Recognition of foreign insolvencies – general report

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Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws, some other international treaties and national legislation, in particular of EU Member States, with regard to recognition of foreign insolvency proceedings. It also develops some recommendations.

Keywords: Recognition; foreign insolvency proceedings; MLCBI; EIR; national laws: basic concepts; discretion; prerequisites of recognition; procedure of recognition: legal effects of recognition.

The most discussed aspect of cross-border insolvency is, probably, the recognition of foreign insolvency proceedings[2]. The term 'recognition' of foreign insolvency proceedings is used both by the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and by the European Insolvency Regulation (EIR) and denotes the prerequisites and legal consequences of giving effect to foreign insolvency proceedings in a country different from the one whose courts conduct the proceeding (forum concursus). It should be noted, however, that 'recognition' is not the only term describing the mechanism of giving effect to foreign insolvency proceedings. In addition, the term can be understood differently. In particular, the concept of recognition under the EIR[3] differs from the MLCBI[4].

The purpose of this report is to give an overview of the approaches to recognition of foreign insolvencies currently in use, with a view to possible recommendations on how the European Union should, from the

1 Paragraphs A and D are authored by Alexander Trunk; paragraphs B and C by Kevin Silvestri; paragraph E by both authors.
2 Bork (2023), p. 69 et seq.; Bork (2017), 2.52 et seq.
3 See Art.19 EIR: 'recognition of foreign insolvency proceedings' used as basic concept for giving effects to foreign insolvency proceedings.
4 See MLCBI Chapter III: 'recognition of a foreign proceeding' as one of several tools of cross-border cooperation in insolvency matters.

perspective of the authors of this book, regulate this topic in relations with non-EU countries (third countries). The report will focus particularly on a comparison of the approaches taken by the MLCBI and the EIR in this respect, but it will also have a look at national approaches, which may differ from both the MLCBI and the EIR. The purpose of this report is not to give a complete comparative account of all such approaches, but rather to focus on aspects which seem to the authors particularly relevant or instructive.

A. General aspects

I. The basic concept of 'recognition'

While both the EIR and the MLCBI use the term 'recognition' (of foreign insolvencies), they do that with different meanings. Under the EIR, recognition relates to foreign 'judgments' (decrees, decisions etc.) rendered in or connected with insolvency proceedings[5], while the MLCBI speaks, more generally, about recognition of foreign insolvency 'proceedings'[6]. This reflects the different historic and constructive background of cross-border cooperation in insolvency matters in civil law and common law countries[7]. In civil law countries, recognition of foreign insolvencies has traditionally been seen as a specific case of recognition of foreign judgments, while in common law jurisdictions the focus lies on (judicial) assistance granted to foreign courts and their proceedings. Typical examples of the common law approach are the former sec. 304 of the U.S. Bankruptcy Code[8], which has in the meantime been superseded by Chapter 15 of the Code implementing the MLCBI[9], and sec. 426 of the British Insolvency Act of 1986[10]. Linguistically particularly clear examples of the conceptual judgment-oriented approach in civil law jurisdictions are Art. 121 § 1 of the Belgian Private

5 Cf. Art.19 (1) EIR referring to the 'opening (decision') of the insolvency proceeding; more clearly so e.g. Art. 32 EIR.
6 Cf., e.g., Art. 15 (1) and Art. 17 MLCBI.
7 Dalhuisen, p. 3–100: 'For purposes of recognition and execution of foreign adjudications, bankruptcy is often equated with judgments. This is especially true in civil law countries of French tradition where, as a consequence, the exequatur procedure is made available for the domestication of foreign bankruptcy measures'.
8 Boshkoff ICQL, 1987, 744; Schrag/Walker/Blumberg BLI 2004, 159; Rimel BDJ 1992, 459.
9 Chapter 15: Ranney Marinelli ABLJ 2008, 269 et seq.
10 Smart, p. 168 et seq.; Fletcher (2005), p. 139 et seq.

International Law Act and Art.166 of the Swiss Private International Law Act (recognition of foreign bankruptcy decrees). However, even civil law jurisdictions sometimes choose a general form at the beginning, speaking about recognition of 'foreign insolvency proceedings', although they thereafter address specifically the recognition of foreign decrees, in particular the decree formally 'opening' an insolvency proceeding (cf. sec. 343 and 345, 353 of the German Insolvency Code, InsO).

