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THE HANDLING OF INSOLVENCY WITHIN TRANS-EUROPEAN
CONTRACTUAL NETWORKS: LEGAL ISSUES
AND POSSIBLE SOLUTIONS

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MAX WEBER PROGRAMME

*The Handling of Insolvency within Trans-European Contractual Networks:
Legal Issues and Possible Solutions*

LEONARDO GIANI

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Abstract

This paper tries to identify some tools which, in case of insolvency, might prove to be effective in order to take care of the specificities which characterise inter-firm contractual networks. To summarise, this paper is fundamentally an attempt to provide an answer to three general questions: What happens if one member of a trans-European contractual network files for bankruptcy? What are the shortcomings of the current regulation? How can the parties cope with these shortcomings? The analysis focuses on the European Union for three basic reasons. The first is that contractual business networks are considered one of the most diffused forms of organisation at European level and their promotion could have a positive impact on the European economy. The second basic reason is that, within the European Union, a uniform regulation of transnational insolvency directly applicable in the Member States exists (with the exception of Denmark). The existence of such a common ground allows a relatively reliable analysis of transnational insolvency. In contrast, an analysis with a wider focus would be less dependable, since the regulation of transnational insolvencies is globally based on a quite intricate pattern of unilateral, bilateral, and multilateral forms of co-operation. The third reason is that the topic seems to fit well with the long-standing and still ongoing debate about the evolution of the existing insolvency regulation and the harmonisation of insolvency law at European level. So, even if this paper does not take a *de jure condendo* approach, it might fit into the context of the above-mentioned debate.

Keywords

Inter-firm collaboration, trans-European networks, bankruptcy, contract law, international insolvency law.

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1. Introduction

Nowadays, as the financial crisis has clearly revealed, enterprises are largely interconnected. Indeed, although the recent crisis stemmed also from regulatory gaps and misconduct affecting the financial services industry, it rapidly spread within the real economy. In this respect, it seems reasonable to consider that the rapid diffusion of the crisis into the real economy was not simply due to links that had always existed among companies and financial institutions, but also to an increased number of inter-firm connections at both national and, in particular, transnational, level. In other words, it is possible to assume that currently, as a consequence of globalisation, enterprises are much more interconnected (both contractually and organisationally) than before. This has been considered valid, for example, with reference to the transformation of the supply chain,¹ although the formation of networks does not seem to be limited to this phenomenon. For these reasons, it becomes important to study the effects of insolvency on transnational inter-firm contractual networks.

However this topic still does not seem to have been explored extensively. Actually, some studies have already been made with regard to this topic.² Other studies consider contractual networks from other, albeit overlapping, perspectives.³ In addition, some studies that seem to focus on this topic, in fact, take a quite peculiar approach.⁴ Among these studies, the issue of insolvency is often mentioned, even if not specifically treated, by studies about the financing of networks or network members.⁵ Some of these studies, while generally concluding that networks play a role in favouring easier and cheaper access to finance,⁶ do not push forward definite conclusions with reference to bankruptcy.⁷

This paper, although relying on and benefiting from the above-mentioned studies, tries to approach the topic from a different perspective. In particular, this paper is essentially devoted to studying the effects of insolvency proceedings on contractual networks whose members are firms from different European Member States. Moving from this analysis, this paper tries to identify some provisions that might be effectively introduced in those contracts in order to take care of the specificities which characterise inter-firm networks or other contractually-engineered solutions.

In essence, this paper is fundamentally an attempt to provide an answer to three general questions: (I) What happens if one member of a trans-European contractual network files for bankruptcy (see *infra* Section 3)? (II) What are the shortcomings of the current regulation (see *infra* Section 4)? (III) How can the parties cope with these shortcomings (see *infra* Section 5)?

More precisely, the first question will be answered by describing the treatment of contracts in case of bankruptcy, given that the case under analysis concerns a contract signed by enterprises from

¹ See, for instance, F. Cafaggi, *Introduction*, in: F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar (2011), p. 2.

² See, generally, F. Cafaggi & D. Galletti (eds.), *La crisi dell'impresa nelle reti e nei gruppi*, Padua, Cedam (2005) and, more recently, G. Meo, *Crisi e imprese dell'indotto*, and R. Tiscini, *La propagazione della crisi all'indotto: la prospettiva delle risorse strategiche di rete*, both in G. Meo & G.D. Mosco (eds.), *Indotto e filiere - Economia alla ricerca del diritto*, in AGE, n. 2/2011, p. 399 ss.

³ See, generally, for instance, I. Mevorach, *Insolvency within Multinational Enterprise Groups*, Oxford, OUP (2009).

⁴ See, for instance, A. Schrank & J. Withford, *The Anatomy of Network Failure*, Sociological Theory, (2011), p. 151 ss.

⁵ See for instance, among many others, D. Scalera & A. Zazzaro, *Do inter-firm networks make access to finance easier? Issues and empirical evidence*, in: F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar (2011), p. 39 ss.; D. Galletti, *Il finanziamento delle imprese nel contesto delle reti: problemi e prospettive di regolazione*, in F. Cafaggi (ed.), *Reti di imprese tra regolazione e norme sociali – Nuove sfide per diritto ed economia*, Bologna, Il Mulino (2004), p. 381 ss.

⁶ See D. Scalera & A. Zazzaro, *Do inter-firm networks make access to finance easier?*, cit., p. 58.

⁷ “(...) lenders can consider it less risky to provide credit to subjects that can count, implicitly or explicitly, on their debt being guaranteed by some of the other network members and for which access to the ICM [A/N internal capital markets] reduces the likelihood of bankruptcy (Gopalan *et al.* 2007). On the other hand, network membership can also adversely affect access to credit. For example, external lenders may realistically expect the risk of contagion crises among the network members to be greater and therefore be willing to buy their assets only at a discount” (D. Scalera & A. Zazzaro, *Do inter-firm networks make access to finance easier?*, cit., p. 48).

different Member States and that one of them is subject to an insolvency proceeding. The second question will be approached by looking at the shortcomings generally identified with reference to the regulation in force, thereby trying to analyse these inadequacies in consideration of the peculiarities of contractual networks. Finally, the third question will be answered by focusing on the design of contracts aimed at governing inter-firm networks as well as on other contractual mechanisms that can be deployed in a network context. In particular, in the light of the shortcomings analysed in the previous part, the third question will be answered by hypothesising and evaluating some contractual provisions or mechanisms that might be suitable to play a role in cases of insolvency.

The analysis focuses on the European Union for three basic reasons. The first one is that, according to some scholars, contractual business networks are one of the most diffused forms of organisation at European level,⁸ and their promotion could have a positive impact on the European economy.⁹ The second basic reason is that, within the European Union, a uniform regulation of transnational insolvency directly applicable in the Member States exists (with the notable exception of Denmark),¹⁰ namely, Regulation (EC) 1346/2000.¹¹ The existence of such common ground allows a relatively reliable analysis of transnational insolvency. In contrast, an analysis with a wider focus would be less reliable, since the regulation of transnational insolvencies is globally based on a quite intricate pattern of unilateral, bilateral, and multilateral forms of co-operation.¹² The third reason is that this topic seems to fit well with the long-standing and still ongoing debate about the evolution of the existing insolvency regulation and the harmonisation of insolvency law at European level.¹³ So, even if this paper does not take a *de jure condendo* approach, it might fit into the context of the abovementioned debate.

2. Trans-European Contractual Networks

A preliminary challenge for a paper focused on inter-firm networks is that of defining inter-firm networks. Such a challenge, from a legal perspective, stems from the fact that inter-firm networks, apart from a few and recent exceptions,¹⁴ are not clearly defined by national or international laws.¹⁵

⁸ See F. Cafaggi, *Contractual Networks and the Small Business Act: Towards European Principles?*, EUI Working Papers LAW 2008/15, p. 4.

⁹ See F. Cafaggi & S. Clavel, *Interfirm networks across Europe: a private international law perspective*, in: F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar (2011), p. 201.

¹⁰ See I.F. Fletcher, *Historical Overview: The Drafting of the Regulation and its Precursors*, in: G. Moss, I.F. Fletcher & S. Isaacs (eds.), *The EC Regulation on Insolvency Proceedings – A Commentary and Annotated Guide*, Second Edition, Oxford, OUP (2009), pp. 1-2.

¹¹ OJ L 160, 30.06.2000.

¹² See, generally, B. Wessels, B.A. Markwell & J.J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford, OUP, (2009), p. 71 ss. and p. 101 ss.

¹³ For what concerns the future evolution of the existing regulation, Article 46 prescribes that the European Commission should present a report about the application of the Regulation 1346/2000 to the European Parliament, the Council and the Economic and Social Committee no later than June 1, 2012 (see K. Dawson, *Cross-Border Insolvency in the European Context*, in: K. Gromek Broc & R. Parry (eds.), *Corporate Rescue – An Overview of Recent Developments from Selected Countries in Europe*, The Hague, Kluwer Law International (2004), p. 197). In October 2011, the European Parliament requested to the European Commission to present one or more legislative proposals relating to an “EU corporate insolvency framework”

(see <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0355&language=EN#title6>, last accessed 31 October, 2012). Subsequently, in spring 2012, the European Commission launched a “Consultation on the future of European Insolvency Law” but, on the basis of a simple research on www.eur-lex.europa.eu, at the mid of September 2012, it had not yet delivered any official legislative proposal.

¹⁴ For instance, a regulation of contractual networks has been introduced in Italy by Legge 9 aprile 2009, n. 33, subsequently amended by Legge 23 luglio 2009, n. 99, then revised by Legge 30 luglio 2010, n. 122, and ultimately reformed by Legge 7 agosto 2012, n. 134 and Decreto Legge 18 ottobre 2012, n. 179 (which was not yet converted into law when this paper was written).

¹⁵ See F. Cafaggi, *Introduction*, cit., p. 15.

This Section, through a short survey of the papers written by some leading scholars, tries to draw the line between different phenomena, in order to provide a definition of contractual networks that can be usefully employed from the perspective of this paper.

Many prominent scholars have written about contractual networks. It seems worthy to remember that, in a paper published almost two decades ago (still often cited and considered by many scholars), an author claimed that “network” was not a legal concept.¹⁶ As another author subsequently pointed out in approaching the analysis of this matter, if this postulation is true, then lawyers would have little to say about networks.¹⁷ However, an accurate description of this debate and the development of a stance about this issue would go far beyond the scope of this paper. For this reason, I simply move from the assumption that contractual networks exist in practice.¹⁸

Having agreed on this, and given the absence of a generally-accepted legal definition, contractual networks still need to be characterised. This characterisation is very complicated, and it must be acknowledged that every definition of contractual networks (including those made by law)¹⁹ contain a relatively-high margin of ambiguity, since they are attempts to conceptualise an incredibly multi-faceted and complex phenomenon.

A first significant distinction can be drawn between strategic relations and networks. As two Italian authors pointed out, with specific reference to an empirical research, not all forms of inter-firm collaboration are strategic relations, and, furthermore, not all the strategic relations can be regarded as networks.²⁰ According to the definition provided by the above-mentioned authors, a strategic relation is generally a contractual relation and it is, *inter alia*, characterised by the following elements: a high level of stability, long duration, hard substitutability of one or all parties, and exclusivity. On the other hand, networks are a more complex collaborative structure which can be governed either by contract (contractual networks) or by the creation of an entity or an association (organisational networks) but,

¹⁶ See generally R.M. Buxbaum, *Is “Network” a Legal Concept?*, JITE, Vol. 149, No. 4, (1993), p. 698 ss.

¹⁷ See G. Teubner, *Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization*, in: G. Teubner & M. Amstutz (eds.), *Networks – Legal Issues of Multilateral Co-operation*, Oxford, Hart Publishing (2009), p. 1.

¹⁸ “Empirical research shows that contractual networks as formalized arrangements exist and play an important role in coordinating activities among firms to induce and preserve incentives to cooperate. Thus a formal concept of contractual networks is not only theoretically possible but also empirically accurate” (see F. Cafaggi, *Introduction*, cit., p. 12).

