: the rescue plan will only affect consenting secured creditors.

10659. The fact that, based on Article 5(1) InsReg, the opening of main insolvency proceedings shall not affect certain rights in rem (attached to the assets, mentioned in the provision, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings) shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m), see Article 5(4) InsReg.

10660. Article 5 is based on the assumption that the localisation of assets pursuant to Article 5(1) InsReg takes place in good faith; the establishment of a right in rem in favour of a certain creditor or third party, may, however, be detrimental to all creditors. In order to redress a legal act leading to this result Article 5(4) InsReg determines that the general rules of the InsReg concerning voidness, voidability or unenforceability as referred to in Article 4(2)(m) and Article 13 apply, see Article 5(4) InsReg. The principle that the right in rem shall not be affected does not lead to immunity from the provisions concerning detrimental acts contained in the *lex concursus*, see Virgós/Schmit Report (1996), nr. 106; Verhagen/Veder (2002), 138. See also: Berends (2005), 412 et seq.

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