The very specific definition of the object of recognition under the civil law approach makes it possible to clearly determine the effects of recognition and can work well without considerations of discretion, which play a significant role under the common law approach[11]. It also allows to see recognition of foreign insolvencies as a particular case of recognition of foreign judgments in general, which contributes to systematic coherence of cross-border judicial cooperation and allows to draw parallels between different areas of international civil procedure and to fill the gaps by way of analogy. On the other hand, the judicial assistance approach used by tradition in common law jurisdictions as to recognition of foreign insolvencies also has parallels in international civil procedure and gives the recognising country broad powers and flexibility for cooperation with foreign insolvencies. This may be very helpful in complicated cases, but at the same time comes with an inherent element of imprevisability.

Within this report, the term 'recognition' will be used in the broad sense, including both the judgment-related concept (EIR approach) and the legal assistance approach (MLCBI and common law). In so far as these conceptual distinctions may play a role to better understand specific rules or to develop future rules, they will be taken into account for the analysis. It should not be overlooked that the concept of judicial assistance (or cooperation and coordination) is broader than recognition, as it may apply also in cases when (formal) recognition is not applied for or even denied[12] or when judicial assistance is requested by a domestic court from foreign courts or in cooperation between parallel insolvency proceedings. For convenience, in this report the term 'recognition' will be used in principle as relating to 'foreign insolvencies', although a more precise look may show that some jurisdictions may have the recognition of judgments in mind, while other use the broader concept of recognition of foreign insolvencies

11 Cf. McCormack (2022), p.230 et seq.
12 Cf. Guide to Enactment and Interpretation of the MLCBI, note 40.

and determine the legal consequences on a conceptually later stage, e.g. when specific decisions on cooperation are requested.

II. Comparative overview

For much of the 20th century, in a significant number of countries recognition of foreign insolvencies was generally denied, referring to an alleged principle of territoriality in international insolvency law[13]. However, even in those times courts sometimes found ways to recognize certain effects of foreign insolvencies, e.g. qualifying them as issues of corporate law[14]. Moreover, some countries concluded treaties on mutual recognition of foreign insolvencies (or, more general, on cooperation in cross-border insolvency matters). Notable examples are the Nordic Bankruptcy Convention of 1933, and the Treaties of Montevideo of 1889 and 1940[15]. Also, the European Economic Community started in the 1960s to work on a Bankruptcy Convention[16], which eventually led to the (in the end politically stopped) EU Bankruptcy Convention of 1995[17], which itself paved the way to the EU Insolvency Regulation 2000, now recast as EU Insolvency Regulation (EIR) 2015. An important step on this way was also the Council of Europe's Istanbul Convention on Certain Aspects of [Foreign] Bankruptcies of 1990[18]. In parallel and co-discussion with the EU, UNCITRAL developed its Model Law on Cross-Border Insolvency (MLCBI) of 1997, which includes important provisions on recognition of foreign insolvencies, and has in recent times been complemented by further, more specific model laws on

13 Cf. Trunk (1998), pp.34 – 45.
14 Smart, p. 168 et seq.; Fletcher (2005), p. 139 et seq.
15 Omar IIR 2002, pp.187 – 189.
16 Fletcher in Lipstein, 124; Fletcher (2005), p. 350 et seq.; Nadelmann, Law and Contemporary Problems 1977, 54 (63); Fletcher (1982), p. 233; Hunter ICLQ 1976, 310; Lew NLJ 1975, 628; Farrar JBL 1977, 320–337.
17 Balz IFLR 1994, 17 et seq.; Balz ABLJ 1996, 485 et seq.; Carbone Dir. comm. int., 1998, 633 et seq.; Fletcher BJIL 1997, 25 et seq.; Guzzi Dir. comm. int. 1997, 901 et seq.; Johnson, IIR 1996, 80 et seq.; Kayser IIR 1998, 95 et seq.; McKenzie ERPL 1996, 181 et seq.; Omar ICCLR 1996, 163 et seq.; Schollmeyer BDJ 1997, 421 et seq.; Zamperetti Giur. comm. 1997, 607 et seq.
18 Fletcher in Ziegel, p. 123; Omar IIR 2003, 155–157; Volken Forum Internationale 1993, 26.; Fletcher International Lawyer 1993, 429 et seq.; Ramackers La Semaine Juridique June 1993, 279–280; Daniele Cahiers de droit Européen 1987, 512 et seq.

cross-border insolvency[19]. Both the EIR and the MLCBI have inspired other organisations such as OHADA to draft their own rules on cross-border insolvencies including recognition[20].