¹⁹ A lively debate occurred in Italy after the passing of a law which provided a framework and gave legal recognition to contractual networks. For instance, some scholars initially claimed that, according to the new law, contractual networks could determine the creation of a subject (see G. Villa, *Reti di imprese e contratto plurilaterale*, Giur. comm., 2010, p. 944 ss.) and, in particular, that networks could be assimilated to consortia (see M.R. Maugeri, *Reti di impresa e contratto di rete*, I contratti, n. 10/2009, p. 960; D. Corapi, *Dal consorzio al contratto di rete: spunti di riflessione*, Riv. dir. comm., 2010, p. 795 ss.; G. Marasà, *Contratti di rete e consorzi*, Corr. Merito, n. 1/2010, p. 9 ss.). Other scholars claimed the opposite (P. Zanelli, *Reti di impresa: dall’economia al diritto, dall’istituzione al contratto*, Contratto e Impresa, n. 4-5/2010, pp. 952 and 954; M. Maltoni, *Il contratto di rete. Prime considerazioni alla luce della novella di cui alla L. n. 122/2010*, in Notariato, n. 1/2011, pp. 67-68) and one of them subsequently considered contractual networks as groups (see P. Zanelli, *Le Rete è, dunque, della stessa natura del gruppo di società?*, Contratto e Impresa, n. 3/2011, p. 535 ss.). One author in particular considered the contractual network as a trans-typic contract (see F. Cafaggi, *Introduzione*, in F. Cafaggi (ed.), *Il contratto di rete – Commentario*, Bologna, Il Mulino [2009], p. 22 ss.). Another author considered the contractual network as a frame contract (see M. D’Auria, *Dal concetto di rete di imprese al contratto di rete*, Corr. Merito, n. 1/2010, p. 17 ss.). Finally, one author claimed that the identification of the legal nature of contractual networks would not be a problem and thus would not be worthy to debate (see A. Gentili, *Una prospettiva analitica su reti di imprese e contratti di rete*, Obbligazioni e Contratti, n. 2/2010, p. 90). These scholarly opinions were based on different versions of the law. The frequent revisions of the law have not promoted certainty. Although the specifics of this topic still remain uncertain, some initiatives have been taken by practitioners in order to reduce the interpretive uncertainties (see generally the document promoted by RetImpresa and Comitato Interregionale dei Consigli Notarili delle Tre Venezie, E. Bernini et al., *Linee Guida per i contratti di rete*, March 2012, available at <http://www.retimpresa.it/phocadownload/DOCUMENTI/linee%20guida%20per%20i%20contratti%20di%20rete.pdf>, last accessed on 31 October 2012). Even the most recent of these initiatives, however, quickly become outdated in some of their parts due to the adoption of the latest amendments.

²⁰ See F. Cafaggi & P. Iamiceli, *Introduction*, in: F. Cafaggi & P. Iamiceli (eds.), *Inter-Firm Networks in the European Wine Industry*, EUI Working Papers LAW 2010/19, p. 6.

in my understanding, in both these cases, they diverge from strategic relations because, *inter alia*, (I) not all the elements of strategic relations must be necessarily present in networks, and (II) network members, especially in organisational networks, share a common goal and conduct one or more common projects of common interest.

Among networks, an important distinction can be drawn between vertical and horizontal networks. This distinction basically leans on the function played by the network and the activities performed by network members.²¹ This distinction seems to be especially important for the implications which it can have on the design of the contractual structure developed to govern the network, as well as for the consequences arising from the insolvency of one network member. In order to understand the difference, consider that contractual networks can be formed to operate in different phases of a supply chain. According to one author, “when they operate within one phase they can be termed a horizontal network, whereas when they encompass multiple phases they may be described as vertical networks”.²² For instance, it can be argued that a contract among various car manufacturers to expand the production of a certain component together can typify a horizontal network, whereas a contract between wine producers and wine sellers is an example of a vertical network.²³

Among networks, another essential distinction is the one between organisational and contractual networks. This distinction is somewhat difficult because of the hybrid nature of networks. The hybrid nature of networks means that they are often considered as halfway between contracts and organisations²⁴ or, more theoretically, as a phenomenon that lies between the market and the hierarchy.²⁵ In other words, as one author pointed out in more than one work, contractual networks challenge the partition between contract law and company law.²⁶ According to the same author, a contractual network can be governed through a multilateral contract or a group of linked bilateral contracts, whereas an organisational network is governed through the creation of a new entity.²⁷ Contractual networks governed through multilateral contracts can be perceived as a sort of business association such as partnerships. This point is crucial from the perspective of this analysis because, as will be also considered ahead (see *infra* Section 3), rules about the treatment of contracts under bankruptcy seem to be designed on the paradigm of bilateral exchange contracts, and special rules often apply to partnerships in case one partner becomes bankrupt.²⁸ In concrete, a contractual network can take the shape of a business association²⁹, and, in these cases, the special rules that may be in place

²¹ See F. Cafaggi & P. Iamiceli, *Introduction*, cit., p. 6.

²² See F. Cafaggi, *Contractual Networks and the Small Business Act*, cit., p. 6.

²³ See generally F. Cafaggi & P. Iamiceli, *Introduction*, cit.

²⁴ See generally G. Teubner, *Networks as Connected Contracts*, in: G. Teubner & H. Collins, *Networks as Connected Contracts*, Oxford, Hart Publishing (2011), pp. 113-145.

²⁵ See generally O.E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, J. L. & Econ., Vol. 22, (1979), p. 233 ss.; O.E. Williamson, *Hierarchies, Markets and Power in the Economy: An Economic Perspective*, Industrial and Corporate Change, Vol. 4, (1995), p. 21 ss.; F. Cafaggi, *Contractual networks and contract theory: a research agenda for European contract law*, in F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar Publishing (2011), p. 66, in particular footnote 1.

²⁶ See F. Cafaggi, *Introduction*, cit., p. 9; F. Cafaggi, *Contractual Networks and the Small Business Act*, cit., p. 6 ss.

²⁷ See F. Cafaggi & P. Iamiceli, *Introduction*, cit., p. 6.

²⁸ For instance, in France, Article L. 221-16 of the *Code de Commerce* provides that: “When a winding-up order is made or a total assignment plan is imposed, or when a prohibition on involvement in a commercial business or an incapacity order becomes final in regard to a partner, the company is dissolved unless its continuation is stipulated in the memorandum and articles of association or unless the other partners unanimously so decide” (English translation available at: <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations>, last accessed on 31 October 2012). In Italy, Article 2288(1) of the *Codice Civile* simply provides that the partner who is declared bankrupt is excluded from the partnership. In the United Kingdom, Paragraph 33(1) of the Partnership Act 1890 provides that “Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner”.

²⁹ The latest amendments to the Italian law acknowledged this possibility by prescribing that even if, as a matter of principle, contractual networks are not legal entities, they can become legal entities if the parties want so (Decreto Legge 18 ottobre

for partnerships should be applied. However, this might not always be the case,³⁰ and, from a theoretical perspective, scholars apparently tend to consider contractual networks and business associations as two distinct legal concepts.³¹

Another very important distinction is between networks and enterprise groups. Drawing a definite line between networks and enterprise groups is extremely difficult,³² and, as I shall explain, to some extent, it is impossible. Networks are generally featured, *inter alia*, by inter-dependence and by a combination of co-operation and competition.³³ In contrast, the most distinctive feature of an enterprise group is that, according to the most commonly accepted definitions,³⁴ it implies a sort of control or co-ordination power exercised by one firm over the others.³⁵ Such a distinctive feature of enterprise groups may be present in networks, but it should not necessarily be present, nor is this always present in fact.³⁶ In the case in which a network is featured by the control or co-ordination power of one firm over the others, it will resemble the concept of group, and many considerations made for groups would be applicable to such networks. However, since networks do not necessarily subtend the existence of an enterprise group, these two concepts should remain distinct as a matter of principle. In brief, the concepts of contractual network and enterprise group may overlap, but they do not necessarily coincide.

The distinction between contractual networks and enterprise groups is particularly important from the perspective of this analysis because the treatment of insolvency within groups is a long-standing problem for bankruptcy scholars. One author who wrote about the insolvency within multinational enterprise groups includes contractual networks in the definition of enterprise group.³⁷ As already stated, this is not wrong, provided that one party of the network under consideration can exercise control or, in any case, a sort of co-ordination power over the other parties.³⁸ However, it is

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2012, n. 179, *inter alia*, amended the previous versions of the law by providing that “Il contratto di rete che prevede l’organo comune e il fondo patrimoniale non è dotato di soggettività giuridica, salva la facoltà di acquisto della stessa ai sensi del comma 4-quater ultima parte”).

³⁰ One author points out that: “There are many types of economic co-ordination involving multiple parties that do not fit the model of a business association, though they share some analogous features” (see H. Collins, *Introduction to Networks as Connected Contracts*, in: G. Teubner & H. Collins, *Networks as Connected Contracts*, Oxford, Hart Publishing (2011), p. 9).

³¹ After summarising the features of networks that make them resistant to be simply classified as either contracts or organisations, an author states that “From a legal perspective, however, there is no doubt that these forms of economic co-ordination between multiple parties must be understood as collections of bilateral contracts rather than business associations” (see H. Collins, *Introduction to Networks as Connected Contracts*, cit., p. 11).

³² For an interesting analysis of the similarities and differences between networks and enterprise groups, see F. Cafaggi, *Il governo della rete: modelli organizzativi di coordinamento inter-imprenditoriale*, in: F. Cafaggi (ed.), *Reti di imprese tra regolazione e norme sociali*, Bologna, Il Mulino (2004), p. 57 ss.

³³ See F. Cafaggi, *Contractual Networks and the Small Business Act*, cit., p. 2.

³⁴ Some authors are in favour of a wide meaning of multinational enterprise group (see, for instance, I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 22).

³⁵ Roughly speaking, an enterprise group (sometimes also referred to as business group or corporate group) consists of a number of companies that are connected either through equity (shareholdings) or through contracts and characterized by the presence of a common source of control or co-ordination.

³⁶ See F. Cafaggi, *Contractual networks and contract theory*, cit., pp. 92-93, in particular footnotes 74 and 75, and consider that some clause of co-operation does not imply co-ordination, this seems to be especially true in the case of horizontal networks, where the parties often are competitors. The situation is different when there is a leader company, as it might be the case of franchising contracts (see I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 20), for which case specific considerations may apply (see J. Buchan, *Reducing Collateral Damage in Franchisor Insolvency*, in: P.J. Omar (ed.), *International Insolvency Law – Themes and Perspectives*, Aldershot, Ashgate Publishing (2008), p. 367 ss.). Coordination power seems to be less likely to occur in the case of looser contractual networks aimed at distribution where the distributor is free to sell goods as it sees fit (see I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 21), unless the relation is characterized by some sort of economic dependence.

³⁷ See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 20.

³⁸ This is, indeed, the case to which the author seems to make reference. “In this type of structure, ownership does not feature (in those parts of the group not operating via conventional subsidiaries), and the entities are interconnected only via

worth repeating that this is not always the case with contractual networks, where the distribution of power may vary to a considerable extent,³⁹ ranging from structures resembling groups because of a very asymmetrical distribution of power, to others in which the power is more symmetrically shared.

A final distinction can be made in relation to the geographical distribution of network members. In this perspective, it is possible to distinguish between local, national, and transnational networks.⁴⁰ Historically, networks emerged and have been studied principally at local level. In particular, they emerged within industrial districts and clusters, so that they have often been confused.⁴¹ The focus of this paper, as the title clearly reveals, is on transnational networks, and, more precisely, on contractual networks whose parties are firms headquartered in different European Member States, so that they can be called trans-European networks.

In conclusion, from all the distinctions referred to above, it emerges that contractual networks are not always and easily identifiable, unless they are expressly regulated, and, even in those cases, they remain an extremely multi-faceted phenomenon.⁴²

For the purpose of this paper, I consider networks as multilateral contracts or as a set of interdependent bilateral contracts signed between firms headquartered in different European Member States. They can operate either vertically or horizontally, but they neither represent mere strategic relations (as they have been described above), nor do they form a new legal entity or a business association, nor do they correspond to the existence of an enterprise group (for which other considerations would apply).⁴³

3. Applicable Regulations and Rules

This paper is focused on the insolvency within a trans-European contractual network (as defined in the previous Section). More precisely, I wish to investigate the case in which a party of a trans-European contractual network becomes insolvent and is subject to a bankruptcy procedure.

A first step in this direction is to look at what may happen in this eventuality according to the regulations currently in force.

Given that this case concerns either a bilateral or a multilateral contract signed by enterprises from different Member States, and that one of them has filed for bankruptcy, it seems worth looking at the European regulation on insolvency proceedings, namely, Regulation (EC) 1346/2000.⁴⁴ In particular, Article 4(2)(e) prescribes that the effects of the insolvency proceedings on current contracts to which the debtor is party are to be determined according to the law of the Member State where the proceeding is opened.⁴⁵

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contractual relationship. However, as with equity-based multinational groups, control may be the element constituting the group, or the ability to control or coordinate a unified business in the more heterarchical patterns. In a way similar to parent-subsidiary relationship, the contractually linked entity may be an integral part of the group and may be closely and commonly controlled. Alternatively, the contractual based group may operate as a transnational network group with looser connections among the entities, yet still operating with a degree of coordination” (see I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 20).

