Rethinking the legitimacy of expectations: Speculative crossclaims, fraudulent transactions, and the immunity rules of the European Insolvency Regulation: Finnish (and some Swedish) perspectives

Tuomas Hupli

University of Turku, Turku, Finland

Correspondence
Tuomas Hupli, University of Turku, Turku, Finland.
Email: tuomas.hupli@utu.fi

Abstract
As a general principle of the law of the European Union, legitimate expectations should be respected as much as possible. The EU Regulation on Insolvency Proceedings (recast) (EIR) aims to achieve this goal by providing a comprehensive set of rules governing the choice of law in cross-border insolvency cases. Despite the academic criticism targeted at these rules, they remained intact in the recast EIR. The basic problem discussed in this article is that according to the prevailing regime created by the EIR, the expectations of the general body of creditors might be ignored, regardless of whether the expectations of the counter party—the favored creditor or any other contracting party of the debtor—are actually illegitimate. The purpose of this article is to evaluate this discrepancy and to propose means that might allow for its rejection at both the theoretical and practical levels. It will also be argued that the CJEU's judgment in Vinyls Italia...
(C-54/16) is insufficient to tackle the basic problem, even though the abuse of the freedom of the choice of law was clearly rejected by the CJEU. The problem discussed in this article is not the abusive choice of the applicable law, but the fraudulent character of the transaction concluded under said law. Furthermore, it seems highly unlikely that the public policy exception (ordre public) would resolve the basic problem, as immunity protection, provided by the various leges causae, is adopted as an integral part of the EIR, with no exceptions for fraudulent or otherwise inappropriate transactions or arrangements. Therefore, immunity protection is part of the public policy of the EU itself. To conclude this article, it is suggested that immunity protection not be revoked but limited only to crossclaims and transactions with no speculative, fraudulent, or otherwise inappropriate motives. This would most likely require a new preliminary ruling of the CJEU. To concretize the problems discussed in this article, the choice of law rules of the EIR regarding creditors’ right to set-off and transaction avoidance are evaluated and applied in the context of the insolvency law of Finland, and, to the extent the basic principles of the national laws are similar, the insolvency law of Sweden.

1 | INTRODUCTION AND THE BASIC PROBLEM

Disputes deriving (directly or indirectly) from cross-border insolvencies require solutions to, among others, three basic problems. The first is related to location, that is, the international jurisdiction of the national courts, and the second is the applicable law. The third and final challenge is that the applicable law must be interpreted and applied by the national court in a way that satisfies the rationale behind the relevant choice of law rules, as well as the requirements of the substantive law in question. Therefore, the national court’s ascertaining of the contents of the applicable law is the decisive element in cross-border insolvency disputes.¹

Concerning the choice of law, the basic solution is universal in that the law of the State where the insolvency proceedings are opened shall be applied to the proceedings and their effects. This is the lex concursus (or lex fori concursus).² It is also the content of Article 7(1) of the Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20, 2015 on Insolvency Proceedings (recast) (EIR):

the law applicable to insolvency proceedings and their effects is that of the Member State within the territory of which such proceedings are opened.
As a synonym to the *lex concursus*, the law of the State in which the proceedings were opened is commonly called the *law of COMI*, which refers to the insolvent debtor's centre of main interests, defined in Article 3(1) of the EIR. For numerous political, economic, and historical reasons, noteworthy exceptions to the *lex concursus* exist, forcing the parties to investigate—though not necessarily to apply—the law of some State other than that in which the proceedings have been opened. Although Article 7(1) of the EIR establishes the primary status of the *lex concursus*, it also provides a reservation: ‘Save as otherwise provided in this Regulation’.

The focus of this article is to examine the problems between the main rule and two exceptions to it, namely the conflict between the *lex concursus* and:

- The *lex causae* applicable to the insolvent debtor's claim against the crossclaim of the creditor.
- The *lex causae* that governs the transaction, which is challenged in the insolvency proceedings in favor of the general body of creditors.

These two conflicts of laws are regulated in the EIR via specific rules provided in Articles 9 (1) and 16. However, there are several reasons to examine their deeper roots. Regarding the general justification for providing exceptions to the *lex concursus*, two opposing approaches can be defined (although roughly). The critical approach requires the exceptions be limited so they would serve carefully evaluated, reliance-based needs instead of indefinite aims and objectives, such as the ‘protection of the local creditors’ or (as is common in the EU context) ‘legitimate expectations’ and ‘certainty of transactions’. According to the contrary opinion, the scope of the exceptions should be widened so they can be applied even in relation to non-EU Member States.

The question of whether the choice of law rules of the EIR should be applied even in relation to third States is important, not only because of Brexit, but also because there are European market areas in which the EIR is not applied to some of the operating States. The Nordic countries—Denmark, Finland, Iceland, Norway, and Sweden—are an important example of a market area of this kind. In bankruptcies related to Denmark, Norway, or Iceland, the Nordic Convention on bankruptcy is still in force.

According to the Nordic Convention, the *lex concursus* applies as the primary law, but there are no exceptions similar to those of the EIR regarding creditors' right to set-off and the law governing transaction avoidance. Thus, if there is a need to apply the same or similar exceptions, the legal basis must lie somewhere in the general principles of the private international law of each of the contracting States, respectively. The question is then whether the EIR could work as a source of law, even in insolvency proceedings related, in some way, to the laws of Denmark, Norway, or Iceland. The same question needs to be resolved in relation to any third States, such as, inter alia, the United States, Canada, or Switzerland. A problem of its own, as indicated above, is the significance of the EIR in relation to the United Kingdom in the post-Brexit era.

The present state of EU insolvency law provides that in relation to third countries, Member States are free to apply their own—that is, national—private international laws. This freedom is a source of uncertainty; some Member States may apply the principles expressed in the EIR, while others may choose diverging solutions. For example, the Supreme Court of Finland seems to have chosen the opportunity to apply the principles of the EIR, having held that the
immunity protection provided by Article 16 of the EIR against transaction avoidance expresses a settled European principle, that is, at least within the jurisdiction of Finland, applicable, regardless of whether the EIR itself is applied in a particular case. The Supreme Court of Finland had already in an earlier ruling referred to the EIR as a source of law expressing the principles of the private international law of Finland, that is, even in cases that fall outside the direct scope of the EIR.

2 | WHY RETHINK THE LEGITIMACY OF EXPECTATIONS?

Because of the diverse views on the general justification for exceptions to the lex concursus, there is a need to evaluate the rationale behind their adoption into the EIR. In the legal literature, the rationale most frequently referred to is, as mentioned above, the protection of the legitimate expectations of the parties who have entered into an arrangement or transaction and thereby created, for example, mutual crossclaims or transactions detrimental to the general body of creditors. Another rationale, closely related to legitimate expectations, is the need to promote the certainty of transactions. Although generally formulated, these rationales are not convincing when applied to transactions or arrangements that are illegitimate by their very nature. In particular, where does the legitimacy of expectations lie (or hide), if the sole or primary purpose of the crossclaims, or the voidable transaction, is intentionally detrimental to the general body of creditors? Are, for example, divergences in national laws governing the transferred claims, suspense periods, limitations of actions, closely related parties, presumptions, or requirements of the awareness or unawareness of the debtor’s financial situation reasonable grounds for displacing the effects of the lex concursus? The national insolvency regimes of the EU Member States differ in many respects. However modern and progressive, the EIR leaves much room for the application of those differences. This is exactly the case concerning the national laws of transaction avoidance and creditors’ right to set-off. In the EIR, both are governed by the lex concursus as the primary law. However, it might be displaced to protect the (allegedly) legitimate expectations upon which the parties of the crossclaims arrangement, or the detrimental transaction, have relied. The basic problem is that according to the EIR, the lex concursus can—considering the wording of the EIR, must—be displaced, regardless of the disloyal motives behind the crossclaims arrangement or the void or voidable transaction. The question is then whether these kinds of motives, and the related expectations, are legitimate enough to earn the protection provided by the EIR, bearing in mind that the general body of creditors has legitimate expectations as well. This reveals yet another basic problem: given that there are colliding expectations, whose expectations are worth protecting?