On the national level, approaches which generally deny recognition of foreign insolvencies seem to have disappeared, two main examples being formerly Japan and South Korea, which have however moved away from the principle of absolute territoriality to an approach of cooperation and recognition based on the MLCBI[21]. However, numerous countries have not passed special legislation on recognition of foreign insolvencies, making it necessary to examine in each case whether, e.g., general rules on recognition of foreign judgments are applied also to foreign insolvencies. This leads to a particularly restrictive approach in countries which recognize foreign judgments only on the basis of international treaties or EU law. However, even in such countries, general rules on judicial assistance might be available also with respect to insolvency proceedings, but the extent of such assistance in civil law countries is much more limited than in common law countries.

Twelve EU member states have passed special legislation on cross-border insolvency law including recognition of foreign insolvencies (Austria, Belgium, Croatia, Czechia[22], Germany, Greece, Hungary[23], Poland, Portugal, Romania, Slovakia, Slovenia, Spain). Ten EU countries recognize foreign insolvencies under general rules on recognition of foreign judgments in civ-

19 The 2018 Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) and the 2019 Model Law on Enterprise Group Insolvency (MLEGI). As to these model laws and current further projects at UNCITRAL see https://uncitral.un.org/en/texts/insolvency (last accessed 05.07.2025).

20 Cf. also soft-law texts adopted by organizations such as the IBA (e.g. the Cross-Border Insolvency Concordat of 1996) or INSOL International, cf. Boon/Wessels.

21 → Kim. Rim, in Ho, 579 et seq.; on Japan, Yamamoto IIR 2002, 67; Abe, in Ho, 321.

22 Some basic rules on cross-border insolvency law are contained in Art.111 of the Czech Private International Law Act (2012), which also addresses – very briefly – recognition of foreign insolvencies (Art. 116 (5). In addition, Czechia has passed some complementary rules to the EIR in Art. 426 – 430a of its Insolvency Code. Furthermore, Czechia has passed specific rules on cross-border banking and insurance insolvencies (Art.112 – 116 PIL Act, completing detailed rules on banking and insurance insolvencies in the Insolvency Code.

23 https://practiceguides.chambers.com/practice-guides/insolvency-2024/hungary (last accessed 05.07.2025).

il and commercial matters (Bulgaria[24], Estonia[25], France[26], Italy[27], Latvia[28], Lithuania[29], Luxembourg[30]) or under common law rules (Cyprus[31], Ireland[32], Malta[33]). The most restrictive approach (no recognition without a treaty) seems to be the followed by Denmark[34], Finland[35], the Netherlands[36] and Sweden[37].

Outside the EU, the most broadly used approach – both among common law and civil law jurisdictions – is recognition under the rules of the MLCBI (e.g. important trading partners of the EU like Australia[38],

24 https://ceelegalmatters.com/restructuring-2022/restructuring-bulgaria-2022 (last accessed 05.07.2025).

25 https://ceelegalmatters.com/restructuring-2022/restructuring-estonia-2022 (last accessed 05.07.2025).

26 Dammann/Sénéchal (2018), pp. 704 – 723.

27 Baccaglini, passim; Corno in Cagnasso/Panzani, 934 et seqq.

28 https://ellex.legal/cross-border-insolvency-latvia/ (last accessed 05.07.2025).

29 https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states#lithuania (last accessed 05.07.2025).

30 https://www.loyensloeff.com/insights/news--events/news/restructuring--insolvency-qa-cross-border--groups/ (last accessed 05.07.2025).

31 https://www.erotocritou.com/c1/publications/cross-border-recognition-of-insolvency-proceedings/ppp-301/47/ (last accessed 05.07.2025).

32 https://www.williamfry.com/knowledge/recognition-of-foreign-insolvency-proceedings/ (last accessed 05.07.2025).

33 https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states#malta (last accessed 05.07.2025).

34 Cf. https://practiceguides.chambers.com/practice-guides/insolvency-2024/denmark (last accessed 05.07.2025).

35 Cf. https://ally-law.com/restructuring-and-insolvency-guide-finland/ (last accessed 05.07.2025).

36 With some exceptions, see https://www.nortonrosefulbright.com/en/knowledge/publications/cbfa12ac/netherlands-25th-anniversary-of-the-model-law#section2 (last accessed 05.07.2025). The Dutch Bankruptcy Act provides for some rules on cross-border insolvencies (sec. 2, 20, 203 – 205) but does not address recognition of foreign proceedings.