³⁹ See F. Cafaggi, *Introduction*, cit., p. 6.

⁴⁰ See F. Cafaggi, & P. Iamiceli, *Introduction*, cit., p. 6.

⁴¹ See F. Cafaggi, *Introduction*, cit., pp. 7-9.

⁴² Consider the scholarly debate which has taken place in Italy after the adoption of a regulation about contractual networks (see *supra* note 19).

⁴³ See generally I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit.

⁴⁴ OJ L 160, 30.06.2000. Article 1 of Regulation (EC) 1346/2000 prescribes: “This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator” (with the exception of insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings).

⁴⁵ That, according to Article 3 of Regulation (EC) 1346/2000, is the Member State where the debtor has its Centre of Main Interests (COMI).

The term “current contract” refers to contracts that are still pending at the time of the opening of the insolvency proceeding,⁴⁶ including arbitration clauses.⁴⁷ Some authors notice, in this regard, that this topic concerns matters such as the termination of current contracts as a result of the opening of a proceeding, and, more importantly, they claim that “for these purposes the law which would otherwise be applicable to the contract may be displaced”.⁴⁸ The meaning of this sentence basically seems to be that, irrespective of other criteria that might be provided by other regulations,⁴⁹ when an insolvency proceeding is opened, the general provision of Article 4(2)(e) applies. In other words, the general provision of Regulation (EC) 1346/2000 should typically prevail over other possibly conflicting rules.⁵⁰ The regulation prescribes two exceptions to the general provision established by Article 4(2)(e), which concern contracts relating to immovable property and employment contracts.⁵¹

As a consequence of the general provision by Article 4(2)(e), it becomes necessary to examine the regulations that are in force in the different Member States with regard to the effects arising from the opening of an insolvency proceeding on current contracts.

This task would be very difficult (if not impossible) for a single lawyer, because he or she should be both trained and competent in several national laws of the different Member States. In addition, some authors claim that this topic has not been extensively analysed in their countries.⁵² Moreover, it must be also considered that, in almost every country, bankruptcy laws have been subject to numerous reforms in the last few years.⁵³ Thus, the most acceptable way to proceed, apart from writing a joint paper with authors from other countries, seems to be that of leaning on the information provided by comparative analyses and reports written by national scholars and experts. Fortunately,

⁴⁶ In this sense, basically this expression is coterminous to executory contracts (see I.F. Fletcher, *Insolvency in Private International Law*, Second Edition, Oxford, OUP [2005], pp. 414-416), even if in some cases the distinction matters between pending contracts that are executory and those that are not (see M.S. Scarberry, K.N. Klee, G.W. Newton & S.H. Nickles, *Business Reorganization in Bankruptcy – Cases and Materials*, Third Edition, St. Paul MN, Thomson West (2006), p. 305). In general, “A contract that has yet to be carried out is said to be an executory contract” (see E.A. Martin (ed.), *Oxford Dictionary of Law*, Oxford, Oxford University Press (2003), p. 191).

⁴⁷ See, for instance, G. Moss, I.F. Fletcher, S. Isaacs (eds.), *The EC Regulation on Insolvency Proceedings*, cit., p. 281.

⁴⁸ *Ibid.*, p. 281.

⁴⁹ “To the extent necessary, the law of the State of the opening displaces the law of the contract determined in accordance with the 1980 Rome Convention” (see M. Virgos & E. Schmit, *Report on the Convention of Insolvency Proceeding*, Brussels, 8 July 1996 (hereinafter “Virgos-Schmit Report”), paragraph 91). Accordingly, Article 1(2)(f) of Regulation Rome I (Regulation EC 593/2008, OJ L 177/6, 04.07.2008) excludes from its material scope “questions governed by the law of companies and other bodies, corporate or unincorporated, such as (...) winding-up of companies and other bodies, corporate or unincorporated (...)”. See also about this point T. Cleary, *Lehman Brothers and the anti-deprivation principle: current uncertainties and proposals for reform*, *Common Markets Law Journal*, Vol. 6, (2011), p. 421.

⁵⁰ “The law of the State of the opening of proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. (...) The substantive effects referred to the competence of the law of the State of the opening by Article 4, are those typical of insolvency law, i.e. effects which are necessary for the insolvency proceedings to fulfil its aims. To this extent, the law of the State of the opening may displace (unless the Convention provides otherwise), the law normally applicable, under the common pre-insolvency rules on conflict of laws, to the act concerned. This happens for instance when Article 4 makes applicable the law of the State of opening of proceedings to invalidate any act (e.g. a contract) detrimental to all the creditors, even if that act is governed under the general rules on conflict of laws (if a contract, those of the 1980 Rome Convention), by the law of a different State” (see Virgos-Schmit Report, cit., paragraph 90).

⁵¹ See Article 8 and 10 of Regulation (EC) 1346/2000.

⁵² See I.F. Fletcher, *Insolvency in Private International Law*, cit., p. 414, footnote 179.

⁵³ See R. Parry, *Introduction*, in: K. Gromek Broc & R. Parry (eds.), *Corporate Rescue – An Overview of Recent Developments from Selected Countries in Europe*, The Hague, Kluwer Law International (2004), pp. 1-2 and K. Gromek Broc & R. Parry (eds.), *Corporate Rescue – An Overview of Recent Developments*, Second Edition, The Hague, Kluwer Law International (2006).

these analyses and reports exist.⁵⁴ Nonetheless, some of them (although published few years ago) may already be quite outdated, at least with regard to certain countries.⁵⁵

The most recent collection of national reports that I have found is contained in a document prepared by *Insol Europe* in 2010, following a request by the European Parliament, in the wake of the debate about the need and the feasibility of a harmonisation of insolvency law at European level.⁵⁶ The information provided in this document, complemented with previous comparative analyses and reports, constitutes the sources upon which this paper is based.

3.1 A Short Survey of some National Rules

Many sources claim that, throughout Europe, national insolvency laws are very different from one another.⁵⁷ Moving from this premise, this sub-Section surveys some basic rules about the treatment of current contracts after the opening of an insolvency proceeding, in order to identify the possible differences and similarities among a number of national laws.

In France, the liquidator⁵⁸ has the right to require the other party to fulfil the contract if he or she has enough money to ensure it.⁵⁹ However, it is not clear whether the party *in bonis* is deprived of his or her rights or not. According to a previous report, the party would not have the right to terminate the contract.⁶⁰ However, it seems quite clear that the other party can solicit the liquidator to take a decision, and, if this formal request remains unanswered after one month, the contract is automatically terminated. The French Commercial Code contains specific provisions with reference to employment, leasing, and trust contracts.

⁵⁴ See generally W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers (2003); K. Gromek Broc & R. Parry (eds.), *Corporate Rescue*, cit.; K. Gromek Broc & R. Parry (eds.), *Corporate Rescue*, Second Edition, cit.

⁵⁵ In Italy, for instance, the main comprehensive reform was generally concluded in 2007, but very structural changes in the existing law as well as new regulations have been approved until very recently (see Legge 27 gennaio 2012, n. 3 on the settlement of over-indebtedness and Legge 7 agosto 2012, n. 134, which reformed important parts of the bankruptcy law). As a result of this, even the most recently published books have been not able to consider the most recent innovations (see, for instance, *Memento Pratico Fallimento 2012*, Milano, Ipsoa – Francis Lefebvre [2012], which is updated December 2011 and does not consider neither Legge 27 gennaio 2012, n. 3 nor Legge 7 agosto 2012 n. 134). Thus, some scholars have started to term and regard bankruptcy law as a “permanently open yard” (see, for instance, L. Stanghellini, *Le crisi di impresa tra diritto ed economia – Le procedure di insolvenza*, Bologna, Il Mulino (2007), p. 337; M. Fabiani, *Diritto fallimentare – Un profilo organico*, Bologna, Zanichelli (2011), p. 40). The same situation seems to occur, for example, in Germany. Indeed, according to recent news, amendments to the German Bankruptcy Code have been lately introduced in March 2012 (see T. Young, Germany’s bankruptcy changes to boost creditors, in *International Financial Law Review*, 8 March 2012, available at: <http://www.iflr.com/Article/2991933/Germanys-bankruptcy-changes-to-boost-creditors.html?LS=EMS623247>, last accessed on 31 October 2012).

⁵⁶ Insol Europe, *Harmonisation of Insolvency Law at EU level*, April 2010, available at: <http://www.insol-europe.org/eu-research>.

⁵⁷ See, for instance, Recital 11 of Regulation (EC) 1346/2000; Insol Europe, *Harmonisation*, cit., p. 5 ss; B. Wessels, B.A. Markwell & J.J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, cit., p. 13 ss.; M. Fabiani, *Diritto fallimentare*, cit., p. 46.

⁵⁸ It must be specified that, apart from cases in which this term may acquire a specific meaning, in general the liquidator is defined by Article 2(1)(b) of Regulation (EC) 1346/2000 as “(...) any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs”.

⁵⁹ “The French Commercial Code applies the same principle to liquidation processes as it does for reorganisation proceedings. (...) Only the liquidator [A/N or the administrator in the reorganisation proceeding] has the right to require the debtor’s contracting party to perform executory contracts in exchange for the performance of the debtor’s obligations but only if the liquidator has enough money to ensure it. In the absence of payment or if the other contracting party does not agree to continue the contractual relationship, the contract will automatically be terminated” (see Insol Europe, *Harmonisation*, cit., pp. 86-88).

⁶⁰ See M.D. Schödermeier & F. Pérochon, *National Report for France*, in W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers (2003), p. 285.

In Germany, apparently, the liquidator has the power to decide whether or not to assume or reject a contract.⁶¹ Even in this country, the other party can solicit the liquidator to take a decision about the contract. The liquidator must reply without delay, otherwise the liquidator loses the right to demand the performance. German law also prescribes special rules for specific contracts, such as contracts relating to tenancy and lease of immovable premises, contracts for services, and mandate.

With regard to liquidation proceedings in Italy, the contract remains suspended and the liquidator (with the authorisation of the creditors) decides whether or not to assume or reject it.⁶² With regard to the judicially-supervised arrangements with creditors (*concordato preventivo*), until recently, the current contracts, in principle, continued to remain in force and neither the judge nor the debtor had the right to terminate them.⁶³ Now, these rules have been changed by a recent reform,⁶⁴ and the debtor may be authorised to terminate or suspend certain contracts. In liquidation proceedings, the party *in bonis* has the right to demand a decision from the liquidator, and, in this case, the judge shall establish a time-limit of no more than sixty days; if the request remains unanswered after the deadline set by the judge, the contract is automatically terminated. Exceptions to the general rule are provided for several specific contracts that may be continued or terminated automatically after the opening of the liquidation proceedings. A variation of the general rule is provided for cases in which the liquidator is authorised to continue in business. In this case, the contracts are not suspended, but continue as a matter of principle, although the liquidator maintains the right to terminate or suspend them.

A general rule that gives the liquidator the right to decide whether or not to assume or reject a current contract, although it is separately regulated for different insolvency proceedings, apparently is valid also in Poland.⁶⁵ Again, the party *in bonis* can demand the liquidator to decide in order to determine the fate of the contract. The liquidator has three months to decide. If the liquidator does not take a decision before the expiry date of the deadline, the contract is terminated. Exceptions to the general rule are prescribed for specific contracts.

In Spain, the above-mentioned general rule seems to be substantially valid, albeit with some relevant peculiarities.⁶⁶ The decisions concerning the termination of current contracts seem to be

⁶¹ “If a mutual contract was not completely fulfilled by the debtor and the other party at a time of the institution of insolvency proceedings, the insolvency administrator may fulfill such a contract instead of the debtor and claim a fulfillment or performance from the other party. If the administrator refuses to fulfill or perform such a contract, the other party may assert a claim by reason of the non fulfillment or non performance only as an insolvency creditor” (see Insol Europe, *Harmonisation*, cit., pp. 47-48). An author explains that the German law does not provide for a general right of the trustee to reject executory contracts. However, the decision to “not assume” the contract seems to have the same (or almost the same) practical effects of a rejection (see F. Robert-Tissot, *The Effects of a Reorganization on (Executory) Contracts: A Comparative Law and Policy Study [United States, France, Germany and Switzerland]*, IILR, Vol. 3, No. 2, (2012), p. 236 and 259).