There are many ways to formulate the various exceptions to the lex concursus. In the EIR, the exceptions regarding both creditors’ right to set-off and transaction avoidance are based on the principle of immunity. Accordingly, the provisions of the EIR expressing this principle are hereafter called the immunity rules or rules of immunity. When applied, the rules of immunity ensure that the opening of insolvency proceedings shall not affect the right or claim in question.

The immunity rules explored in this article have already been well interpreted in many earlier academic articles. To provide some additional value for the international discussion, this article aims to analyze the application of these exceptions. The national regime around which the problems of application are assessed in this article is the law of Finland, that is, more
precisely, the Finnish law governing creditors’ right to set-off their claims in insolvency proceedings, as well as the Finnish law on transaction avoidance and, closely connected with that, the Finnish law governing ‘any means of challenging’ transactions detrimental to the general body of creditors.21 Furthermore, as the national law of Finland regarding set-off and transaction avoidance is in many respects similar to that of Sweden, an evaluation of the Finnish law might provide some useful information which is, perhaps, common to both EU Member States.

3 | THE LEX CONCURSUS IN GENERAL/IN PARTICULAR

3.1 | The lex concursus as the general primary law

The primacy of the lex concursus is one of the cornerstones of the EIR. This is typical not only to the European but also to the universal thinking on how the problems of private international law should be governed in cross-border insolvencies. There are many ‘natural’ reasons for the leading role of the lex concursus.22 First, it is the domicile law of the debtor. Second, it is also the domicile law of the forum concursus (the court that has both international and national jurisdictions over the insolvency proceeding) and the domicile law of the judges serving said court. As long as judges are humans and not robots, the human mind easily creates a psychological tension that urges a judge to apply the law most familiar to the judge personally concerning both the principles and details of the law.23 In summary, the lex concursus is the lex fori, the law of the forum, in cross-border insolvency proceedings. This feature of international insolvency law is straightforwardly concordant with the traditional principles of general private international law.24

3.2 | The particular scope of the lex concursus

The choice of law rules of the EIR is constructed through three steps:

1. The lex concursus applies generally as the primary law: Article 7(1).
2. The lex concursus shall determine in particular the matters listed in Article 7(2); this list includes the conditions under which set-offs may be invoked and the rules relating to the voidness, voidability, or unenforceability of legal acts detrimental to the general body of creditors: Articles 7(2)(d) and (m).
3. The lex concursus might be excluded by the immunity rules regarding set-offs and transaction avoidance: Articles 9(1) and 16.

By following these three steps, we are still far from answering the question of what the applicable law in a particular case is concerning a set-off or transaction avoidance. The steps described above only show the path by which the parties see whether the immunity rules may or may not be applied. This is because there is no need for any immunity protection when:

- A set-off is permitted under the lex concursus.
- The legal transaction in question falls out of the scope of the rules of the lex concursus regarding transaction avoidance: ‘the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors’.
The same applies vice versa: immunity protection is needed (immunity rules might be applied) only when:

- A set-off is not permitted under the *lex concursus*.
- The legal transaction in question can be declared void or is voidable or unenforceable under the regime of the *lex concursus*.

After an overview of the immunity rules of the EIR, it is time to take a closer look at their contents.\(^2\)

4 CONTENTS OF THE IMMUNITY RULES

4.1 The right to set-off

As stated above, the *lex concursus* determines (downright ‘in particular’) the conditions under which set-offs may be invoked. However, the principle and the rules of immunity are designed to provide ‘protection’ against the application and effects of the *lex concursus*. The immunity rule concerning creditors’ right to set-off is established in Article 9(1) of the EIR, which reads as follows:

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.\(^2\)

The function of Article 9(1) of the EIR is stated clearly in Recital 70 of the EIR:

set-off would acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.

Article 9(1) of the EIR provides for the creditor two alternatives for invoking a set-off: this may be the result of either the *lex concursus* or the law governing the claim of the insolvent debtor against the creditor. According to the wording of Article 9(1) of the EIR, immunity protection is provided even if the law applicable to the insolvent debtor’s claim is the law of the third State.\(^2\)

4.2 Transaction avoidance

Concerning immunity protection against transaction avoidance (legal acts detrimental to the general body of creditors), Article 16 of the EIR declares that:

Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

a. the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and
b. the law of that Member State does not allow any means of challenging that act in the relevant case.
Just as immunity protection defends the right to set-off, Article 16 defends the contractual party of the insolvent debtor against the effects of the *lex concursus*. Even when the *lex concursus* allows the general body of creditors the right to claim that the legal transaction is void, voidable, and so on, the original law governing this transaction, the *lex causae*, might still save the transaction. However, this save only happens if, according to the *lex causae*, there are *no means* of challenging the act in the relevant case. Important to note is that all the means provided by the *lex causae*—not only the rules related to insolvency—can and must be investigated. When any of those means allows any challenge to the transaction, the immunity rule of Article 16 of the EIR is not applied and the transaction can be challenged in favor of the general body of creditors. The burden of proof is on the debtor’s contractual party, that is, the defendant to the dispute, who must provide proof that there are no means of challenging the transaction by the grounds of *lex causae* ‘taken as a whole’.28

Also important to note is that Article 16 of the EIR does not require the *forum concursus* (or any other court that has jurisdiction over disputes of transaction avoidance)29 to apply the *lex causae*. It only demands an *investigation* of the contents of the *lex causae* to determine whether it allows any means of challenging the transaction in question. Where no means of challenging are available according to the *lex causae*, the transaction remains intact. Even if the *lex causae* allows some means of challenging the transaction, these means are not applied. Instead, the transaction avoidance rules of the *lex concursus* are applied, and their effects shall be ordered just as they would have been ordered in a case with no attention to immunity protection.30

---

5 | SPECIAL FEATURES OF FINNISH (AND SOME SWEDISH) INSOLVENCY LAW

5.1 | Purpose and background of the evaluation

The aim of the following two sections is to explore certain features that arise when the law of Finland is applied in disputes related to cross-border insolvency proceedings.31 Some of these features make the Finnish law ‘attractive’ to be chosen in an agreement, while others are less attractive for a contractual choice, at least an intentional one.32 Of course, the question of whether the contractual choice of law of a particular State is attractive depends on the perspective: whose interests are at stake? For the general body of creditors and for the insolvency practitioner—whose duty is to provide for the creditors the best possible dividend—the law that restricts the right to set-off is attractive. Conversely, for the individual creditor who would want to set-off its claim, all restrictions are unattractive. The law that provides the means to challenge suspicious transactions, concluded long before the filing or opening of the insolvency proceedings, is attractive for the general body of creditors and for the insolvency practitioner representing that body, but unattractive for the contracting party who has benefited from the particular transaction.33

The purpose of exploring certain features of the national insolvency laws is simply to analyze the actual results that follow when the immunity rules of the EIR are applied to the relevant national provisions. In fact, the choice of law rules are designed (they are meant) to be applied in the context of the various national laws. Furthermore, the analysis of the application gives us a more realistic view to the question whether the immunity rules of the EIR truly protect the legitimate, or in certain situations, illegitimate, expectations.
5.2 | Restrictions to the right to set-off

5.2.1 | General right to set-off

The general right to set-off in insolvency proceedings is declared in Chapter 6, Section 1(1), of the Bankruptcy Act of Finland (120/2004) (BAF):

Subject to the exceptions provided in sections 2 and 5, the creditor has the right to use a claim in bankruptcy for set-off against a debt owed to the debtor at the beginning of bankruptcy. The creditor has the right of set-off even if the debt owed to the debtor or the claim has not fallen due when the set-off notice is given.

5.2.2 | Speculative crossclaims

The exceptions provided in Chapter 6, Section 2, of the BAF are designed to avoid agreements and arrangements by which the crossclaims are created intentionally with the purpose of reaching a composition for the set-off in the expected insolvency proceeding. By these kinds of arrangements, the parties create speculative cross-claims with the purpose of avoiding the effect of the pari passu principle. The first of these restrictions excludes the right to set-off with the claim that the creditor has acquired by a transfer during the suspect period specified by the law, while the second is targeted to the commitments of payment that, in fact, are not commitments but payments recoverable to the bankruptcy estate. The provisions in Chapter 6, Sections 2(2) and 2(3), of the BAF read as follows:

A claim against the debtor that has been acquired from a third party later than three months before the cut-off date referred to in section 2 of the Act on the Recovery of Assets to a Bankruptcy Estate cannot be used for set-off against a debt owed by the creditor to the debtor at the time of the acquisition. The same provision applies to claims acquired in the said manner before the cut-off date, if the creditor at the time of the acquisition had a justified reason to believe the debtor to be insolvent. A creditor who has committed to the payment of a debt to the debtor under circumstances where the arrangement is comparable to a payment made by the debtor has no right to set-off in so far as the payment would have been recoverable to the bankruptcy estate.