37 https://practiceguides.chambers.com/practice-guides/insolvency-2024/sweden (last accessed 05.07.2025).

38 Zander/Pettingill, Recognition of a Foreign Insolvency Process and Enforcement of Insolvency-Related Judgments (Australia), https://uk.practicallaw.tr.com/w-039-4645 (last accessed 07.07.2025).

Canada[39], Brazil[40], Japan[41], Saudi Arabia, South Korea[42], Mexico, South Africa[43], the UK or the U.S., also e.g. the OHADA member states under the OHADA Uniform Insolvency Act[44]). This is followed by assistance under common law rules (e.g. Hongkong[45], India[46], but also several offshore jurisdictions[47] such as the Bahamas, Bermuda[48], the Cayman Islands, or Panama) or by recognition under general rules of civil procedure (e.g., most importantly, China[49]). Examples of the 'civil procedure approach' in Europe are, with some modifications, the offshore jurisdictions Liechtenstein[50] and Monaco[51], as well as Russia[52]. Several countries, which have applied for EU membership, have aligned their cross-border insolvency law to some degree with the EIR, including provisions on recognition of foreign

39 Nocilla, Canadian cross-border insolvency law and the triumph of 'modified universalism': A retrospective, 33 IIR 2024, pp. 399 – 420.
40 See → Galdino/Garcia.
41 Yamamoto, IIR 2002, p.67 et seq.
42 See →Kim.
43 See →Boraine.
44 See → Leno.
45 Yung, Cross-border Insolvency in Hong Kong: Developments and Updates, (2022) 31 International Insolvency Review pp.297 – 323, see also https://www.nortonrosefulbright.com/en-hk/knowledge/publications/80831390/cross-border-insolvency-in-hong-kong (last accessed 05.07.2025).
46 Cf. https://ibclaw.in/recognition-of-indian-cirp-proceedings-in-a-foreign-court-a-landmark-judgment-and-the-call-for-cross-border-insolvency-laws-in-india-by-abhineet-pange-and-mahima-jayan/#:~:text=The%20Need%20for%20a%20Cross%2D-Border%20Insolvency%20Law,Z%2C%20they%20have%20yet%20to%20be%20implemented (last accessed 05.07.2025).
47 Some of them have adopted the MLCBI, e.g. the British Virgin Islands (BVI), the DIFC (UAE) or Singapore.
48 See https://law.asia/foreign-liquidator-assistance-common-law-bermuda/#:~:text=There%20are%20no%20statutory%20mechanisms%20for%20the,or%20cross%2Dborder%20co%2Doperation%20in%20insolvency%20or%20restructurings.&text=The%20general%20rule%20is%20that%20the%20court,the%20place%20of%20incorporation%20of%20the%20company.%E2%80%9D (last accessed 06.07.2025).
49 See → Shi.
50 Art.1 and 5 of the Liechtenstein Insolvency Code.
51 Monaco provides for international jurisdiction as to insolvency proceedings in Art.6 nr.6 of its Private International Law Code, but has not adopted the MLCBI or passed other special rules on recogition of foreign insolvency proceedings. However, in its relations with France, the principle of unity and universality of insolvency proceedings is laid-down in the France-Monaco Bankruptcy Treaty of 1950.
52 See → Yarkov/Baldanov.

insolvencies (Bosnia and Herzegovina[53], Georgia[54], North Macedonia[55]). Albania, Kosovo, Montenegro[56], Serbia and Ukraine have instead opted for the MLCBI. Norway and Switzerland have developed specific approaches: The Swiss Private International Law Act provides for recognition of foreign insolvencies through a simplified insolvency proceeding (Art. 166 – 175 Swiss Private International Law Act)[57]. Norway has created a set of rules on cross-border insolvency law (Bankruptcy Act, Part IV, sec. 161 – 177), which takes its major inspiration from the EIR, but is less detailed and contains also some specific provisions[58]. As to recognition of foreign insolvencies outside the scope of the Nordic Bankruptcy Convention the Act takes a civil procedure approach adapted to the specifics of insolvency proceedings (Art. 163 – 172 Norwegian Bankruptcy Act).