⁶² “The contracts with obligations for both parties pending to be performed at the time of the adjudication of bankruptcy will remain suspended until the receiver with the consent of the committee of creditors declares that he will replace the bankrupt in the contract or that he will terminate it, if this is considered in the interest of the procedure” (see Insol Europe, *Harmonisation*, cit., p. 104).

⁶³ See A. Maffei Alberti, *National Report for Italy*, in W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers (2003), p. 426; M. Fabiani, *Diritto fallimentare*, cit., p. 645.

⁶⁴ See *supra* note 55.

⁶⁵ In liquidation “(...) the receiver may wholly or partially rescind a reciprocal contract (such as a sale or delivery contract) that has not yet been fully performed by either of the parties. The receiver may also demand the full performance of obligations under such a reciprocal contract. A bankrupt’s counterparty under such a reciprocal contract may seek a decision from the receiver on whether he rescinds or performs the contract (decision to be taken within three months). A failure to respond means that the contract is rescinded” (see Insol Europe, *Harmonisation*, cit., p. 122). The same principle seems to apply in arrangements bankruptcy. However, exceptions to this general rule are provided for several specific contracts that may terminate automatically upon the opening of a proceeding.

⁶⁶ “Contracts with reciprocal obligations for both parties pending to be performed at the time of the insolvency declaration: (a) will remain in force and with effect, and will be funded by the debtor’s estate; (...) (c) the judge may declare, if appropriate for the insolvency, the termination of such contracts upon the request of the receivers or the debtor, even if no

attributed to the judge, rather than the liquidator, although it is not completely clear whether the judge can act only after a request by the liquidator.⁶⁷ Employment contracts are a partial exception to the general rule, since they remain in force, but they may also be subject to reorganisation measures and may be amended, suspended or terminated pursuant to the decision by the judge. Another exception apparently concerns current contracts with public authorities, which are subject to special laws.

In Sweden, the liquidator has the right to assume the contract.⁶⁸ However, the document by *Insol Europe* does not provide much relevant information about the treatment of current contracts under the Swedish insolvency law. According to the available information, Swedish law seems to follow the general rule,⁶⁹ although some specific contracts, such as employment and lease contracts, seem to be treated differently.

Finally, a general rule that gives to the liquidator the power to decide whether to assume or to reject current contracts seems to be valid in the United Kingdom.⁷⁰ However, the document by *Insol Europe* does not distinguish between English and Scottish law, as other previous analyses do.⁷¹ Looking at some of the previous analyses, confirmation can be found that the general rule is followed in both England and Scotland.⁷² One interesting difference between these two countries is that, apparently, in England the liquidator cannot be forced to decide as to whether to adopt or reject a contract within a certain time-limit or not,⁷³ whereas in the Scottish proceeding called “sequestration” the party *in bonis* can demand that the liquidator decide within twenty-eight days.⁷⁴ Both in England as well as in Scotland, some special rules seem to apply with reference to suppliers of gas, water, electricity, and telecommunications.

According to this brief survey of the relevant provisions in force in different countries with regard to the effects of the opening of an insolvency proceeding on current contracts, it can be concluded that, in spite of several persisting differences, some general similarities can also be highlighted. Firstly, in principle, the opening of an insolvency proceeding does not necessarily and automatically imply the termination of current contracts (or, at least, not every insolvency proceeding

(Contd.)

specific termination provision or default exists (in the absence of an agreement on the termination terms, the judge will determine them, and the creditor’s indemnity will be paid from the debtor’s estate); (...) (e) the judge may decide not to terminate the agreement if it considers that this is appropriate for the insolvency (any obligation arising from such agreement will be satisfied from the debtor’s estate)” (see *Insol Europe, Harmonisation*, cit., p. 56).

⁶⁷ See, also, C. Paz-Ares, M. Virgòs & N. Bermejo, *National Report for Spain*, in: W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers (2003), pp. 614-615.

⁶⁸ “The bankruptcy estate may choose to accede as a party to the debtor’s contracts and assume the debtor’s obligations for performance of the contract. In the situation which arises, the bankruptcy estate can demand performance of the other party’s obligations in accordance with the contract” (see *Insol Europe, Harmonisation*, cit., p. 133).

⁶⁹ See, also, A. Holmgren, *The Swedish Reorganization Law*, in: K. Gromek Broc & R. Parry (eds.), *Corporate Rescue – An Overview of Recent Developments from Selected Countries in Europe*, The Hague, Kluwer Law International (2004), pp. 137-138.

⁷⁰ “In the case of contracts entered into prior to an administration, the administrator will generally have a free choice whether and for how long the company should give effect to them. He may decide that the contract should continue or remain in force as long as the company fulfils its obligations under those contracts, or at any time he may decide to repudiate the contract and bring the contract to an end. (...) A winding up does not of itself constitute a breach of executory obligations under contracts made by the company. The commencement of a winding up does not automatically bring a company’s business to an end so that dealings with third parties may continue depending on whether the liquidator wishes to carry on a business. (...) The basic principles which apply to a liquidation apply in the case of a bankruptcy” (see *Insol Europe, Harmonisation*, cit., pp. 153-154).

⁷¹ See W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, cit.

⁷² See R. Stevens, *National Report for England*, in W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, cit., p. 224; G.L. Gretton & W.W. McBryde, *National Report for Scotland*, in: W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, cit., p. 566.

⁷³ See R. Stevens, *National Report for England*, cit., p. 224.

⁷⁴ See G.L. Gretton & W.W. McBryde, *National Report for Scotland*, cit., p. 566.

implies termination).⁷⁵ In contrast, as a general rule, national insolvency laws give the liquidator the right to decide whether to assume or reject current contracts or not, although they may regulate this matter in different ways. However, this general rule is subject to exceptions with reference to specific contracts that may be regulated in different ways by national insolvency laws.⁷⁶ Moreover, although this paper is focused on contractual networks which, in theory, are different from business associations, it is essential to recall that, as already mentioned (see *infra* Section 2), this general rule often does not apply to some organisations, since a number of national laws prescribe different consequences from the bankruptcy of one member.⁷⁷

3.2 The Effects on Bilateral and Multilateral Contracts

An author explains that different determinants drive the choice between forming a network through a set of linked bilateral contracts or a multilateral contract.⁷⁸ In view of this, it seems interesting to investigate whether the effects from the opening of an insolvency proceeding on networks governed through a group of linked bilateral contracts are different from those on networks governed through multilateral contracts.

For what concerns the legal treatment of these two different kinds of arrangements, one may argue whether the rules described in the previous sub-Section apply only to bilateral contracts or whether they also apply to multilateral contracts. The reports and the analyses which have been considered above make no explicit distinction. Furthermore, some laws also fail to make any explicit distinction.⁷⁹ With specific reference to Italy, for example, one author persuasively explains that the general principle prescribed by bankruptcy law with regard to current contracts can be applied to multilateral contracts,⁸⁰ and other authors confirm this view.⁸¹ With reference to another (extra-European) country, some authors consider rules about executory contracts applicable to joint-ventures,

⁷⁵ The basic logic of this general rule is effectively explained by some American scholars: if debtors “could not take advantage of their rights under prepetition contracts and leases, reorganization often would be difficult or impossible. A debtor that operates on leased premises could not continue in business. A debtor that relies on long term contracts with major customers or suppliers could lose much of its sales volume or lose the sources of supply needed to keep the business operating. The value of a favourable contract (...) would be lost; that would reduce the value of the debtor’s business, harm the debtor’s creditors (who look to that value for repayment) and lessen the chances of a successful reorganization” (see, M.S. Scarberry, K.N. Klee, G.W. Newton & S.H. Nickles, *Business Reorganization in Bankruptcy*, cit., p. 299). For this reason, bankruptcy law typically allows the liquidator to assume or reject current contracts. The scholars quoted above wrote about the bankruptcy law in the United States and, in particular, with reference to a Chapter 11 proceeding. However, the same seems generally true in Europe, apart from some differences and a few exceptions (see W.W. McBryde & A. Flessner, *Principles of European Insolvency Law and General Commentary*, in: W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers [2003], pp. 45-47).

⁷⁶ “Exceptions to the powers of the insolvency representative with respect to treatment of contracts generally fall into two categories. The first relates to specific types of contract, the second to contracts that cannot be performed. In respect of the first, where the insolvency law provides that automatic termination provisions are overridden, specific exceptions may be desirable for contracts, such as short-term financial contracts (e.g. swap and futures contracts — see below, paras. 208-215), insurance contracts and contracts for the making of a loan. Exceptions to the power to reject may also be appropriate in the case of labour agreements, agreements where the debtor is a lessor or franchisor or a licensor of intellectual property and termination of the agreement would end or seriously affect the business of the counterparty, in particular where the advantage to the debtor may be relatively minor, and contracts with government, such as licensing agreements and procurement contracts” (see UNCITRAL, *Legislative Guide on Insolvency Law*, [2005] available at: http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf, hereinafter “UNCITRAL Guide”, p. 130, § 143).

⁷⁷ See, for instance, with regard to France, Article L. 221-16 of the *Code de Commerce*; with regard to Italy, Article 2288(1) of the *Codice Civile* and, with regard to England, Paragraph 33(1) of the Partnership Act 1890 (*supra* note 28).

⁷⁸ See F. Cafaggi, *Contractual networks and contract theory*, cit., p. 91 ss.

⁷⁹ See, for instance, Article 72 of the Italian bankruptcy law (Regio Decreto 16 marzo 1942, n. 267).

⁸⁰ See L. Boggio, *Gli accordi di salvataggio delle imprese in crisi*, Milan, Giuffrè (2007), pp. 222-223, footnote 4.

⁸¹ See F. Ferrara Jr. & A. Borgioli, *Il fallimento*, Milan, Giuffrè (1995), p. 397-398.

which often are multilateral agreements similar to contractual networks in many respects.⁸² However, especially when taking a comparative law perspective, this conclusion might not be considered to be correct everywhere. In the absence of contrasting information, in this paper, I consider the general rules provided by national insolvency laws as conceptually applicable to both bilateral and multilateral contracts, although I acknowledge that, in some countries, this might not be always true.

Agreed on this, it seems interesting to consider the case in which a contract is terminated following the opening of an insolvency proceeding (either the termination is automatically determined by law or by a decision of the liquidator).

In order to do so, the characteristics of the above-mentioned two types of contractual networks must be further described. However, it must be considered that, from a legal perspective, these features may vary significantly depending on the national law applicable to the contract, since some of them may allow designing networks in ways that others forbid.⁸³ For this reason, an accurate description would imply a detailed legal comparison. Unfortunately this would go beyond the scope of this paper. As a consequence, this analysis will consider these two kinds of contractual networks more from a conceptual or economic, rather than a legal, perspective (yet again acknowledging the fact that some of the opinions expressed below might not be in line with the regulations of some EU Member States).

Networks governed through a set of inter-dependent bilateral contracts can be described as networks of contracts, while networks governed through a multilateral contract can be described as networks of enterprises.⁸⁴ As already stated, the choice between one of these two forms seems to be driven by some underlying characteristics of the prospective participants to the network or by the function which the network is expected to perform.

According to one author, networks of contracts are usually arranged when there is a lower level of inter-dependence of the performances, less uncertainty, less need of co-ordination among the parties, and the parties want to retain a relatively high level of freedom, that actually may result in the autonomy to exit from the network.⁸⁵ However, the same author explains that not all the sets of linked bilateral contracts actually constitute networks. In order to have these networks, a group of linked contracts should be characterised by a still relatively high level of inter-dependence, a strong collective interest to pursue, and a common objective.⁸⁶ Under these conditions, it seems realistic to presume that the termination of one contract necessarily has a significant impact on the network as a whole. The most severe consequences arise when the existence of the terminated contract was essential for the continuation of the others or when all the contracts are indispensable for each other. In this case, the termination of one contract may imply a domino effect on the others, with the result of the simultaneous termination of all the bilateral linked contracts and the dissolution of the network.⁸⁷

Analogous considerations can be made with reference to networks of enterprises governed through a multilateral contract. Multilateral contracts are used to organise networks characterised by a high level of inter-dependence and a strong need of co-ordination among parties, who agree to centralise exchanges of information and put in place monitoring devices,⁸⁸ thereby implicitly limiting their freedom in the perspective of pursuing a common objective. However, not all multilateral contracts constitute networks. In order to amount to a network of enterprises, a multilateral contract should be featured by a high inter-dependence of performances and costly substitutability.⁸⁹ Under these conditions, the withdrawal or the expulsion of one party from a multilateral contract might have,

⁸² See A.J. Currie & K. Burgers, *Bankruptcy Issues Affecting Joint Ventures*, ABI Journal, Vol. 29, No. 9, (2010), p. 48 ss.