As can be seen from these provisions, the speculative nature of the crossclaim may be ‘hidden’ either in the claim of the creditor (the acquired claim) or in the claim of the insolvent debtor (the creditor’s ‘commitment’ to the payment).

5.2.3 | Restrictions of the credit institution’s right to set-off

Chapter 6, Section 5, of the BAF places a special restriction on credit institutions’ right to set-off, as follows:

A credit institution shall not set a claim off against funds that the debtor has on deposit in an account with the institution at the beginning of bankruptcy or that at
that time are held by the institution for a transfer to the debtor’s account, if the account under the pertinent terms can be used for the management of payments.\textsuperscript{37}

The rationale for rejecting the credit institutions’ right to set-off is not the speculative nature of their crossclaims but simply the fact that the business of the credit institutions automatically creates crossclaims. The exclusion of the right to set-off mitigates this ‘natural priority’ and thus promotes the principle of equality of the creditors.

\textbf{5.2.4 | Finnish law as the \textit{lex concursus}}

In cases where Finland is the State of the opening of insolvency proceedings, the starting point is that the creditors are entitled to set-off their claims.\textsuperscript{38} This follows directly from the main rule of the \textit{lex concursus} (Chapter 6, Section 1(1), of the BAF). Nevertheless, if the crossclaims are speculative, as described above (i.e., created on purpose to achieve the set-off situation and to avoid or minimize the negative effect of the debtor’s insolvency to a particular creditor), the \textit{lex concursus} blocks the set-off and then the claim in question is entitled only to the general dividend among the other claims in the same ranking (\textit{pari passu}). The same applies to the credit institution’s claim, as provided in Chapter 6, Section 5, of the BAF.

Given that these restrictions are applied as provisions of the \textit{lex concursus}, a creditor’s right to set-off depends on the application of the Article 9(1) of the EIR: if the set-off is permitted according to the law applicable to the insolvent debtor’s claim, the \textit{lex concursus} is excluded, and then the creditor is allowed to set-off its claim. The problem of the legitimacy of expectations concerns speculative crossclaims: the worst scenario is that the law applicable to the insolvent debtor’s claim allows the set-off regardless of the disloyal nature of the crossclaims arrangement. If this is the case, Article 9(1) of the EIR does not protect the legitimate but illegitimate expectations and, furthermore, sets aside the legitimate expectations of the general body of creditors.

The wording of Article 9(1) of the EIR is clear in that it does not require the law applicable to the insolvent debtor’s claim to be from any of the EU Member States.\textsuperscript{39} This is a starting point, but nevertheless, the question of the \textit{overall applicability} of the EIR remains to be solved. As stated above, in cases in which the EIR is not applicable in the first place, it is the duty (and right) of the EU Member States, respectively, to decide their own private international law, that is, the rules and principles governing conflicts of laws related to insolvency proceedings. This is also the case regarding the laws of third States, including the UK in the post-Brexit era and Denmark (which can be considered a ‘third State’ in relation to the EIR). The same applies when the business of the debtor is excluded from the scope of the EIR, as established in Article 1(2). In conclusion, it depends on the choices of the Member States whether the Article 9(1) of the EIR is applied to defend the right to set-off in cases where the \textit{lex causae} is the law of the third State and in cases that fall out of the scope of the EIR.

\textbf{5.2.5 | Finnish law as the \textit{lex causae} (the law applicable to the insolvent debtor’s claim)}

The restrictions laid down in Finnish law to creditors’ right to set-off also apply when the law of Finland—regardless of the \textit{lex concursus}—is the \textit{lex causae}, that is, the law applicable to the insolvent debtor’s claim. This means, among other things, that Finnish law is not attractive for
creditors to be chosen by agreement, given that any alternative law would allow the right to set-off. This is important to note when drafting the terms of the choice of law in contracts, especially those of credit institutions: should, for any reason, the *lex concursus* reject the credit institution's right to set-off, the Finnish law as the *lex causae* is of no help, as it would reject it as well. Conversely, the law of Finland is quite attractive to the customers of credit institutions, insolvency practitioners, and the general body of creditors in the insolvency proceedings of those customers. Concerning speculative crossclaims (regulated in Chapter 6, Section 2(2) and 2(3), of the BAF), Finnish law is unattractive to the parties of the crossclaims arrangements but certainly attractive to the general body of creditors and insolvency practitioners. The speculative character of the arrangement means the right to set-off is rejected by the *lex causae*. In these cases, the fate of the creditor's right to set-off depends solely on the *lex concursus*.

6  | TRANSACTION AVOIDANCE AND DISREGARD OF ARTIFICIAL TRANSACTIONS

6.1  | Filling the gap between transaction avoidance and artificial transactions

One of the many duties of the insolvency practitioner is to collect for the estate the assets that have been transferred away during the financial distress of the debtor. Traditionally, the laws governing transaction avoidance have been the most powerful instrument to achieve this goal. The Swedish law on transaction avoidance has provided the model for the Finnish one, and they even share many of the most important details. Thus, there is, in the laws of both countries, a distinction between the objective and subjective provisions of avoidance, extended suspect periods concerning the closely related parties and the requirement that the intentional inappropriateness of the transaction meets the preconditions of the *actio pauliana*, that is, the general subjective provision of avoidance.

The most remarkable difference between the laws of Finland and Sweden is that, in addition to the traditional rules of transaction avoidance, the Finnish insolvency law provides a special means of disregarding *artificial transactions*. This provision, established in Chapter 5, Section 11, of the BAF, reads as follows:

(1) Assets that are alleged to belong to a third party shall be assets of the bankruptcy estate if the status of the third party is based on a financial transaction or other arrangement whose legal form does not correspond to its actual content or intent and if this form is evidently being used in order to avoid enforcement or to keep assets out of reach of creditors. The provision on assets applies also to income directed by the debtor into such an arrangement.

(2) In the evaluation of the actual content or intent of the arrangement referred to in paragraph (1), due note shall be taken of the authority of the debtor, where comparable to the authority of an owner, the acts of the debtor that are comparable to an owner's acts, as well as the benefits of the arrangement to the debtor and other similar circumstances.

Chapter 5, Section 11, of the BAF remarkably enlarges the selection of ‘any means of challenging’ the detrimental acts, as defined in Article 16(b) of the EIR. As can be seen from the
wording of Chapter 5, Section 11, of the BAF, artificial transactions are undoubtedly fraudulent; they include a subjective element of ‘fraud’, ‘dishonesty’, or ‘inappropriateness’, just as the subjective grounds for traditional transaction avoidance. One might ask, therefore, what the rationale is behind adopting a special set of rules for disregarding artificial transactions. First, artificial transactions are subject to the risk of being disregarded without any time limits: provided the transaction is considered artificial, it can be disregarded, regardless of when it was entered into, that is, there is no suspect period.

Another difference, as compared to traditional transaction avoidance, is that there is no limitation of action for claiming the disregard of artificial transactions. The very idea behind the disregard of artificial transactions is that the time factor is irrelevant. The reason for this is that the third party, that is, the contracting party of the debtor, has no real, genuine right that would ever deserve legal protection. Furthermore, one of the key features of the provision of the disregard of artificial transactions is that it can be applied against anyone, not only against the closely related parties of the debtor. Hence, Finnish law provides for the general body of creditors a remarkably wider range of means to challenge transactions when compared to the traditional rules of transaction avoidance. This is because the transaction avoidance laws typically require:

- suspect periods for different kinds of transactions;
- suspect periods be absolutely and exhaustively fixed by the law;
- the debtor’s closely related parties be fixed by the law;
- the suspect periods be extended in relation to the closely related parties; and
- transaction avoidance claims be subject to the limitations of actions laid down in the law (with no option for extension, by neither substantial nor procedural grounds).