III. Sphere of application

The subject-matter sphere of application of the rules on recognition of foreign insolvencies differs in the various jurisdictions. Some regimes include both commercial and non-commercial insolvency proceedings as well as proceedings relating to the insolvency of legal and natural persons (consumers and sole traders). Other regimes define the notion of insolvency proceedings very broadly, including, e.g. also corporate or contractual workouts. Yet others apply rules on recognition of foreign insolvencies to some types of insolvency proceedings only, leaving room for either applying them by analogy to other types of proceedings or applying different

53 In Bosnia and Herzegovina, each of the entities (BiH Federation, Brčko District and Republika Srpska) have passed their own Bankruptcy Acts. They all contain provisions on cross-border insolvency law modelled after the Croatian Bankruptcy Act.

54 The Georgian Insolvency Act of 2020 is inspired by the EIR, though in a simplified form, see Chapter 11 of the Act. Art. 116 deals with recognition of foreign insolvencies in a minimal manner, referring basically to general rules on recognition of foreign judgments.

55 The North Macedonian Bankruptcy closely follows the Croatian Bankruptcy Act.

56 With some modifications and adds-on derived from the EIR, see Part IX of the Montenegro Bankruptcy Act.

57 Cf. https://www.news.admin.ch/de/nsb?id=66833 (last accessed 07.07.2025). See also → Staehelin/Kleider.

58 See Ali/Røsæg, New Rules on Cross-Border Insolvency in Norway, 17 Yearbook of Private International Law (2015/2016), pp. 385 – 394.

rules, e.g. on recognition of foreign judgments in civil and commercial matters. Also, some countries carve out (cross-border) insolvencies in certain business areas, such as the financial sector, and submit them to special rules. This is the case, for example, under the EIR[59], and the U.S. Bankruptcy Code[60]. Other countries use general rules on recognition of foreign insolvencies as a basis and apply them subsidiarily to specific branches of the economy such as the financial sector, while taking into account specifics that may characterize such sectors[61].

It is also not uncommon to define the term 'insolvency proceeding' differently for purposes of domestic proceedings and (recognition of) foreign proceedings. This may be done in a way that certain foreign proceedings cannot be recognized, although similar domestic proceedings are governed by insolvency law in the respective country and might be recognized as such in foreign countries. Another possibility is to recognize foreign proceedings under insolvency rules, although such proceedings do not exist under domestic rules, or are categorized as 'non-insolvency' proceedings in the domestic context. This may apply, e.g., to corporate restructurings or contractual workouts[62]. This does not exclude, of course, that such proceedings may be recognized abroad, whether under insolvency rules, judgment-recognition rules, or conflict of laws rules.

IV. Terms

Some cross-border insolvency legislations include lists of terms with definitions[63]. Both the EIR and the MLCBI use this approach for their overall sphere of application, i.e. the definitions are not limited to the issue of recognition. On the national level, terms are sometimes defined for recognition purposes only. Such definitions sometimes indirectly serve to delimit

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59 Art.1 (2) EIR.

60 § 109 (2)(b) and (3) of the Bankruptcy Code, with some modification as to Chapter 15 of the Code, see § 1501(c)(1) and (3). As to bank insolvencies see also Pannen/Riedemann.

61 This is true, e.g. for Austria (sec. 243 InsO) and Germany (no explicit exclusion of banking and insurance insolvencies from the Insolvency Code; but specific banking and insurance legislation has prevalence).

62 See also → Silvestri (Part A.).

63 Some legislations provide for lists of definition in their general parts, but include therein terms, which are relevant for cross-border cases, e.g. Art.2 of the Bankruptcy Act of Bosnia and Herzegovina (Federation of Bosnia and Herzegovina) of 2021.

the rules on recognition of foreign insolvencies from general rules on recognition of foreign judgments (such as, in the EU, the Brussels Ia/Ibis Regulation) or from general rules on conflict of laws (such as, in the EU, the Rome I or Rome II Regulations). Sometimes definitions include rules of a more general character, e.g. on conditions and procedures for recognition.

V. General structure of the rules on recognition of foreign insolvencies

Before turning to details of the rules on recognition of foreign insolvencies, the basic structures of the existing texts and rules need to be examined as they may inspire future regulation by the EU as to recognition of non-EU insolvencies.