⁸³ See various contributions in F. Cafaggi, *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, cit., and, in particular, F. Cafaggi & S. Clavel, *Interfirm networks across Europe*, cit., p. 206.

⁸⁴ See F. Cafaggi, *Contractual networks and contract theory*, cit., p. 69.

⁸⁵ *Ibid.*, p. 93.

⁸⁶ *Ibid.*, p. 74.

⁸⁷ *Ibid.*, pp. 83-84.

⁸⁸ *Ibid.*, p. 94.

⁸⁹ *Ibid.*, p. 84.

at least in theory, even harsher consequences on the network than the termination of one contract among a set of linked bilateral contracts. If the participation of one member is essential for the scope of the contract, in the event of its withdrawal or expulsion, the contract is terminated and the network is dissolved.

So, with reference to the case in which a network member becomes insolvent, what may the relevant differences be between a structure based upon a set of linked bilateral contracts or a multilateral contract?

A first difference leans on the application of the concept of privity.⁹⁰ This can be an obstacle to the establishment of networks through inter-dependent bilateral contracts because, in this case, network members are formally parties of different, albeit linked, contracts. So, under a strict application of privity, some network members can be regarded as third parties with reference to those contracts which they have not explicitly signed. This is a problem that might be more or less relevant with reference to different national regimes; while, in some countries, mechanisms allowing to go beyond privity have been developed, in others, this may be more problematical.⁹¹ Conversely, in networks organised through multilateral contracts, all the members are also parties of the same contract. Privity affects the subject of contractual networks in general and, consequently, it also bears implications in cases of insolvency. Although this issue deserves a thorough analysis that would go beyond the scope of this paper, these implications can be appreciated just by considering the wording of Article 4(2)(e) of Regulation (EC) 1346/2000, which makes reference to “(...) current contracts to which the debtor is party”.

A second difference is that, in multilateral contracts, the parties are better able to monitor each other. Indeed, beyond general duties of reporting and warning,⁹² the parties of a multilateral contract can set up more structured mechanisms of monitoring. For instance, it seems easier to establish a common monitoring body charged with the duty of overseeing and co-ordinating the performances of the parties through a multilateral contract than through a set of bilateral linked contracts. Moreover, it also seems that formal rules about the sanctioning of opportunistic or deviating members can be provided more easily through a contract that contemporaneously binds all the network members as opposed to a series of coordinated provisions within bilateral linked contracts.⁹³ In these regards, as will be better explained later on, efficient mechanisms of peer monitoring among network members can have important implications for what concerns insolvency.

A third difference is that, in multilateral contracts, parties can allocate and regulate the risk of non-performance more comprehensively and explicitly. Indeed, beyond the legal difficulties arising from privity, the parties of a set of inter-dependent bilateral contracts also seem to face factual obstacles. For instance, it cannot be taken for granted that they necessarily are familiar and able to contract with each other. In other words, in a network organised through a set of bilateral linked contracts, one of them can be the nexus, serving as the connection link with the others that are downstream or upstream. In this case, only the parties of this contract which is the nexus know the parties of the others.

From this (non-exhaustive) list of differences, it might be inferred that networks organised through multilateral contracts can pose fewer problems or can be better equipped with provisions

⁹⁰ The concept of privity is very important. In a nutshell, privity can be defined as “The relationship that exists between the parties to a contract. The common law doctrine of privity of contract established the only the parties to the contract, i.e. those that provided consideration, could sue or be sued under the contract. Third parties could not derive rights from, nor have obligations imposed on them by, someone else’s contract” (see E.A. Martin (ed.), *Oxford Dictionary of Law*, cit., p. 383).

⁹¹ See, for instance, S. Whittaker, *Contract networks, freedom of contract and the restructuring of privity of contract*, in: F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar Publishing (2011), p. 179 ss.

⁹² See F. Cafaggi, *Contractual networks and contract theory*, cit., pp. 93-94.

⁹³ Apart from the case in which linked bilateral contracts make reference to a common external source (e.g., codes of conduct developed by associations), in this case the parties are not directly linked together, but they are all bound to respect the provisions of the common external source.

suitable to cope with the problems arising in the context of insolvency. At first glance, such a conclusion seems to be theoretically correct, although the analysis made above was not directly aimed at assessing the possible advantages of networks based upon multilateral contracts in comparison to networks based upon bilateral linked contracts. However, this issue needs to be studied in greater depth in order to arrive at a definite conclusion. Moreover, it must be acknowledged that this issue might be misplaced. Indeed, there might be cases in which parties are not able or willing to choose between the two models.

4. Possible Shortcomings

As explained in the previous Section, Regulation (EC) 1346/2000 prescribes that the effects of an insolvency proceeding on current contracts to which the debtor is party are determined according to the law of the Member State where the proceeding is opened. This rule provides a valuable uniform guideline in cases of international insolvency which occur within the European Union. However, disparities among national legislations persist. For a series of reasons often underlined by experts,⁹⁴ a harmonisation of insolvency laws at European level would be a desirable outcome, but, in spite of several, some even ongoing, attempts, it appears extremely complex,⁹⁵ and it still seems far from being achievable.⁹⁶

Given the apparent impracticality of full harmonisation, the document prepared by *Insol Europe* calls for a harmonisation limited to specific areas of insolvency law, and it considers this feasible at European level. In particular, the above-mentioned document explicitly considers the effects of the opening of an insolvency proceeding on current contracts as one of the areas where there is both the need and the possibility of a harmonisation. More precisely, the current differences among national laws give rise to four shortcomings, which represent the key reasons pushing for greater harmonisation of the current national rules.

The first shortcoming is that the differences in the national treatment of current contracts are likely to encourage opportunistic behaviours such as forum shopping. Forum shopping (sometimes termed as legal tourism) has been the subject of a lively debate among scholars. Some authors, in fact, do not see it as a completely negative practice, explaining that it could have the effect of promoting a race to the top among the most efficient national legislations. In contrast, other scholars point out that, instead of a race to the top, it could lead to a race to the bottom, by encouraging the selection of the most convenient legislations (which are not always the most efficient).⁹⁷ The subject, as already stated, is under debate. Without entering in this dispute, it can be assumed that, in the context of a trans-

⁹⁴ See Insol Europe, *Harmonisation*, cit., p. 26-27. For a very interesting and critical academic analysis, see generally F.M. Mucciarelli, *Optimal allocation of law-making power over bankruptcy law in "federal" and "quasi-federal" legal systems: is there a case for harmonizing or unifying bankruptcy law in the E.U.?*, NYU Working Paper No. 11-28, Law and Economics Working Paper Series, (September 2011).

⁹⁵ The Regulation (EC) 1346/2000 itself explains in Recital 11 the difficulty: "This Regulation acknowledges the fact that as a result widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community".

⁹⁶ "By its very nature, insolvency law interfaces with many other laws and systems such as land, employment and contract laws and the court systems of each country. Until these are all harmonised, it will not be possible to harmonise all aspects of insolvency law. For example, because of the widely differing structures and roles that the courts play in insolvency proceedings, it will not be possible to harmonise the court's supervision of office holders. Therefore, at present, there are serious reservations as to whether full harmonisation would be attainable, even if it were deemed possible" (see Insol Europe, *Harmonisation*, cit., p. 27). Indeed, even the recent motion by the European Parliament to the European Commission (see *supra* note 13) seeks the harmonisation of "specific aspects" of insolvency law.

⁹⁷ See D.P. Kessler & D.L. Rubinfeld, *Empirical Study of the Civil Justice System*, in A.M. Polinsky & S. Shavell, (eds.), *Handbook of Law and Economics – Volume I*, Amsterdam, North Holland (2007), p. 375 ss.. With specific reference to insolvency, see, for instance, W.G. Ringe, *Forum shopping under the EU Insolvency Regulation*, EBOR, Vol. 9, (2008), p. 600 ss.

European insolvency case, allowing forum shopping may result in a diminished level of protection for creditors.⁹⁸

The second shortcoming is that the current framework may result in uncertainty and unpredictability. These results are not under debate, given that they can be viewed only negatively. In particular, given that contracts are increasingly important in economic life, their fate becomes a central concern in cases of insolvency.⁹⁹ Consequently, any uncertainty in their treatment may result in a diminished confidence of lenders *ex ante*, and may discourage creditors from supporting justifiable re-organisation plans, thereby weakening the chances of fruitful re-organisation schemes.

The third shortcoming is that the differences in the national treatment of current contracts and the existing structure of the regulation about international insolvency provide incentives to pursue forms of conduct that may prove to be inefficient. More precisely, the action by local creditors who are concerned about the protection of their rights often leads to the opening of secondary proceedings. This occurrence, which is explicitly envisaged and regulated by Regulation (EC) 1346/2000, is perceived to grant an advantage to a few local creditors at the expense of promoting a successful re-organisation or an orderly liquidation and efficient distribution to all creditors.

The fourth shortcoming is that the differences in the legal treatment of current contracts under insolvency can undermine the achievement of a level playing-field. Contractual networks have been considered to be functional to support economic integration and promote industrial development in the European Union.¹⁰⁰ Since the promotion of a level playing-field is often considered positively in the pursuit of these goals,¹⁰¹ the harmonisation of the legal treatment of current contracts under insolvency should be presumed to have a positive impact. In particular, one of the areas in which the regulation of the treatment of current contracts upon the opening of an insolvency proceeding differs the most is that of employment contracts.¹⁰²

The considerations reported above, apart from the concerns raised in some specific areas such as the employment contracts, are made with reference to the regulation of current contracts in general. It can be claimed that, as far as these arguments are considered generally valid, they also apply with regard to contractual networks. However, contractual networks present peculiarities that have to be taken into account.

This paper does not take a *de jure condendo* perspective, so this is not to say that an act should be necessarily adopted and rules established that are aimed at dealing with the specific case of insolvency within contractual networks, at least not until explicit recognition and consideration is given to networks by European private legislation. Indeed, in view of the innate complexity of contractual networks and given the extremely multi-faceted shape which they can take in practice, it

⁹⁸ See Recital 4 of Regulation (EC) 1346/2000 and, generally, Insol Europe, *Harmonisation*, cit. For a different view, see generally W.G. Ringe, *Forum shopping under the EU Insolvency Regulation*, cit.

⁹⁹ “As an economy develops, more and more of its wealth is likely to be contained in or controlled by contracts. As a result, the treatment of contracts is of overriding importance to insolvency proceedings” (see UNCITRAL Guide, cit., p. 119, § 108). “As the trustee or the DIP begins to work to restructure the business, its ongoing contracts (...) become a central concern. As the trustee decides what direction the ongoing business should take, a review of the pending contracts becomes essential. Some of the debtor’s pre-bankruptcy contracts may have been good bargains, while others may have been bad”. This is even truer considering that “To an ever-increasing extent, the wealth of our society is in contracts, and valuable contracts are found in every aspect of economic life” (see E. Warren & J.L. Westbrook, *The Law of Debtors and Creditors*, New York, Aspen Publishers [2006], pp. 522 and 524).

¹⁰⁰ See F. Cafaggi & S. Clavel, *Interfirm networks across Europe*, cit., p. 201.

¹⁰¹ According to the website of the European Commission: “The rules governing the four freedoms of movement – for goods, services, people, and capital – are not, by themselves, sufficient to achieve the objectives of the Single Market. These objectives can be fully achieved only if national and European policies create a favourable climate for business to grow across borders. Firms need to be confident that they can compete on a level playing field and that appropriate legal structures exist to allow all businesses, whatever their size, to operate effectively across the EU” (see http://ec.europa.eu/internal_market/top_layer/business-environment/index_en.htm, last accessed on 31 October 2012). More precisely, the motion *supra* released by the European Parliament on 17 October 2012 and concerning the harmonisation of insolvency law (see *supra* note 13) considers the benefits arising from a level playing field is its first recital.

¹⁰² See Insol Europe, *Harmonisation*, cit., p. 27.

does, at any rate, seem very difficult to devise rules suitable to encompass every possible situation. Moreover, as one scholar observed in relation to enterprise groups¹⁰³ (which are usually easier to identify than contractual networks), a rigid “one size fits all” approach might not be appropriate, because it would ignore the specificities of each case. In contrast, general rules that allow for a sufficient degree of flexibility in their application might be better suited to coping with the problems arising within networks in an efficient manner.¹⁰⁴

In spite of this, the peculiarities of contractual networks persist and may determine situations in which the shortcomings that have been generally highlighted above are even exacerbated. For instance, according to the definition given in the second Section, one of the distinctive features of networks is inter-dependence, which may be looser or tighter, but always remains high. In such contexts, uncertainty and unpredictability with regard to the effects resulting from the opening of an insolvency proceeding may contribute to discourage the formalisation of inter-firm relations, thereby hindering the development of more structured forms of co-operation. On the other hand, formalisation through contracts can be of help in reducing uncertainty among the parties. In other words, in the absence of a coherent legal framework, given that the achievement of legislative solutions at European level faces several obstacles, and might not be appropriate to tackle this subject, the floor is open to the parties. More specifically, at the moment, contractually engineered solutions seem to be a possible way of addressing problems that may occur in networks in cases of insolvency.