The purpose of the rules governing the disregard of artificial transactions is to fill the gap, or the grey zone, where the law of transaction avoidance cannot be applied. Even the general law of obligations, of property or of torts, may be powerless in the face of the transactions described in Chapter 5, Section 11, of the BAF. The legal drafting of the provisions on the disregard of artificial transactions was also inspired by the principle, and the doctrine, of lifting the corporate veil, as well as the general denial of the abuse of justice.

The conclusion that a particular transaction is artificial is based on a comparison between the substance and the form of said transaction; provided there is a contradiction between the substance and the form, the transaction is nothing more than a façade or a deception. The artificial transaction hides the fact that the debtor, not the third party, is the owner of the assets in question and that the debtor, not the third party, still holds possession over them. Subject to this precondition, the transaction shall be disregarded. As a result, these assets belong to the bankruptcy estate of the debtor.

In disputes over the disregard of an artificial transaction, the subject matter is, ultimately, the ownership of assets that can be the subject of a civil dispute, even outside of insolvency proceedings. It is undoubtedly true that some transactions similar to those laid down in Chapter 5, Section 11, of the BAF can be challenged in all (or at least in most) of the EU Member States by legal grounds not related merely to insolvency law. Therefore, as a general principle, the disregard of artificial transactions would likely not be considered by the CJEU an issue deriving directly from the insolvency proceedings, as defined in Article 6(1) of the EIR. However, one of the benefits of adopting special provisions concerning the disregard of artificial transactions by the insolvency legislation is that these transactions are, by the special provisions connecting
these transactions to the explicit needs of the creditors of the insolvent debtor, closely linked with the substantive effects of the insolvency proceedings. This link seems to support the interpretation that if the claim for the disregard is contested, there is a dispute closely linked with these proceedings. Given that this is the correct interpretation (i.e., provided that the CJEU would also find the link to be sufficiently close), the dispute over the disregard of artificial transactions would fall within the scope of Article 6(1) of the EIR.45

6.2 | Disregard of artificial transactions in the context of article 16 of the EIR

6.2.1 | Finnish law as the lex concursus

When Finland is the State of the opening of insolvency proceedings (main or territorial), it follows directly from the lex concursus that any artificial transaction is subject to the risk of being disregarded. The immunity protection provided in Article 16 of the EIR would nevertheless save the transaction, given that the person who benefited from it provides proof that it is subject to the law of another Member State and that the law of said State does not allow any means of challenging the transaction in the relevant case. Provided there is no evidence of an abusive purpose in the choice of law, there still remains an open question: when the mere purpose of the transaction is to keep the assets in question out of reach of creditors, where are the legitimate expectations that need to be secured and protected?

It would be useful to bring before the CJEU the following: if the artificial transaction, the only purpose of which is to be detrimental to the creditors of the insolvent debtor, could be disregarded by the lex concursus, is it truly the content and purpose of EU insolvency law that the principle of immunity protects the persistence of this transaction? Rather, could it be in accordance with the general principles of EU insolvency law, especially the protection of legitimate expectations, to disregard this transaction, irrespective of the fact that the lex causae does not allow any means of challenging it (because, for example, the suspect period or the limitation period for the action is shorter than those of the lex concursus)?

One might ask for the reason why the general grounds for transaction avoidance should not also be able to breach the principle of immunity guaranteed in Article 16 of the EIR. The simplest answer lies between the legitimacy and nonlegitimacy of expectations: the purely objective grounds for transaction avoidance are created by transactions (payments of debts, for example) that, although the legal effects of the collective insolvency proceedings can be avoided or diminished by them, might have other purposes. The objective grounds for a transaction avoidance claim may even be met without any disloyal motives and without investigating the motives at all. Even the classical subjective ground for transaction avoidance, the actio pauliana, usually concerns transactions by which the assets of the debtor have been transferred to a third party (the debtor’s contracting party), who then achieves an authentic, genuine right to those assets and, accordingly, the debtor no longer possesses said assets.46

For the reasons just mentioned, transactions that might be recovered on the grounds of actio pauliana are not artificial in the sense that the application of Chapter 5, Section 11, of the BAF requires. This is the case despite the fact that the legal and factual effects of the transactions subject to the principles of actio pauliana are detrimental to the general body of creditors and even though in many (perhaps in most of the) actio pauliana cases, this detrimental effect is one of the key purposes of the transaction. The decisive difference is that the motive for the
transaction is *not only* to keep the assets out of reach of creditors but also to establish a genuine right to the debtor’s contracting party. Therefore, in the general grounds for transaction avoidance, there *can* be legitimate expectations that might deserve the immunity protection provided by Article 16 of the EIR. On the contrary, the very idea behind the disregard of artificial transactions is that the substantive right of the contracting party of the debtor is not authentic and genuine but merely artificial. Thus, there *cannot* be legitimate expectations or any other motives worth protecting by the principle of immunity.47

6.2.2 | Finnish law as the lex causae

When the artificial transaction is subject to the law of Finland as the *lex causae*, Chapter 5, Section 11, of the BAF provides *one of the means* of challenging the transaction. Thus, irrespective of the contents of the *lex concursus*, Article 16 EIR does not save the transaction, provided of course it is, or it can be considered, artificial. However, as mentioned above, the court does not apply the *lex causae*, but the avoidance rules of the *lex concursus*.48 In light of this, the disregard of artificial transactions according to Chapter 5, Section 11, of the BAF is available only when the *lex concursus* is the law of Finland, that is, when Finland is the State where the insolvency proceedings are opened, whether the main or territorial proceedings.

7 | PROPOSAL FOR THE FUTURE OF THE LEGITIMACY OF EXPECTATIONS

Immunity protection for the expectations of the creditors claiming set-off, as well as the expectations of the debtor’s contractual parties in artificial transactions, can and should be reconsidered. This is not a novel assertion; over the years, many academics have criticized the choice of law rules of the EIR.49 What has been highlighted above in this article is that the expectations deserving immunity protection must be *legitimate*. The text of the EIR does not expressly indicate this requirement, but it is clearly the rationale behind the immunity rules of Articles 9(1) and 16 of the EIR.50 Under the prevailing regime, there seem to be two basic means to avoid the application of the immunity rules for the protection of illegitimate expectations:

- seeking support from the case law of the CJEU; and
- applying the public policy exception (*ordre public*) laid down in Article 33 of the EIR.

Concerning the case law of the CJEU, the court has held in *Vinyls Italia*51 that the immunity protection against transaction avoidance may be validly relied upon, provided the parties of the transaction have not exercised the freedom of choosing the *lex causae* ‘for abusive or fraudulent ends’ (paragraph 56), unless:

... 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*. (paragraph 54; author’s emphasis)
Nevertheless, \textit{Vinyls Italia} concerns the artificial nature of the choice of law, \textit{not the artificial content of the transaction itself}. Provided there is no signal or evidence expressing the abuse of the choice of law, the judgment in \textit{Vinyls Italia} provides no means to avoid the application of immunity protection, even if the transaction is intentionally detrimental to the general body of creditors. The same holds true regarding set-off with a speculative crossclaim.\footnote{52}

Regarding the public policy exception (\textit{ordre public}) laid down in Article 33 of the EIR, it seems highly unlikely to be applicable to most of the judgments concerning set-off or transaction avoidance. First, the EIR is based on the principle of \textit{mutual trust}. Because the EIR is in force (has been ‘adopted’) in each of the EU Member States—except Denmark—the immunity rules laid down in Articles 9(1) and 16 are in force as well. In addition, the public policy exception can only be invoked in cases where the refusal to enforce a judgment handed down in the context of insolvency proceedings would be ‘manifestly contrary’ to the public policy of the requested Member State, in particular its fundamental principles or the constitutional rights and liberties of the individual.