1. EIR and MLCBI

The EIR is structured in four parts: general provisions, recognition of (foreign) insolvency proceedings, secondary proceedings as a special case of parallel proceedings, insolvency proceedings of corporate groups. The MLCBI is structured, mainly, in five parts, whose content differs significantly from the EIR: general provisions, access of foreign representatives and creditors to courts in that State (whether in the context of domestic proceedings or assistance/recognition), recognition of foreign proceedings and relief, cooperation with foreign courts and representatives, concurrent proceedings.

The EIR and the MLCBI share many commonalities:

- the common intent to improve cooperation between different countries in insolvency matters,
- the focus on the debtor's COMI as the main jurisdictional ground for the conduct of insolvency proceedings (main proceeding), accompanied by the existence of an 'establishment' as a subsidiary jurisdictional ground (non-main or 'territorial' proceeding),
- the lex fori concursus principle as a basic conflict of laws rule in insolvency proceedings,
- the 'universality' of the effects of a main (COMI-based) proceeding,
- combined with the admissibility of concurrent proceedings,

- ‘recognition’ of foreign insolvency proceedings as a basic concept for defining the effects of an insolvency proceeding outside the forum concursus,
- the differentiation, also in the recognition context, between ‘main’ proceedings (COMI-based and with ‘universal’ effect) and ‘non-main’ proceedings (establishment-based and with territorial effect only).

However, the provisions in the EIR and the MLCBI on recognition of foreign insolvencies[64] contain also major differences:

The core difference between the two instruments lies in the fact that under the EIR recognition is conceptually tied to recognition of decisions rendered in the course of the insolvency proceedings, while the MLCBI relates the term ‘recognition’ to foreign insolvency proceedings in a general manner and, in addition, treats recognition of foreign insolvency proceedings as only one (though important) element of judicial assistance to a (foreign) insolvency proceeding. The legal position of foreign representatives is dealt with in the MLCBI as a separate category of judicial assistance, while under the EIR the legal position of (foreign) insolvency practitioners is contingent on the recognition of the foreign proceeding, more specifically, of the opening decision, in which the foreign insolvency court has appointed the representative. It may even happen that the decision to commence (‘open’) the foreign proceeding is recognized, but the decision to appoint a particular representative is not (e.g. if a corrupt or otherwise incapable person has been appointed). The MLCBI leaves the relation between ‘recognition’ of a foreign insolvency proceeding and acceptance of certain acts of a foreign representative open, seemingly giving the court the power (and perhaps discretion) to decide this question.

Another difference relates to the use of conflict of laws methods in cross-border insolvencies. The EIR includes a complete and very detailed set of rules on conflict of laws, which apply both in domestic insolvency proceedings and in the recognition context. The MLCBI, on the other hand, deals with conflict of laws issues only in a minimal manner and focusses instead on uniforms substantive[65] rules for recognition and other coordination and cooperation. It needs to be noted, however, that UNCITRAL is currently

64 As to differences between the EIR and MLCBI on other aspects of cross-border insolvency cf. in particular, the general reports on ‘domestic insolvency proceedings’ and ‘concurrent insolvency proceedings’ in this book: →Trunk (Domestic proceedings) and →Trunk (Concurrent proceedings).

65 ‘Material’ or ‘procedural’, see → Preface.

working on a complementary instrument dealing with conflict of laws in insolvency, which will – from today's perspective – also address conflict of laws in the recognition context[66] and provide in this respect for a very flexible approach[67].

A third difference relates to the role of judiciary discretion at recognition. The EIR's rules on recognition of foreign insolvency proceedings (or decisions), are, in principle non-discretionary: When prerequisites for recognition exist, recognition is granted by law and even the legal effects of recognition are determined by law: conflict of laws and the substantive rules under the applicable law[68]. In contrast, the MLCBI, drawing inspiration from the practice in Common Law countries, refers to a significant degree to judicial discretion[69], although recognition itself is mandatory[70]. It should also not be neglected, that both models (EIR and MLCBI) use numerous general clauses, which may give some space to freedom of assessment.

A further significant difference between the EIR and the MLCBI concerns procedural aspects of recognition. Under the MLCBI recognition is based on a formal recognition proceeding, while under the EIR recognition is basically 'automatic', i.e. it does not require a formal recognition proceeding.

Both the MLCBI and the EIR contain various rules on cooperation and communication as well as certain rights and duties of creditors or insolvency representatives in cross-border insolvency cases[71]. These provisions apply also in the context of recognition of foreign proceedings, but they are not limited to this constellation and will therefore not be addressed here in detail.