5. Possible Contractual Solutions

This Section focuses on the design of contracts aimed at governing inter-firm networks as well as on other contractual mechanisms that can be deployed in a network context. More precisely, in view of the shortcomings reported above, the aim of this Section is to analyse some contractual provisions or mechanisms which are suitable to playing a role in cases of insolvency. Three disclaimers must be made at this point. First, with reference to the opening of an insolvency proceeding, some of these mechanisms can work *ex ante*, while others can work *ex post*, but, in both cases, they might have an impact on the handling of insolvency. Second, a certain degree of generality is somehow imposed by the indefiniteness of the concept of contractual network and the virtual absence of legal definitions of this phenomenon. Three, some of the above-mentioned contractual devices might be in conflict with some of the provisions of national insolvency laws, and, therefore, might have a limited application. This analysis is aimed at taking precisely these issues into account. These provisions or mechanisms might, to a certain extent, be considered as forms of transnational private regulation by contract.

5.1 Peer Monitoring

One feature that scholars consider to be often present in contractual networks is that they allow for a relatively high level of peer monitoring.¹⁰⁵ Although this activity can be focused on different aspects, besides the core contents of a contract, network members may agree on several provisions regarding exchange of information and warning duties. Moreover, networks that are more structured can be governed by contracts that provide for the establishment of governance mechanisms, including the creation of common bodies charged with the function of overseeing the performance of the parties and even of taking decisions which are likely to affect all the members of the network. All these kinds of provisions allow for effective peer monitoring.

Peer monitoring (and the contractual provisions suitable to foster this ability by network members) can be considered very important with reference to the handling of insolvency. Indeed, effective peer monitoring may allow network members to foresee the possible financial distress of each other, and, furthermore, to understand whether the distress is serious or if it is merely a temporary

¹⁰³ See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 289.

¹⁰⁴ See C. Aubert de Vincelles, *Linked contracts under French law*, in: F. Cafaggi (ed.), *Contractual Networks, Inter-Firm Cooperation and Economic Growth*, Cheltenham, Edward Elgar Publishing (2011), pp. 177-178.

¹⁰⁵ See, for instance, F. Cafaggi, *Contractual networks and contract theory*, cit., p. 66; D. Galletti, *Brevi note sulla riforma dell'ordinamento concorsuale nella prospettiva delle reti di imprese*, in: F. Cafaggi & D. Galletti (eds.), *La crisi dell'impresa nelle reti e nei gruppi*, Padua, Cedam (2005), p. 169.

difficulty. This may allow network members to take the appropriate measures or make conscious decisions, in order to safeguard their own individual positions, or even the common project.¹⁰⁶

In the first regard, for instance, the ability to understand whether a firm is proximate to being declared bankrupt may help it to avoid unpleasant consequences, such as the risk that certain transactions might be considered to be preferential or even fraudulent transfers, and consequently invalidated. Although this subject will be better analysed in the next Section, we must consider that national insolvency laws usually provide for the possible nullification of certain transactions entered into by the debtor during a “suspect period” prior to the opening of an insolvency proceeding. These cases are essentially those of transactions which favour some creditors over others (preferential transfers), and transactions aimed at delaying creditors from collecting their claims or made at undervalue (fraudulent transfers).¹⁰⁷ The length of the suspect period varies a great deal from country to country, but, on average, it ranges from a few months to a couple of years, before the opening of the proceedings.¹⁰⁸ Even though transactions necessary to keep the business in operation are frequently excluded from avoidance,¹⁰⁹ those made on favourable terms between network members might fall under the avoidance provisions, if they occur during the suspect period. For these reasons, monitoring activity which allows network members to realise whether one of them may be subject to bankruptcy in a relatively short period of time can prove to be useful.¹¹⁰

In the second regard, for instance, a well-timed prediction concerning the financial distress of one member may allow the other network members to look around for potential substitutes. For a few basic reasons, this activity acquires extreme importance in network contexts. Indeed, contractual networks are characterised, among other things, by high inter-dependence of performances and hard substitutability. In plain language, this essentially means two things: the entire common project can be jeopardised if just one member becomes unable to fulfil its tasks (e.g., it ceases to do its business or it withdraws from the contract); it can be extremely difficult to find other firms on the market able to fulfil the same tasks or to step in the common project. In contemplation of the opening of an insolvency proceeding concerning one network member, a precautionary research for substitutes can be vital. Given that the initiation of proceedings can determine the cessation of the business or the rejection of the contract if one of these events actually materialises, the availability of a substitute may eliminate or limit some of the disruptive effects that would probably occur otherwise. For all these reasons, monitoring mechanisms which allow for the early identification of signs of financial distress may prove to be useful in network contexts.

Other examples can be made about the importance of peer monitoring. Some of them will be made in the following sections of this paper. At this point, however, attention may also turn to how peer monitoring can be effectively realised in practice. This subject concerns the governance of the network, which is a complicated topic and deserves a detailed analysis. From the perspective of this paper, it seems sufficient to mention some of the mechanisms of contractual governance that may be conducive to a more effective peer monitoring, although these mechanisms are not limited to peer monitoring, and to refer to other papers for more structured analyses.¹¹¹ One essential mechanism to realise effective peer monitoring clearly concerns the creation of systems for the exchange of

¹⁰⁶ “A single party’s default may undermine the results of the overall project. In order to address this risk, the parties prefer to be able to monitor each other collectively instead of delegating control to the most immediate contractual partner. Furthermore, collective monitoring may produce more effective and timely responses to unforeseen contingencies” (see F. Cafaggi, *Contractual networks and contract theory*, cit., p. 98).

¹⁰⁷ See F.M. Mucciarelli, *Optimal allocation of law-making power over bankruptcy law*, cit., p. 12.

¹⁰⁸ See Insol Europe, *Harmonisation*, cit., p. 19.

¹⁰⁹ See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 287; F.M. Mucciarelli, *Optimal allocation of law-making power over bankruptcy law*, cit., p. 12.

¹¹⁰ For an interesting analysis that considers the relevance of peer monitoring with respect to the avoidance provisions, see D. Galletti, *Brevi note sulla riforma dell’ordinamento concorsuale nella prospettiva delle reti di imprese*, cit., pp. 169-176.

¹¹¹ Although concerning mainly the Italian contractual networks, see generally, for instance, F. Cafaggi & P. Iamiceli, *La governance del contratto di rete*, in: F. Cafaggi (ed.), *Il contratto di rete – Commentario*, Bologna, Il Mulino (2009), p. 45 ss.

information and the provision of commitments to issue warnings in cases in which sensitive information would reveal the probable occurrence of certain events. Another mechanism is the creation of a common body in which every network member can sit. This, in fact, can be expected to ease reciprocal knowledge and the informal exchange of information. For the same reasons, another mechanism that can prove to be helpful in enhancing effective peer monitoring, even if it is not precisely a contractual, but a more organisational, device, might be the practice of having interlocking directors among network members (when it is allowed). In conclusion, although the mechanisms of governance that may prove to be conducive for valuable peer monitoring are not restricted to those mentioned above, they represent a list of possible interesting options.

5.2 *Inter-Firm Transactions*

In a network context in which some members are richer than others, and given the hard substitutability that often characterises these forms of collaboration, some of them may agree to support financially distressed firms which are parties of the contract. This occurrence can be characterised as inter-firm lending or intra-network lending, especially when it concerns the provision of finance.

Apart from the case in which some members are richer than the others, even within networks in which the members are on an equal footing from a financial point of view, there might be the established practice of concluding transactions at very favourable conditions for network members. This would be a practice that could be conducive to preventing insolvency, and, at least in some respects, it would be similar to intra-group transactions, even though intra-group transactions can be featured by asset integration.¹¹²

A main problem these transfers seem able to pose in relation to insolvency proceedings, particularly in the second case, is that they might be judged incompatible with avoidance provisions, that is to say the rules prescribing the potential annulment of certain transfers made by the debtor during a suspect period before the opening of the insolvency proceeding.¹¹³

With regard to avoidance provisions, Regulation (EC) 1346/2000 prescribes a general provision that is quite similar to the one that is prescribed for current contracts. Indeed, Article 4(2)(m) provides that the validity of pre-bankruptcy transactions by the debtor shall be determined according to the law in force in the Member State where the insolvency proceeding is opened.¹¹⁴ An important exception to this general provision is prescribed by Article 13 of Regulation (EC) 1346/2000, which provides for cases in which Article 4(2)(m) should not be applied.¹¹⁵

The regulation regarding preferential and fraudulent transfers, as already mentioned in the previous Section, may vary considerably from country to country. An accurate description of the rules in force in the different Member States would go beyond the scope of this paper. For the purposes of this analysis, it seems sufficient to describe (I) the general conditions for the application of these provisions, and (II) the principal differences that have been evidenced among the national laws of some of the Member States.

¹¹² These are the cases in which a multinational enterprise group operates as a single entity in terms of the substance of entities. See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 290.

¹¹³ These provisions, although differently regulated, are present in every regulation considered. See I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., p. 123, footnote 129. The problem is particularly relevant in the second case because, in the case of lending by members richer than the others, avoidance provisions would apply only if the lender were to become bankrupt, which is a possible, albeit quite singular, event.

¹¹⁴ Moreover, it must be reported in this regard that: “It follows from the case law of the Court of Justice of the European Union (CJEU) that pursuant to Article 3 (1) of the EC Regulation No 1346/2000 the courts, of the EU Member State within the territory of which insolvency proceedings have been opened, have jurisdiction to decide to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another EU Member State” (see Insol Europe, *Harmonisation*, cit., p. 18).

¹¹⁵ “Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that: the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case”.

In the first respect, according to some authors and documents,¹¹⁶ preferential transfers, provided that they took place during the suspect period, generally are avoidable if they consist of a transfer made to a creditor on account of a pre-existing debt, and if, as a result of that transaction, the creditor received a larger percentage of its claim than other creditors in the same class. Alternatively, in order to invalidate fraudulent transactions, and provided that they took place in the suspect period, it is generally required to prove the intent of the debtor. Transactions at undervalue are avoidable if they represent donations or if the value received by the debtor is much lower than the market value. Possible defences against avoidance exist, but they differ from transaction to transaction. The most common defences are that the transfer was needed to keep the business in operation, or that it was consistent with normal commercial practices, and, in particular, with the ordinary course of business between the parties. On the other hand, national insolvency laws often provide stricter rules for avoidable transactions made by “related persons”. The definition of related persons depends on their level of connection with the debtor, and may range from persons having family ties with the debtor to persons simply having a business association or other business connections with the debtor. The justification for stricter rules applied to transfers made by related persons may be that these parties are more likely to be favoured, and, because of their position, that they might be aware of the debtor’s financial distress at an earlier stage.¹¹⁷

In the second regard, there are two aspects for which the national insolvency laws seem to diverge greatly, and concern the length of the suspect period during which such transactions can be liable for consideration for annulment, and the onus of proof.¹¹⁸ However, with specific reference to inter-firm contractual networks, another difference seems worthy of consideration. This difference concerns the stricter rules for avoidable transactions made by related persons. In some Member States, they do not seem to exist at all, or, at least, they are not reported by the available sources, but they exist in other Member States.¹¹⁹ This difference is particularly important with regard to the insolvency of a member of a trans-European contractual network. In fact, such different treatment can undermine the achievement of a level playing field at European level and can foster forum shopping.

In view of the short description given above, a few concluding observations can be made regarding the chance of intra-network transactions effectively playing a role in the handling of insolvency. On the one hand, intra-network transactions might be defended on several grounds. Indeed, even if they favour some creditors (i.e., other network members) at the expense of others, it can be argued that they are consistent with typical commercial practices or with the ordinary course of business between the parties. Furthermore, even if they are made at undervalue, they might still be justified by the fact that they allowed the business to be maintained in operation. On the other hand, stricter rules for avoidable transactions performed by related persons (assuming that network members are included in this definition) work in the opposite direction.

¹¹⁶ See UNCITRAL Guide, cit., pp. 135-155, §§ 148-203; I. Mevorach, *Insolvency within Multinational Enterprise Groups*, cit., pp. 287-288.