In light of all this, there are plausible reasons for the conclusion that the mere fact that the parties have made use of the national differences of insolvency laws, even when it has happened intentionally to the detriment of the general body of creditors, would hardly constitute a manifest violation of public policy. It must also be noted that by accepting into the EIR such immunity rules as Articles 9(1) and 16, the EU has also accepted, as a part of the public policy of the Union itself, the risk that the differences in national insolvency laws might be utilized in an undesirable way. This indicates that the problem discussed in this article must be resolved by some other means than invoking the public policy exception.\footnote{53}

There seems to be one, albeit theoretical, means to avoid the conclusion just described: given that the public policy exception also includes the public policy of the EU,\footnote{54} it might be argued that the protection of the legitimate expectations of the general body of creditors is an essential part of the union-wide public policy. Therefore, immunity protection may violate this policy, in some cases manifestly. However, as stated above, immunity protection provided by the various \textit{leges causae} is also an essential part of the union-wide public policy. It follows that we need to examine one more fundamental question: \textit{whose} legitimate expectations are worth protecting over the others?

Typically, most of the creditors of the insolvent debtor have had no opportunity to protect themselves against the effects of the debtor’s financial distress, while the creditors of the speculative crossclaims and the beneficiaries of the fraudulent transactions have had this opportunity and even used it to their own benefit. The expectations of the latter ones are, at least prima facie, less legitimate than the expectations of the former ones. It may even be considered that the immunity protection provided by the EIR for the speculative crossclaims and for the fraudulent, disloyal, inappropriate, or even artificial transactions endangers (or, at least, is incompatible with) the principles of mutual trust and legal certainty.\footnote{55}

Where, then, should the ultimate border of the legitimacy of expectations be drawn? Regarding the creditor’s right to set-off, speculative crossclaims should be excluded from the right to set-off, regardless of whether the law applicable to the insolvent debtor’s claim allows the set-off. In cases where the \textit{lex concursus} is the law of Finland, this would mean that even when the foreign \textit{lex causae} (the law applicable to the insolvent debtor’s claim) would allow the set-off, the \textit{lex concursus} would exclude that right by applying the restrictions established in Chapter 6, Section 2 (2)–(3), of the BAF.\footnote{56} This would strengthen the impact of the \textit{lex concursus} by reducing unjustified exceptions to it. Furthermore, this kind of change in the fundamentals of the EIR would promote the general principle of protecting legitimate, not illegitimate, expectations.\footnote{57}
Concerning transaction avoidance and other (‘any’) means of challenging preinsolvency acts, an ultimate border of the legitimacy of expectations should be drawn to abolish the immunity of artificial transactions, at least the kind of transactions defined in Chapter 5, Section 11, of the BAF. They do not deserve immunity protection, as has been analyzed earlier in this article. As a more radical step, it might be desirable to reject immunity protection from all transactions of an intentionally fraudulent, disloyal, or inappropriate character.\(^5^8\)

The immunity rules of the EIR protecting the right to set-off and transaction avoidance provide a presumption in favor of the lex causae. As discussed above in this article, this presumption is problematic when the substantive content of the protected claim or transaction is speculative, fraudulent, disloyal, or otherwise inappropriate.\(^5^9\) As on overall suggestion, the initial setting and therefore the presumption between the lex concursus and the immunity protection could be turned to the contrary: where the substance of the preinsolvency contract, transaction, crossclaims arrangement, etc. is intentionally illegitimate, the legitimate expectations are those of the general body of creditors, not those of the beneficiaries.\(^6^0\)

8 | CONCLUDING REMARKS

Along with the drafting of the recast EIR, there was an opportunity to strengthen the impact of the lex concursus. This opportunity was missed, however. Therefore, the immunity rules still apply, regardless of whether the crossclaim is speculative or the transaction is artificial or in some other way intentionally fraudulent. In future developments of European insolvency law, two alternatives seem available for excluding immunity protection from illegitimate expectations. One is the evolutionary case law of the CJEU, which would require that, regardless of the lex causae in question, the immunity rules of Articles 9(1) and 16 of the EIR would not be applied to protect speculative crossclaims and artificial, intentionally fraudulent transactions. Another option is to harmonize the laws of Member States in such a way that there would be no need to discuss whether to apply the lex causae instead of the lex concursus. It remains to be seen whether this goal can be achieved or promoted in the project of harmonizing the transaction avoidance laws of EU Member States, which has already started at the university level.

ENDNOTES

1 For a more detailed list of the problems raised by cross-border insolvency, see, for example, Bob Wessels, “The Changing Landscape of Cross-border Insolvency Law in Europe” (2007) XII Juridica International Law Review, available at: <https://www.juridicainternational.eu/index.php?id=10550>. See also Paul Omar, “The Inevitability of ‘Insolvency Tourism’” (2015) 62 Netherlands International Law Review 429, 440 and 443–444 (regarding especially the need to harmonise the insolvency laws of the EU Member States); Peter Mankowski, “The European World of Insolvency Tourism: Renewed, But Still Brave?” (2017) 64 Netherlands International Law Review 95–114.

2 In the legal literature, lex fori concursus is often simply referred to as lex concursus. The shorter version is used, for example, in Gabriel Moss, Ian Fletcher and Stuart Isaacs (eds), Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings (3rd edn) (Oxford University Press, 2016).

3 Instead, or along with the law of COMI, the lex concursus might also be the law of the State where the debtor possesses an establishment (Article 3(2), EIR). Special problems related to opening insolvency proceedings on the grounds of the debtor’s establishment, that is, the territorial proceedings, fall out of the scope of this article. In principle, at least, the assessments of the law of COMI apply mutatis mutandis to the law of the State where the territorial proceedings are opened.
As mentioned above in the abstract, the content of these articles remained intact in the recast EIR. Hereinafter in this article, any references to the previous Articles 6(1) and 13 also refer to the present Articles 9(1) and 16 (and vice versa).

For a deeper analysis of the approach that I call critical, see John Pottow, “Beyond Carve-Outs and Toward Reliance: A Normative Framework for Cross-Border Insolvency Choice of Law” (2014) 9(1) Brooklyn Journal of Corporate, Financial & Commercial Law 197 proposing a new approach based on actual defensive litigant reliance. Concerning the critical view for protection against transaction avoidance provided by Article 13, EIR, see Michael Veder, Cross-border Insolvency Proceedings and Security Rights (Kluwer Legal Publishers, 2004) stating (315–316) that the opening of insolvency proceedings in the COMI of the party of a transaction (or one of the parties to it) ‘is a foreseeable risk that should be taken into account when entering into a transaction’; therefore, legitimate expectations might exist only when the proceedings are opened in the Member State where the debtor possesses an establishment (or has assets located there). Because the risk is foreseeable, it has also been stated that the rationale of protecting legitimate expectations ‘may be challenged on its own terms’; see Reinhard Bork and Renato Mangano, European Cross-border Insolvency Law (Oxford University Press, 2016), paragraph 4.104. See also Moritz Brinkmann, “Avoidance Claims in the Context of the EIR” (2013) 4(4) International Insolvency Law Review 371–383.

The EIR was originally meant to cover only the ‘intra-community effects’ of insolvency proceedings (meaning, nowadays, their effects on EU Member States), see Miguel Virgos and Etienne Schmit, Report on the Convention on Insolvency Proceedings (1996), paragraphs 44(1)(b) and 93(2): ‘The need to protect legitimate expectations and the certainty of transactions is equally valid in relations with non-Contracting States’. For a comprehensive analysis of the application of Article 13, EIR, see Alexander Juraj, “Avoid the Choice or Choose to Avoid? The European Framework for Choice of Avoidance Law and the Quest to Make it Sensible” (March 2009), available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1410157>, recommending immunity protection also be applied in relation to third States.

Denmark, Finland, Iceland, Norway and Sweden—Convention regarding Bankruptcy, signed at Copenhagen, November 7, 1933. For more on the Nordic Convention, see Bob Wessels and Gert-Jan Boon, Cross-border Insolvency Law, International Instruments and Commentary (2nd edn) (Wolters Kluwer, 2015), paragraph 38.

See Moss, Fletcher and Isaacs (eds) (above Note 2), paragraph 4.39, where it is expressly stated that the benefit of Art. 13 EIR providing protection against the transaction avoidance rules of the lex concursus ‘cannot be claimed in a case where the transaction in question is governed by Danish law’.

Given that the Danish permanent exemption to the EIR excludes protection against transaction avoidance (see above Note 8), the rule must be the same in relation to the law of the UK in the post-Brexit era, provided there will be no deal or any other special arrangement. This is, of course, only one of the many Brexit-related problems in the field of cross-border insolvency law. For the fundamental problems, see Chris Umfreville et al., “Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a ‘No Deal’ Scenario” (2018) 27 International Insolvency Review 422; Mankowski (above Note 1), 103–105.