A more particular aspect of recognition of foreign insolvencies concerns insolvency-related proceedings (or judgments), which are linked with for-

66 Note by the Secretariat on 'Applicable Law in Insolvency Proceedings', A/CN.9/WG.V/WP.202, prepared for Working Group V (Insolvency Law), Sixty-sixth session, New York, 12–16 May 2025, p.36 – 38.

67 At present, the following text is proposed: 'Upon recognition of a foreign proceeding, the court may grant relief by giving effect to the *lex fori concursus* and other laws applied by the foreign court in accordance with chapter II of these legislative provisions.'

68 Such national rules may, however, include elements of judicial discretion, which is not a concept absent in Civil Law countries.

69 See, e.g., Art.19 and 21 MLCBI.

70 See Art.17 MLCBI; this applies also to the core effects of recognition under Art. 20 MLCBI.

71 Chapters II, IV and V MLCBI.

eign insolvencies. The EIR contains rules on (international) jurisdiction for such proceedings (art.6 EIR) as well as on the recognition of decisions rendered in them (art.32 EIR). This topic is dealt with in detail in another contribution to this book[72].

Overall, the EIR approach gives more legal certainty, while the MLCBI approach is more flexible,

2. Treaties and other uniform law outside the EIR and the MLCBI

Since the beginning of the 19th century, a significant number of treaties have been concluded to deal, either specifically or in a larger framework of international civil procedure, with insolvency (bankruptcy) proceedings. Between EU member states, such treaties (namely, those listed under art. 85) have been superseded by the EIR. Although these treaties still deserve interest from a historical perspective, they will not be analysed in this report.

Two modern texts are, however, interesting for this project: the Council of Europe's Istanbul Convention on Certain International Aspects of Bankruptcy of 1990[73] and the OHADA Uniform Insolvency Act of 2015, which creates a uniform insolvency regime for the 17 member states of the Organization for Harmonization of Business Law in Africa[74]. A short glimpse will also be made at uniform cross-border insolvency law in the banking and insurance sectors.

a) Istanbul Convention on Certain International Aspects of Bankruptcy

The Istanbul Convention, which has not entered into force, can be seen as a predecessor both of the EIR and of the MLCBI. It remains an interesting object of comparison for this book as it deviates to a certain degree from the structures both of the EIR and the MLCBI. The Convention consists

72 See → Trunk (Concurrent proceedings).
73 Text available at https://www.coe.int/en/web/conventions/-/council-of-europe-european-convention-on-certain-international-aspects-of-bankruptcy-ets-no-136-translations (last accessed 07.07.2025).
74 Text in English available at http://www.ohadalegis.com/anglais/telAUGB/1998-Uniform-Act-bankruptcy-proceedings-en.pdf (last accessed 07.07.2025). An earlier version of the UIA was passed in 1998. For details see → Leno.

of five chapters: General provisions, Exercise of certain powers of the liquidator, Secondary bankruptcies, Information of the creditors and lodgement of their claims, Final provisions. Similarly to the EIR, the Istanbul Convention would apply only between member states of the Convention.[75] Taking apart the restricted term definition of 'bankruptcy' in this context[76], the Convention assembles in a rather patchy way provisions on domestic insolvency proceedings, recognition of foreign proceedings and concurrent proceedings. Its focus lies on recognition of foreign proceedings[77], although this term is not used. Many provisions are formulated a way that they can be applied to domestic proceedings (with a cross-border dimension) as well as to recognition of foreign proceedings and in concurrent proceedings[78].

Art. 3 and 4 of the Convention determine the main prerequisites for recognition of a foreign decision 'opening' the bankruptcy proceeding: indirect jurisdiction (basically: COMI, subsidiarily establishment), effectiveness (not necessarily finality) of the foreign decision, no violation of public policy). The Convention does not provide for a formal recognition proceeding. It states the basic conflicts rule of lex fori concursus (Art. 10 – for the recognition context, Art. 19 – for secondary bankruptcy proceedings) but limits the lex fori concursus in the recognition context by 'implementation' rules of the lex rei sitae (Art. 10 (2). Another provision protects 'security' (in rem) 'over land or other property established or recognised by the law of the (recognizing) Party' (Art. 14 (2) of the Convention). On the other hand, 'any Party may permit the foreign liquidator to exercise on its territory wider powers than those laid down in this chapter' (Art. 16 of the Convention). Beyond this, the Convention contains numerous more or less specific substantive provisions, which have mostly a procedural[79], but sometimes also a material character[80]. An unusual provision is Art.11 (1), according to which 'the liquidator's powers as set out in Article 10, paragraph 1, shall be suspended during a two month period commencing the day after the publication of the notice referred to in Article 9.' The policy