¹¹⁷ See UNCITRAL Guide, cit., p. 146, § 182.

¹¹⁸ See Insol Europe, *Harmonisation*, cit., p. 18.

¹¹⁹ According to the Polish law, “(...) legal acts for consideration (i.e., acts that are not gratuitous), performed by the bankrupt within six months prior to the filing of the bankruptcy petition are ineffective as against the bankruptcy estate if concluded with certain entities related to the bankrupt. As far as companies go, these entities include affiliated companies and companies in relation to which the bankrupt was a dominant or a subsidiary party”. Moreover, according to the Spanish law, “The transactions executed by the debtor during a two-year period prior to the initiation of insolvency proceedings and that are detrimental to the debtor’s estate may be challenged and annulled, even in the absence of fraud. In particular: (...) transfer of assets to any of the persons that are “specially linked with the debtor” (e.g. inter-group transactions)”. According to Swedish law, “in order primarily to protect creditors, the Swedish Companies Act has also introduced two prohibitions on limited companies providing loans. The first prohibits a limited company from providing money loans to certain closely-related companies or persons. The second prohibition limits the company’s possibilities to grant loans to enable the borrower to acquire shares in the company or in a parent company in the same group, referred to as a prohibition on acquisition loans” (Insol Europe, *Harmonisation*, cit., p. 55, p. 121, and p. 133).

5.3 Termination Clauses

Instead of leaving the decision about the termination of a contract in the hands of the liquidator, the parties may want to agree on clauses providing for automatic termination upon the opening of an insolvency proceeding (sometimes termed as “early termination clauses” or “*ipso facto* clauses”).

This is a further aspect for which the national insolvency laws of different Member States (as well as laws throughout the world) diverge, determining uncertainties which have, even recently, raised the attention of scholars and practitioners.¹²⁰ The problem is that, in fact, contracts often contain clauses which provide for automatic termination upon the opening of an insolvency proceeding. The regulatory panorama is extremely varied concerning this issue. As a matter of principle, some national insolvency laws uphold the validity of these clauses;¹²¹ conversely, others laws override such clauses, making them unenforceable;¹²² in some countries, uncertainties seem to persist.¹²³ The rationale behind the different legal treatment of these clauses relies on the balance between conflicting interests. On the one hand, among other things, the rationale behind the rules providing for the upholding of

¹²⁰ Although referring to a case mainly concerning financial contracts, see, generally, T. Cleary, *Lehman Brothers and the anti-deprivation principle*, cit., p. 411 ss.

¹²¹ In the United Kingdom, “many contracts provide that a party can treat a contract as terminated by reason of the other party[’s] insolvency” (see Insol Europe, *Harmonisation*, cit., p. 153). More precisely, in England “a contract may provide that it is to terminate or that rights are to be accelerated upon one party entering into an insolvency proceeding. Generally speaking, such contract terms are valid and enforceable” (see R. Stevens, *National Report for England*, cit., p. 225); in Scotland, “A contract will in practice often have a clause whereby if one party becomes insolvent the other party has the right to terminate the contract. Such clauses are enforceable” (see G.L. Gretton & W.W. McBryde, *National Report for Scotland*, cit., p. 566). This matter, however, can be discussed in the light of the so called anti-deprivation principle, that can be summarized as follows: “there cannot be a valid contract that a man’s property shall remain his until his bankruptcy, and on the happening of that event shall go over to someone else, and be taken away from his creditors” (see, generally, T. Cleary, *Lehman Brothers and the anti-deprivation principle*, cit., p. 411 ss.).

¹²² In France, “The French Commercial Code provides that “notwithstanding any legal rule or contractual term to the contrary, the indivisibility, termination or rescission of the contract may not result from the sole decision opening a reorganization proceeding” (see Insol Europe, *Harmonisation*, cit., p. 86); some authors more explicitly said, “Any contractual clause providing for termination of the contract in case of insolvency is void” (see M.D. Schödermeier, F. Pérochon, *National Report for France*, cit., p. 285). In Italy, as a matter of principle, clauses providing for an automatic termination of a contract upon bankruptcy are unenforceable (“Sono comunque inefficaci le clausole negoziali, pur molto diffuse nella prassi, che prevedono il fallimento come causa di risoluzione automatica del contratto”, see G. Presti & M. Rescigno, *Corso di diritto commerciale*, Bologna, Zanichelli [2011], p. 274); however, an author called for caution in interpreting such provision: “Questa disposizione che mira a proteggere il curatore e ad impedire che singoli contraenti acquisiscano posizioni di vantaggio rispetto ad altri deve però essere interpretata con prudenza. La risoluzione e le clausole risolutive espresse non sono vietate in assoluto ma solo quando siano correlate alla dichiarazione di fallimento” (see M. Fabiani, *Diritto fallimentare*, cit., p. 366). With specific reference to contractual networks, this rule has been considered by a recent document: “Si osserva, infine, che nel disciplinare pattiziamente le possibili cause di recesso/esclusione è doveroso e opportuno - stante la discussa struttura del contratto di rete - tener presente il disposto dell’ art. 72 comma 6 L. Fall., in forza del quale le clausole negoziali che facciano dipendere la risoluzione del contratto dal fallimento di una parte sono affette da inefficacia” (see E. Bernini et al., *Linee Guida per i contratti di rete*, cit., p. 88). This matter can be subject of further interpretations after Legge 7 agosto 2012, n. 134. In Poland, “Any contractual provision for an ‘automatic’ variation or termination of a contract upon bankruptcy is invalid. Following bankruptcy, the parties may in principle exercise their contractual and statutory termination rights based on other grounds (e.g. failure to perform obligations), but they must respect and give priority to the statutory effects of bankruptcy” (see Insol Europe, *Harmonisation*, cit., p. 122). In Spain, “(...) as a matter of principle, early termination clauses triggered by the insolvency declaration are void and unenforceable” (see Insol Europe, *Harmonisation*, cit., p. 56); more precisely “(...) Spanish law does not recognise the efficiency of a clause stipulating that the contract is automatically terminated in the event one of the parties becomes bankrupt or insolvent. In the case of contracts *intuitu personae*, the contrary principle applies” (see C. Paz-Ares, M. Virgòs & N. Bermejo, *National Report for Spain*, cit., p. 615).

¹²³ “The rights and duties under the provisions mentioned cannot be excluded by advance agreements (§ 119). It is not clear from the legislative history whether this also rules out so-called insolvency clauses giving an immediate right to terminate on the other party’s insolvency” (see A. Flessner, *National Report for Germany*, in W.W. McBryde, A. Flessner & S.C.J.J. Kortmann (eds.), *Principles of European Insolvency Law*, Deventer, Kluwer Legal Publishers (2003), p. 355). See, also, Robert-Tissot, *The Effects of a Reorganization on (Executory) Contracts: A Comparative Law and Policy Study*, cit., pp. 241-242.

these clauses is that their nullification would basically create an exception to the general contract rules.¹²⁴ On the other hand, the rationale behind rules providing for the unenforceability of these clauses is that the objective to maximise the returns for creditors may require the preservation of contracts in spite of what the parties agreed.¹²⁵ The UNCITRAL Legislative Guide seems to have taken an intermediate approach, recommending the adoption of a general rule according to which clauses providing for the automatic termination of contracts upon the opening of a proceeding should be unenforceable, but recommending, at the same time, the provision of exceptions to such a general rule.¹²⁶ In general, this issue can be viewed in terms of power allocation. The application of the general rule would strictly adhere to the *pari passu* principle,¹²⁷ while the provision of an exception would give more power to some creditors over others.

The differences between a set of bilateral linked contracts and multilateral contracts matter in this respect. Indeed, the rules about the effects of the opening of an insolvency proceeding on current contracts seem to have been planned, at least in some countries, primarily with reference to bilateral synallagmatic contracts.¹²⁸ As already explained in a preceding Section, the general rules can also be considered applicable to multilateral contracts, at least in some countries. However, this may be slightly different with reference to provisions that forbid early termination clauses. Indeed, some multilateral contracts may give rise to structured forms of collaboration that might be viewed as *de facto* organisations. In such cases, it might be argued that rules specifically prescribed for some organisations should be analogically applied.¹²⁹ This possibility, however, cannot be always taken for

¹²⁴ “The approach of upholding these types of clause may be supported by a number of factors, including the desirability of respecting commercial bargains; the need to prevent the debtor from selectively performing contracts that are profitable and rejecting others (an advantage that is not available to the counterparty); the effect on financial contract netting of not upholding an automatic termination provision; the belief that, since an insolvent business will generally be unable to pay, delaying the termination of contracts potentially only increases existing levels of debt; the need for creators of intellectual property to be able to control the use of that property; and the effect on the counterparty’s business of termination of a contract, especially one with respect to an intangible” (see UNCITRAL Guide, cit., p. 122, § 115).

¹²⁵ “Although the approach of overriding such clauses can be regarded as interfering with general principles of contract law, such interference may be crucial to the success of the proceedings. In reorganization, for example, where the contract is a critical lease or involves the use of intellectual property embedded in a key product, continued performance of the contract may enhance the earnings potential of the business; reduce the bargaining power of an essential supplier; capture the value of the debtor’s contracts for the benefit of all creditors; and assist in locking all creditors into a reorganization. In liquidation, the arguments in favour of overriding termination clauses include the need to keep the business together to maximize its sale value or to enhance its earnings potential; to capture the value of the contract for the benefit of all creditors rather than forfeiting it to the counterparty; and the desirability of locking all parties into the final disposal of the business” (see UNCITRAL Guide, cit., pp. 122-123, §§ 116 and 117).

¹²⁶ The UNCITRAL Guide considers that: “While this issue is clearly one that may require a careful weighing of the advantages and disadvantages, there are, nevertheless, circumstances where the ability of the insolvency representative to ensure that a contract continues to be performed will be crucial to the success of reorganization and also, but perhaps to a lesser extent, liquidation where the business is to be sold as a going concern. For these reasons, it is desirable that an insolvency law permit such clauses to be overridden” (see UNCITRAL Guide, cit., p. 123, § 118). Based on this line of reasoning, the UNCITRAL Guide finally recommends: “70. The insolvency law should specify that any contract clause that automatically terminates or accelerates a contract upon the occurrence of any of the following events is unenforceable as against the insolvency representative and the debtor: (a) An application for commencement, or commencement, of insolvency proceedings; (b) The appointment of an insolvency representative. 71. The insolvency law should specify the contracts that are exempt from the operation of recommendation 70, such as financial contracts, or subject to special rules, such as labour contracts” (see UNCITRAL Guide, cit., p. 132).

¹²⁷ “(...) jurisdictions universally proclaim the importance of treating similarly situated creditors in similar ways. This notion is often encapsulated in the phrase *pari passu*, meaning that all creditors in a particular rank of priority should receive the same proportionate distribution of the value available to that level of priority. In Europe, a different Latin phrase is sometimes used, *paritas creditorum* (equality of creditors)” (see B. Wessels, B.A. Markwell & J.J. Kilborn, *International Cooperation in Bankruptcy and Insolvency Matters*, cit., p. 16 and footnote 9). For a definition of “strong” and “weak” versions of the *pari passu* principle, see V. Finch, *Corporate Insolvency Law – Perspectives and Principles*, Second Edition, Cambridge, Cambridge University Press (2009), p. 599.

¹²⁸ Regarding Italy, see L. Boggio, *Gli accordi di salvataggio delle imprese in crisi*, cit., pp. 222-223, footnote 4.

¹²⁹ See *supra* note 28.

granted, given that some scholars seem to consider such an analogical application precluded in some cases.¹³⁰

Some provisions that may not conflict with rules prohibiting *ipso facto* clauses can be hypothesised.

A first example concerns a clause that would allow the termination of the contract or (in multi-party networks) the expulsion of one member when certain financial conditions are not met or a specific threshold is exceeded.¹³¹ With reference to the law in force in many countries, such a provision does not seem to conflict with the above-mentioned rules, because it does not link the termination to the opening of an insolvency proceeding. In some cases, however, it can be viewed as a circumvention of the law.¹³² Regardless of these cases, the determination of the thresholds and their verification become crucial points in relation to such clauses. Concerning the first point, the thresholds should be determined so that they can reflect a real condition of insolvency, that is to say, a situation which allows the inference that the opening of a proceeding is realistically proximate. And concerning the second point, this is an issue which further evidences the relevance of peer monitoring. More precisely, it seems reasonable to argue that the concrete verification of the thresholds would heavily depend on provisions which allow network members to exchange relevant information in an effective manner and issue timely warnings.