Virgos and Schmit (above Note 6), paragraphs 44 and 93(2) (in fine).

The ruling of the Supreme Court now in question has the identifier KKO 2014:99 (date of issue: December 22, 2014). For the relation between the EIR and the national laws of the Member States, see Andrew Keay, “The Harmonization of the Avoidance Rules in European Union Insolvencies” (2017) 66 ICLQ 79, discussing the principle of the effectiveness of EU law as an obstacle for applying national laws to the choice of law and civil procedure. Keay’s assessment is easy to agree with. Furthermore, the principle of the effectiveness of EU law would require the application of the (principles behind the) EIR, even in relation to third States, but, as indicated above, this is not generally the case in the prevailing regime of EU law.

Case identifier: KKO 2006:108. These two precedents (KKO 2006:108 and KKO 2014:99) express the basic ‘spirit’ of the Finnish Supreme Court: the principles of the EIR can also be applied as principles of the national law of Finland. These precedents concern transaction avoidance, and thus more general conclusions are subject to uncertainty. Nevertheless, the initial setting regarding the creditors’ right to set-off is similar enough to provide reason for the question why would Article 9(1), EIR not also express a settled European principle, applicable even outside the direct scope of the EIR. To achieve more clarity and predictability, it would be advisable to amend the national law of Finland in such a way that has occurred, for example, in
Germany, where the Insolvenzordnung, Zwölfter Teil (Internationales Insolvenzrerecht) provides, inter alia, choice of law rules regarding set-off and transaction avoidance similar to those of the EIR.

In this article, the evaluation is limited to the exceptions provided in Articles 9(1) and 16, EIR. For the comprehensive discussion regarding the contents and the rationale of the various exceptions provided in the EIR, see, for example, Bork and Mangano (above Note 5), paragraphs 4.31–4.123.

See, for example, Virgos and Schmit (above Note 6), paragraphs 109, describing the protection of the right to set-off as ‘a sort of guarantee governed by a law on which the creditor concerned can rely at the moment of contracting or incurring the claim’, and 138 (the right to exclude the transaction avoidance rules of the lex concursus aims to uphold the ‘legitimate expectations of creditors or third parties of the validity of the act in accordance to the normally applicable national law’). See also Keay (above Note 11), 86 (‘certainty of transactions in other Member States’).

The purpose of this article is not to provide a comparative analysis of the differences in national insolvency laws among the EU Member States, as this kind of analysis would require a special research project. For an overview of the various details on the transaction avoidance laws of selected Member States, see Gerard McCormack, Andrew Keay and Sarah Brown, European Insolvency Law—Reform and Harmonization (Edward Elgar Publishing, 2017), 147–201 (with citations). To fulfil the aim of this article, it is sufficient to bear in mind that, as the CJEU has ruled in Hermann Lutz v Elke Bäuerle (C-557/13, ECLI:EU:C:2015:227), the limitation periods and other time-bars, as well as the ‘relevant procedural requirements for the exercise of an action’ for transaction avoidance are to be determined by the lex causae. In light of this, there is no reason to presume that any different stance would be applied to the disputes concerning the immunity protection of the creditor’s right to set-off. The case and the judgment of the CJEU in Vinyls Italia (C-54/16, ECLI:EU:C:2017:433) will be examined later in this article (see Section 7). However, it must be noted that the Vinyls Italia primarily concerned abuse of the freedom of the choice of law. Provided there is no evidence of an abusive choice of law, the Vinyls Italia case does not solve the problem of the speculative use of the differences in substantive national laws. Some support that a general prohibition of the abuse of rights can be found in the case of Kratzer v R + V Allgemeine Versicherung AG (C-423/14, ECLI:EU:C:2016:604), but the question resolved is not similar enough to provide a plausible guarantee against the speculative crossclaims or disloyal or even fraudulent transactions detrimental to the general body of creditors.

Even though the problems of cross-border insolvencies are universal, many of the legal solutions, even under a sophisticated international instrument like the EIR, still follow the national rules and thus the State borders. The rules and principles governing cross-border insolvencies have admittedly been developed during the past three decades; nevertheless, there is much work to be done. Regarding the situation in the early 1990s, see Jay Westbrook, “Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum” (1991) 65 The American Bankruptcy Law Journal 457, 457–458, describing the global legal situation of that time as ‘primitive and chaotic’. The divergences in national insolvency regimes may even have an impact on the incorporation or domicile decision of the debtor, as this decision determines the national jurisdiction in which the insolvency proceedings may be opened and, therefore, the lex concursus as well. See comprehensively Omar (above Note 1), 429–444, regarding, especially, the need to harmonise the insolvency laws of the EU Member States (440–443).

See above Note 15 and, furthermore, concerning set-off, Lidija Simunovic, “Rethinking the European Model Law of Set-Off in the Era of Brexit and the Recent Reform of the French Civil Code” (2019) 15 Croatian Yearbook of European Law & Policy 135; Moss, Fletcher and Isacs (eds) (above Note 2), paragraphs 4.22–4.26.

The immunity rules might also be described as providing a ‘safe harbour’ or ‘veto right’ to protect the creditor’s right to set-off or the persistence of a pre-insolvency transaction. See Tuula Linna, “Actio Pauliana—‘Actio Europensis’? Some Cross-Border Insolvency Issues” (2014) 10 Journal of Private International Law 69–81; Juraj (above Note 6); Oriana Casasola, “The Transaction Avoidance Regime in the Recast European Insolvency Regulation: Limits and Prospects” (2019) 28 International Insolvency Review 163, 173.

As the EIR includes many exceptions to the lex concursus, one might ask for the reasons to choose specifically set-off and transaction avoidance to be discussed in a particular research article. This question is important, as in some of those other exceptions, the principle of immunity is expressed by the same wording as the exception applicable to the creditors’ right to set-off, that is, by stipulating that the opening of insolvency
proceedings ‘shall not affect’ the right in question. This is the case regarding the third parties’ rights in rem (Article 8) and the seller’s rights based on a reservation of title (Article 10(1)), both subject to that the asset in question is, at the time of the opening of proceedings, situated within the territory of a Member State other than the State of the opening of proceedings. See also Virgos and Schmit (above Note 6), paragraph 107 (stating that set-off is governed in the EIR in the same way as the rights in rem); Michael Bogdan, Concise Introduction to EU Private International Law (2nd edn) (Europa Law Publishing, 2012), 177. Despite these similarities, I have chosen the provisions of set-off and transaction avoidance to be explored in this article, as they are not connected to the Member State where the particular assets are situated at the time of the opening of the insolvency proceedings. An additional reason for this choice is that the application of Articles 9(1) and 16, EIR necessarily require ascertaining the contents of the law other than the lex concursus. See also Bork and Mangano (above Note 5), paragraph 4.108.

20 See, for example, the citations above Note 5.

21 The quote ‘any means of challenging’ refers to Article 16(b), EIR.

22 For a comprehensive analysis of the role of the lex concursus role in the regime of the EIR, see Bork and Mangano (above Note 5), paragraphs 4.07–4.30.

23 This is not to say that the familiarity of the applicable law would not be important to insolvency practitioners as well. Although European lawyers are fairly free to exercise their profession in any Member State of the EU, an insolvency practitioner is most often appointed from the Member State where the proceedings are opened (i.e., the COMI State or the State of the debtor’s establishment). This kind of ‘homeward trend’ is undoubtedly weaker than it was, let us say, a couple of decades ago. However, it probably has retained some of its practical power. For the global view of the discussion concerning the application of the domestic and, on the other hand, the foreign insolvency law, see Jenny Clift, “Choice of Law and the UNCITRAL Harmonization Process” (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 19, 29–31, discussing the pros and cons of the alternative models, including the opportunity for the combination of the domestic and the foreign law.