In multi-party networks, another contractual provision that does not seem to conflict with the legal rules which prescribe the invalidity of early termination clauses is one that would explicitly declare the essential character of the participation of one member or that the participation of each member shall be considered essential. Assuming that the practical effect of such provisions would be that, if a liquidator decided to withdraw from a contractual network, the network would dissolve, one might argue about what the advantages of this kind of agreement. In some cases, the essentiality of one or more participants can be easily inferred from the circumstances, but, in more dubious cases, it would need to be ascertained, and this might bear costs (e.g., litigation). In these cases, such a clause would both reduce uncertainty and diminish the possible costs.

5.4 *Substitution Clauses*

As already stated, contractual networks are typically characterised by hard substitutability of one or all parties. This feature can be described in terms of asset specificity. When this feature is particularly relevant parties may, in order to safeguard their investment, agree on contractual provisions that are suitable to minimise the consequences of such a scarce fungibility. Indeed, as one author wisely

¹³⁰ For instance, with reference to consortia organized through the creation of a corporation (*società consortili*), an Italian author, who wrote even before the reform of the Italian bankruptcy law, seems to consider that early termination clauses are void: “(...) non sembrano legittime quelle clausole che prevedono l’esclusione automatica o facoltativa del socio nel caso in cui la sua impresa sia assoggettata a procedure concorsuali. Le norme relative a tali procedure, si è infatti osservato, sono dirette a tutelare sia la posizione dei creditori sia anche interessi di carattere più generale, la cui soddisfazione potrebbe richiedere la prosecuzione dell’esercizio dell’impresa, sulla base di una valutazione che spetta solo ed esclusivamente agli organi delle stesse. In questa prospettiva la clausola di esclusione comporta che la scelta circa le sorti dell’impresa sia demandata ad una convenzione stipulata dall’imprenditore anteriormente all’apertura della procedura, sottraendo la facoltà di scelta agli organi deputati” (see M. Sarale, *Consorti e società consortili*, in: *Trattato di Diritto Commerciale*, diretto da Gastone Cottino, Padua, Cedam [2004], p. 553-554).

¹³¹ “(...) la struttura di rete può essere un veicolo di trasmissione di incentivi nel senso della prevenzione almeno in due modi: attraverso l’adozione di una regolamentazione preventiva delle condizioni finanziarie “tollerabili”, al cui superamento sia collegato un potere di espulsione del soggetto dalla rete, come “minaccia credibile”; oppure direttamente attraverso la trasmissione all’interno della rete di conoscenza strumentali all’organizzazione dell’impresa in modo da prevenire l’insorgere della crisi” (see D. Galletti, *Brevi note sulla riforma dell’ordinamento concorsuale nella prospettiva delle reti di imprese*, cit., pp. 175-176).

¹³² “Where an insolvency law provides that termination clauses can be overridden, creditors may be tempted to take preemptive action to avoid that outcome by terminating the contract on some other ground before the application for insolvency proceedings is made (assuming a default by the debtor other than one triggered by commencement of the proceedings). Such a result may be mitigated by providing that the insolvency representative has the power to reinstate those contracts, provided both pre- and post-commencement obligations are fulfilled” (see UNCITRAL Guide, cit., p. 123, § 119).

explains with reference to multi-party contractual networks, mutual inter-dependence arises among the fulfilment of tasks, not necessarily among parties.¹³³ Therefore, besides effective monitoring, clauses that allow for a relatively easier substitution of one member may be useful to lessen the problems arising from hard substitutability in cases of insolvency.

A first category of contractual provisions that may prove to be useful in this regard are those which grant to viable network members the right to buy the business of distressed members in the event of their insolvency. These provisions basically have the structure of a call option.¹³⁴ In theory, the reverse can also be imagined. In other words, parties may agree on contractual provisions which grant distressed network members the right to sell their business to viable members in the event of their insolvency. These provisions would have the structure of a put option. Supposing that these clauses are provided in the contract governing the network, if the liquidator would assume it, they would arguably bind him. However, considering the specificities of networks, provisions structured as call options seem to be more helpful than those structured as put options. Indeed, the provisions structured as put options seem essentially aimed at the protection of the insolvent member, without consideration for the protection of the network or the safeguarding of the common project. Conversely, provisions structured as call options seem designed in order to allow network members to protect their investments and uphold the achievement of the common project.

A second category of contractual provisions that may prove to be valuable, although they are slightly different from those described above, are those that would provide for a pre-emption right to be granted to the solvent network members in the event of the business of the insolvent member being sold as a whole by the liquidator. For instance, such kinds of provisions, analysed by one author with reference to business leases that might be stipulated by the liquidator with other network members,¹³⁵ seem to be allowed by the Italian bankruptcy law.¹³⁶

A third category of provisions concerns those that allow an easier search for substitutes in cases in which one of the companies wishes to exit from the network. In this perspective, clauses requiring the parties to provide a time notice before deciding to exit or clauses that impose duties to continue co-operation after the termination of the contract¹³⁷ or the withdrawal, can acquire some meaning. However, clauses requiring a time notice might be deemed void under some insolvency laws, on the grounds that, by influencing the decision of the liquidator, they may be an obstacle to the maximisation of returns for creditors. Alternatively, supposing that these clauses are provided in the contract governing the network, if the liquidator decides to assume it, they would arguably bind him. Therefore, it might be argued that, if the liquidator accepts the contract, he or she could not withdraw at a later stage without giving the time notice. On the other hand, for those clauses that impose duties to co-operate after the termination of the contract, it can be argued that they would be primarily practical when, even if the liquidator decides to terminate the contract, the conditions of the debtor and the features of the insolvency proceeding allow the distressed business to be kept in operation, since such co-operation might otherwise be concretely impossible.

¹³³ See F. Cafaggi, *Contractual networks and contract theory*, cit., pp. 89-90.

¹³⁴ The option can be defined as follows: “a right to do or not to do something, usually within a specified time. An enforceable option may be acquired by contract (i.e. for consideration) or by deed to accept or reject an offer within a specified period. (...). On the London Stock Exchange, options to sell or to buy quoted securities are purchased for a certain sum of money, which is forfeited if they are not taken up. An option to sell is known as a put option, that to buy is a call option, and an option to either sell or buy is a double option” (E.A. Martin (ed.), *Oxford Dictionary of Law*, cit., p. 346).

¹³⁵ See D. Galletti, *Brevi note sulla riforma dell'ordinamento concorsuale nella prospettiva delle reti di imprese*, cit., p. 167 ss.

¹³⁶ Article 104-bis(5) of the Italian bankruptcy law: “Il diritto di prelazione a favore dell'affittuario può essere concesso convenzionalmente, previa espressa autorizzazione del giudice delegato e previo parere favorevole del comitato dei creditori. In tale caso, esaurito il procedimento di determinazione del prezzo di vendita dell'azienda o del singolo ramo, il curatore, entro dieci giorni, lo comunica all'affittuario, il quale può esercitare il diritto di prelazione entro cinque giorni dal ricevimento della comunicazione”.

¹³⁷ See F. Cafaggi, *Contractual networks and contract theory*, cit., pp. 89-90 and p. 83, footnote 47.

5.5 Insurance Mechanisms

In addition to the options considered above, network members may agree on many other devices that might have an effect in cases in which one member becomes insolvent. Two theoretical possibilities might be (I) the stipulation of insurance contracts in contemplation of the event that a member might become insolvent, or (II) the settlement of a contractual mechanism that would have the same substantial effect.

The first device (i.e., insurance) has been already considered by one scholar as a possible solution in cases of insolvency.¹³⁸ However, this scholar considered insurance only from a theoretical standpoint. In order to verify the practicability of this solution, an empirical investigation about the various practices and contracts offered by the insurance industry would be necessary. However, such an analysis would go beyond the scope of this paper and, maybe, be outside the competency of the author. Therefore, at the moment, such a solution can be proposed here as a mere possibility, while its feasibility remains to be tested in fact, and it might result in a possible extension of this work.

The second mechanism is that network members may agree to set aside funds in contemplation of a possible insolvency. These resources would essentially constitute a sort of “emergency fund” that network members might agree to use either to finance the re-organisation of an insolvent member (if it is, for instance, a member whose withdrawal may cause the dissolution of the entire network), or to soften the effects arising from the insolvency of one of them. In the first case, however, it might also be argued that the existence of this protection would provide incentives to moral hazard. On the one hand, with reference to the second case, it might be argued that, because such a solution would imply a cost, it might be suitable to diminish the risk of opportunistic forms of behaviour or conduct.

6. Conclusions

This paper has analysed contractual inter-firm networks, and, in particular, it has assessed the case in which a network member becomes insolvent and is subject to insolvency proceedings. The three questions at the beginning were: What happens if a member of a trans-European contractual network files for bankruptcy? What are the shortcomings of the current regulation? and How can the parties cope with these shortcomings? In conclusion, it seems both possible and useful to summarise the answers that have been provided to these three questions.

The first question has been answered by looking at the treatment of contracts in cases of bankruptcy, given that the case under analysis concerns a contract signed by enterprises from different Member States, and that one of them is subject to an insolvency proceeding. According to the regulation in force, the effects of the insolvency proceedings on the current contracts to which the debtor is a party shall be determined according to the law of the Member State in which the proceeding is opened. Even if the national insolvency laws vary a great deal among the different Member States, some similarities can nonetheless be highlighted. In principle, the opening of insolvency proceedings normally does not necessarily, or automatically, imply the termination of current contracts (or, at any rate, not all insolvency proceedings imply termination). As a general rule, national insolvency laws give to the liquidator the right to decide whether to assume or reject the current contracts, although they regulate this issue in different ways. However, this general rule suffers exceptions with regard to specific contracts that may be regulated in different ways by national insolvency laws. Moreover, although this paper focuses on contractual networks, it must be noticed that this general rule often does not apply to some organisations, since a number of national laws prescribe different consequences from the bankruptcy of one member.

The second question has been approached by looking at the shortcomings generally identified with reference to the regulation in force, and by trying then to analyse these inadequacies in

¹³⁸ In analysing solutions suitable to reduce the collateral damages in franchisor insolvency (considering that franchising is a contract characterised by specificities that, although not always, can be present in contractual networks), an author considered “requiring franchisees to insure against their franchisor insolvency”. The author explains that she “is not aware of any such insurance, but theoretically the risk and potential loss are measurable so the possibility of insurance should not be ruled out” (see J. Buchan, *Reducing Collateral Damage in Franchisor Insolvency*, cit., p. 401).

consideration of the peculiarities of contractual networks. There are four shortcomings. The first one is that the differences in the national treatment of current contracts are likely to encourage opportunistic forms of behaviour such as forum shopping. The second is that the current regulatory framework may foster uncertainty and unpredictability. The third is that the differences among national rules of current contracts and the existing structure of the regulation about international insolvency can provide incentives to behave in ways that may prove to be inefficient, such as the opening of secondary proceedings. The fourth is that the differences in the legal treatment of current contracts under insolvency can endanger the achievement of a level playing-field. In all these regards, contractual networks present peculiarities that have to be taken into account. However, bearing in mind the innate complexity of contractual networks, and given the very multi-faceted shape that they can take in practice, it seems, at any rate, very difficult to devise rules suitable to encompass every possible situation. In contrast, general rules that allow for a sufficient degree of flexibility in their application may be better suited to cope with the problems arising within networks in an efficient manner. Against this background, this part concludes that, at the moment, contractually engineered solutions seem to be a possible way of addressing the problems that may occur in networks in cases of insolvency.

The third question, consequently, has been answered by focusing on the design of contracts aimed at governing inter-firm networks as well as on other contractual mechanisms that can be deployed in a network context. In particular, in the light of the shortcomings analysed above, this part of the paper hypothesises and evaluates some contractual provisions or mechanisms that might be suitable to play a role in cases of insolvency. With regard to the opening of an insolvency proceeding, some of these mechanisms can work *ex ante*, while others can work *ex post*, but, in both cases, they might have an impact on the handling of insolvency. Moreover, some of these devices might be in conflict with some provisions of national insolvency laws, and, thus, might have a limited application. The analysis has considered these issues with regard to five possible solutions. The first possible solution concerns the establishment of systems of peer monitoring among network members, and it has been explained how these systems may prove to have an impact on the handling of insolvency in a network context. The second solution concerns intra-network transactions. The third solution concerns clauses providing for the automatic termination of the contract upon the opening of insolvency proceedings. The fourth solution concerns clauses which allow easier substitution of the insolvent member. Finally, the fifth solution concerns mechanisms which allow network members to insure against the chance that one of them may fall under bankruptcy.