24 On the historical grounds for the lex fori as the primary rule in private international law, see Albert Ehrenzweig, “The Lex Fori: Basic Rule in the Conflict of Laws” (1960) 58 Michigan Journal of Law Reform 637. See also Janeen Carruthers, “Substance and Procedure in the Conflict of Laws: A Continuing Debate in Relation to Damages” (2004) 53 International & Comparative Law Quarterly 691, 692–696, discussing whether the grounds for the lex fori principle lie more in convenience and pragmatism, on the one hand, or in natural justice and the human mind, on the other. One of the many elements of this discussion is (regardless of the reasons for the exceptions to the lex concursus) the problem of how to achieve a proper assessment of the contents of foreign law in a national court. Concerning this basic problem, see Carlos Esplugues Mota, “Harmonization of Private International Law in Europe and Application of Foreign Law: The ‘Madrid Principles’ of 2010” (2011) 13 Yearbook of Private International Law 273. Regarding the Finnish contribution to this discussion, see Tuulikki Mikkola, “Comparative Legal Information and Obstacles Achieving It: Mastering (Surviving) The Jungle of Foreign Rules in Finnish Court”, in IRIS 2018. Proceedings of the 21st International Legal Informatics Symposium (Editions Weblaw, 2018), 667, 668, stating that the rules of private international law ‘are technical by nature; signs that identify applicable rules. They are rules about rules’.

25 As mentioned above in the main text, much has been written about the immunity rules of Articles 9(1) and 16, EIR. Nevertheless, to make the latter parts of this article easier for readers to follow (without the need to reference earlier writings simultaneously), I found it useful to provide an overview to the extent described above.

26 There is a risk that the set-off that has already been concluded, or the creditor’s right to invoke the set-off, is declared void in insolvency proceedings (Article 9(2), EIR). According to both the Finnish and Swedish national laws, set-off itself can be recovered to the bankruptcy estate as a payment of debt but only if the creditor in question would not have been allowed to invoke set-off in bankruptcy. In case there is a need to challenge the transaction by which the set-off situation has been created (but the set-off itself has not yet been concluded), the general provision on transaction avoidance might be applicable according to the national laws of both Finland and Sweden.
For the question of whether this is the correct interpretation and for the resolutions made by certain Member States, see Bork and Mangano (above Note 5), paragraph 4.72.

For the burden of proof, see C-310/14 Nike European Operations Netherlands BV v Sportland Oy [2016], [37–45], where the CJEU also held (see esp. paragraph 45) that there remains an opportunity for the claimant to prove the contrary, but this is needed only after the defendant has first met the requirements of its own initial burden.

The forum concursus usually refers to the court in which the insolvency proceeding has been opened. Depending on the national forum rules, the court that has jurisdiction over the actions of transaction avoidance may or may not be the same court unit as the forum concursus. According to Finnish law, they may be the same [Act on the Recovery of Assets to the Bankruptcy Estate, 758/1991, § 23(2)].

This has been described in the Swedish literature by stating that Article 13, EIR only provides for a threshold effect, see Mikael Mellqvist, EU:S Insolvensforordning M.M., En Kommentar (Norstedts Juridik AB, 2002), 246. See also Linna (above Note 18).

The system of the corporate insolvency law of Finland contains separate acts, on the one hand, on bankruptcy (the traditional liquidation proceeding) and, on the other, on corporate restructuring. The rules governing set-off and transaction avoidance apply in both. The Ministry of Justice has produced unofficial English translations of both the Bankruptcy Act (20.2.2004/120) and the Restructuring of Enterprises Act (25.1.1993/47). Translations are available at the Finlex database: <https://www.finlex.fi/en/laki/kaannokset/2004/en2004120>; <https://www.finlex.fi/en/laki/kaannokset/1993/en19930047>. The basic structure of the insolvency legislation is similar to that of Sweden. In addition, the provisions concerning set-off and transaction avoidance share the same principles in both Finland and Sweden with the exception that, in Swedish law, there is no general restriction to a credit institution’s right to set-off its claim. As well, the opportunity for the disregard of artificial transactions, at least in the way governed in the Bankruptcy Act of Finland, is a Finnish peculiarity, yet bearing in mind that the same (kind of) result might be available on the grounds of the general private law of Sweden (as well as many other national private laws of the EU Member States).

The choice of law rules of the EIR are mandatory and thus cannot be replaced by a contract. Nevertheless, the parties are free to agree upon the law referred to in Articles 9(1) and 16 (but not on the question of whether to apply these Articles). See, for example, Bork and Mangano (above Note 5), paragraph 4.03. On the binding nature of the original Convention on insolvency proceedings, see also Virgos and Schmit (above Note 6), paragraph 47.

For the transaction avoidance law as a means for the insolvency practitioner to fulfil the task of accumulating assets for the insolvent’s estate, see McCormack, Keay and Brown (above Note 15), 130.

The right to set-off is absolutely rejected by Chapter 6, Section 2(1), BAF with any claim that does not entitle the creditor to a payment out of the bankruptcy estate or with a claim junior to other claims (as specified in Section 6, paragraphs (1)(3)–(1)(5), Act on the Ranking of Claims, 1578/1992). The rationale of these restrictions is self-evident and thus left out of the scope of this article.

The suspect periods are regulated exhaustively in the Act on the Recovery of Assets to a Bankruptcy Estate (758/1991).

These provisions were adopted in Finnish law by following the model of the Bankruptcy Act of Sweden (1987:627), Chapter 5, Section 16.

Naturally, most of the accounts held by the credit institutions can be used for the management of payments, which means that the restriction established in Chapter 6, Section 5, BAF is noteworthy.

Because set-off with speculative crossclaims is rejected in the Finnish law by provisions similar (in fact, identical) to those of Swedish law, it is reasonable to assume that an assessment of the speculative crossclaims might have some relevance in relation to the cross-border cases to which the law of Sweden applies.

Despite the wording, an interpretation that would limit the scope of Article 9(1) solely to the laws of the Member States has gained some support in academic writing and in the national praxis of some of the EU Member States (see the citation above Note 27). Regardless of what should be the final solution to this problem of interpretation, it might be considered that including the laws of third States within the scope of Article 9(1), EIR is
not violating its wording. On the contrary, by rejecting the right to set-off provided by the law of the third State, the national court would violate the wording provided in Article 9(1).

40 See, for example, the citation above Note 33.

41 In Finland, transaction avoidance is governed by a separate act (Act on the Recovery of Assets to the Bankruptcy Estate, 758/1991), while in Sweden, the provisions on transaction avoidance are included in Chapter 4, Bankruptcy Act (Konkurslag, 1987:672).

42 There is an identical provision in the Finnish Enforcement Code (hereafter ECF 705/2007), Chapter 4, Section 14 (identical not by wording but by the content and the rationale). The provisions governing the disregard of artificial transactions are only available in liquidation bankruptcy and enforcement proceedings. The opportunity to apply similar rules in corporate reorganisation has never been discussed in Finland. The reason for this might be the basic idea that any effort to reorganise a business is destined to fail due to the artificial transactions concluded by the debtor. Whether this holds true has not been considered in the academic literature.

43 For instance, it is unclear whether the general provision of simulated transactions (in Finnish law, the Contracts Act, 228/1929, § 34) would be applicable when the transaction is not totally simulated but has some kind of mutual purpose for the parties. The artificial transactions defined in Chapter 5, Section 11 BAF, are not totally simulated because there is a purpose behind them: to keep the assets out of reach of creditors. By disregarding the transaction, this purpose is invalidated.

44 The policy reasons for adding the new instrument to the Finnish legislation are explained in the draft works of the reform (Government Bill 275/1998, 3–9 (general rationale) and 13–17 (detailed justification)). Among these reasons, the equality of debtors was also mentioned. The debtors who could benefit from (i.e., paying for) the legal and economic expertise were better off than those who could not.

45 It must, however, be admitted that the interpretation described above is subject to uncertainty, as the principle of vis attractiva concursus is not adopted as a general principle of the EIR. On the contrary, Article 6(1), EIR pushes the question of the international jurisdiction based on the ‘sufficiency’ of the link between the action and the insolvency proceedings. It follows that the EIR and the Brussels I regulation still ‘compete’ against each other concerning the rules of international jurisdiction. Even though the question of the ownership of assets is of utmost importance in any insolvency case, the rules of jurisdiction of the EIR are excluded by the Brussels I regulation, given that the link between the claim (the action) and the insolvency proceedings is not considered to be sufficiently close (i.e., close enough). As it is generally known, the interaction between the EIR and the Brussels I regulation has been debated among scholars and it has been investigated a couple of times by the CJEU. For a critical assessment of this problem, see Gerard McCormack, “Reconciling European Conflicts and Insolvency Law” (2014) 15(3) European Business Organisation Law Review 309, especially 324, discussing the CJEU Case C-292/08 German Graphics Graphische Maschinen GmbH v Alice van der Schee ECLI:EU:C:2009:544, where the dispute concerned the jurisdiction for an action over the reservation of title, which fell outside the scope of the EIR due to the lack of a sufficient link to the insolvent proceedings. See also CJEU Case C-641/16 Tünkers France and Tünkers Maschinenbau GmbH v Expert France ECLI:EU:C:2017:847, where the forum rules of the Brussels I Regulation were applied instead of those of the EIR in a case concerning an action for damages for unfair competition.

46 Regarding the question of whether the rules and principles of the actio pauliana are elements of insolvency law or, rather, elements of the general civil law, there are differences between the national regimes. See McCormack, Keay and Brown (above Note 15), 175–178; Linna (above Note 18), 86–87.

47 It will be discussed later in this article whether all transactions of a fraudulent nature should be excluded from the scope of immunity protection.

48 See, for example, Mellqvist (above Note 30), 246; (in greater detail) Bork and Mangano (above Note 5), paragraph 4.103.

49 For problems and criticisms of the immunity rule of Article 16, EIR (and its predecessor Article 13), see Veder (above Note 5); Bork and Mangano (above Note 5), 156; Casasola (above Note 18), 173–174. A particular problem related to this discussion is whether the transactions concluded as part of the out-of-court workouts should be protected against transaction avoidance. For a comprehensive review of this problem under the laws
of certain EU Member States, and for recommendations to resolve it, see Bob Wessels and Stephan Madaus, *Rescue of Business in Insolvency Law* (European Law Institute, 2017) 278–284.

50 This rationale is stated in Recitals 67 and 70, EIR and in much of the legal literature already referred to in this article.

51 CJEU, C-54/16, ECLI:EU:C:2017:433.

52 It might, perhaps, be argued that artificial transactions are generally void, voidable or unenforceable according to the national laws of the EU Member States and, therefore, the problem discussed in this article does not even exist. However, the problem lies in the diverging *details* of the national laws regarding, for example, suspect periods, limitations of actions, procedural requirements or diverging presumptions of awareness/unawareness of the debtor’s financial circumstances. As Case C-557/13 *Lutz v. Bäuerle* ECLI:EU:C:2015:227 indicates, these kinds of elements are determined by the *lex causae* and therefore it may follow that the reasonable, legitimate expectations of the general body of creditors are excluded by—in the worst case—a formal detail. In addition, the problem lies in the crossclaims and transactions that are not manifestly artificial but, in some way, speculative, disloyal, fraudulent, inappropriate or otherwise intentionally detrimental to the general body of creditors. It must also be noted that the ruling of the CJEU in *Kratzer* (see above Note 15), according to which an artificial application for an employment post does not fall within the definition of ‘access to employment, to self-employment or to occupation’ and that the application of this kind may be considered an abuse of rights, does not solve the problem examined in this article. The pre-insolvency transactions and the crossclaims arrangements are (not always but typically) far more complicated and thus far more difficult to be considered either abusive or honest acts, as compared to the mere question of whether an application for an employment post has been made with the sole intention of obtaining compensation on the grounds of discrimination instead of the employment post in question.

53 Regarding immunity protection against transaction avoidance, Michael Bogdan, in Moss, Fletcher and Isaacs (above Note 2), paragraph 8.267 has described this result as ‘undesirable’, which is easy to agree with. For the public policy exception laid down in the EIR and for the interaction between the EIR and the Brussels I Regulation, see Virgos and Schmit (above Note 6), paragraphs 202–210; Bork and Mangano (above Note 5), paragraphs 5.41–5.57 and 5.62; Giorgio Corno, “Enforcement of Avoidance Claims Judgments in Europe. Present Rules and (reasonable) Future Reforms” (2013) 4(4) *International Insolvency Law Review* 425–426. The discussion regarding the public policy exception in cross-border insolvency law is, of course, a universal topic. For the analysis of the law of the United States (regarding the recognition of a foreign insolvency proceedings according to Chapter 15 of the Bankruptcy Code), see, for example, Michael Garza, “When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy?” (2015) 38(5) *Fordham International Law Journal* 1585.

54 See Bork and Mangano (above Note 5), paragraph 5.45; Virgos and Schmit (above Note 6), paragraph 205.

55 For the relationship between the principle of legal certainty and the (principle of) protection of the legitimate expectations in the EU law, see, inter alia, Jérémie van Meerbeeck, “The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust” (2016) 41 *European Law Review* 275, 280, describing (with citations) the principle of legal certainty as an ‘umbrella’ principle and the principle of legitimate expectations as its ‘corollary’. See also Takis Tridimas, *The General Principles of EU Law* (2nd edn) (Oxford University Press, 2006), 242–297.

56 Because the set-off with speculative crossclaims is governed by similar provisions in the laws of both Finland and Sweden, the proposal described above might, perhaps, have some relevance in the context of Swedish law as well.

57 My proposal for strengthening the impact of the *lex concursus* (i.e., for breaching immunity protection) is aimed against the *intentional* arrangements where a single creditor is or should be aware of the debtor’s financial distress. Arrangements concluded in good faith fall out of the scope of this proposal.

58 In the national regimes of the EU Member States, fraudulent transfers, as well as any transactions entered into in bad faith, are widely at risk of being challenged in insolvency proceedings, see, for example, Wessels and Madaus (above Note 49), 255–280. However, as mentioned above (above Note 52), the problem is that there are remarkable variations in the national details regarding, for example, suspect periods, limitations of actions
or presumptions. Of course, the problem of the diversity of avoidance laws is not limited to the European level; rather, the basic problems are universal. The drafters of avoidance laws aim to find a balance between the two conflicting interests: first, to return the transferred assets back to the insolvent estate to the most possible and appropriate extent and second, to minimise the uncertainty that the risk of avoidance imposes on the ordinary course of business transactions. See, for example, Jay Westbrook, “Avoidance of Pre-Bankruptcy Transactions in Multinational Bankruptcy Cases” (2007) 42 Texas International Law Journal 899; Andrew Keay, “In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions” (1996) 55 Sydney Law Review 55 (especially 59–69 regarding the distinction between, on the one hand, equality among the creditors and, on the other, the relation between debtors and the general body of creditors).

As also discussed above, the fact that the case law of the CJEU (in Vinyls Italia) rejects the abusive choices of law is of no help when the abusive element is not in the choice of law of the parties but in the substantive content of the claim or the transaction the parties have concluded under the chosen law. Given that the law has been chosen in good faith (or where there is no evidence showing the abusive purpose of the choice of law), the presumption in favour of the lex causae applies. Therefore, the legitimate expectations of the general body of creditors may be excluded, regardless of the fact that the substantive expectations of the counter party are not worth protecting.

This proposal seems to have something in common with the reliance-based model proposed by Pottow (above Note 5). See also Charles Mooney Jr., “Harmonizing Choice-of-Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests” (2014) 9 Brooklyn Journal of Corporate, Financial & Commercial Law 120. I must admit that my proposal might seem somewhat ‘trivial’ in theoretical terms, but its primary purpose is to pay attention to the question of what expectations are actually legitimate in the context (and in the vicinity) of insolvency. To use the traditional metaphors: the immunity rules of the Articles 9(1) and 16, EIR assume that the lex concursus is the ‘evil’ against which the protection of immunity is needed. However, this assumption is not valid when the protection is granted to the intentionally artificial, fraudulent or in some other way disloyal arrangements. In these cases, the principal setting is the opposite: the lex causae and the immunity rules of the EIR play the role of the ‘evil’ against which the general body of creditors needs protection.

**How to cite this article:** Hupli T. Rethinking the legitimacy of expectations: Speculative crossclaims, fraudulent transactions, and the immunity rules of the European Insolvency Regulation: Finnish (and some Swedish) perspectives. *Int Insolv Rev.* 2021;30:191–212. [https://doi.org/10.1002/iir.1411](https://doi.org/10.1002/iir.1411)