75 Cf. Art. 1 (2) of the Convention.
76 See Art.1 of the Convention.
77 Cf. Art.4, 10, 11, 14, 15 of the Convention.
78 See, e.g., Art. 1 (2), 2, 8, 10, 12 et al. of the Convention.
79 See, e.g. Art. 8 – protective measures, Art. 9 – advertisement of liquidator's powers abroad.
80 See, e.g. Art. 5 – partial payment to creditors abroad, Art. 13 discharge by payment or delivery of assets to the 'liquidator', Art. 16 – extension of liquidator's power by recognizing country.

of this provision is questionable as it encourages debtors to move assets to a 'safe haven' during this period[81].

b) OHADA Uniform Insolvency Act[82]

The OHADA Uniform Insolvency Act (UIA) is the first modern large-scale uniform insolvency law not only in Africa, but also globally. It contains a Chapter (Title VII) on cross-border insolvencies.

The UIA applies both to classical bankruptcy proceedings and more flexible restructuring proceedings, but it is limited to commercial insolvencies (art.1 – 2). It also extends to banks and insurance undertakings, in so far as there is no other special regulation (art.1 – 1). Although Title VII covers by its heading international insolvency proceedings in a general manner, the two chapters of this title focus on the recognition of foreign proceedings. Direct jurisdiction is established within the chapter on general provisions of the Act (art. 3 and 3–1), distinguishing between main proceedings (individual debtor's principal establishment or company's registered office) and non-main proceedings (national main centre of operations). This is somewhat in contrast with Title VII, where the distinction between main and non-main proceedings is grounded on other heads of jurisdiction: centre of main interest and establishment.

Within Title VII, Chapter 1 deals with inner-OHADA recognition, while Chapter 2 deals with recognition of third-countries insolvencies. Chapter 1 appears to be inspired by the EIR with its judgment-based approach, while Chapter 2 follows, with some modifications, the MLCBI. Although the heading of Chapter 2 refers only to recognition (of foreign proceedings), some provisions also cover – like the MLCBI – particular aspects of domestic and concurrent proceedings. Thus, the UIA merges two models. An EIR-inspired approach seems to have been chosen for intra-OHADA relations as it fits better for countries with close legal and economic relationships. The MLCBI was apparently regarded more suitable for relations with the 'rest of the world', perhaps because of its flexibility. Interestingly, art.247 subs.2 UIA applies the judgment-based approach to recognition, which is

81 Under Art. 11 (2), only a limited group of creditors (mainly preferential creditors and public creditors) are allowed to enforce their claims during this period, but even this limitation may in some cases be detrimental to the success of the insolvency proceeding, e.g. in reorganization cases.

82 For details see → Leno.

used in Chapter 1, also to recognition under Chapter 2, thus linking the EIR- and the MLCBI-approaches. In contrast with the EIR, art.247 subs.1 UIA uses the term 'res judicata' (*autorité de la chose jugée*) to describe the effects of recognition. This illustrates the link between recognition of foreign judgments in general (with focus on the French legal tradition) and recognition of foreign insolvencies. The term 'res judicata' denotes, in this context, probably only that the foreign decision has the effects given to it under its lex fori concursus and is not open to renewed scrutiny by courts in other OHADA countries. Another significant deviation from the EIR consists in that the UIA does not provide for specific conflict of laws rules. Perhaps this was not regarded necessary, as substantive insolvency law is unified by the UIA and third-country relations were left aside as not being frequent enough to deserve particular rules. The Act appears, however, implicitly based on the lex fori concursus as the governing law.

c) Banking and insurance sectors[83]

On the international level, Unidroit has been working for several years on a project relating to bank insolvency (including cross-border aspects), which has recently been completed with a UNIDROIT Legislative Guide on Bank Liquidation' (2025)[84].

In numerous countries specific rules on insolvencies of businesses operating in certain industries are in place. Typical examples are insolvencies in the financial services sector, in particular for banks and insurances. Such enterprises are sometimes excluded from general insolvency law, sometimes they are included but special rules may prevail[85]. This is also true for cross-border insolvency rules.

In the EU, for example, there are special directives applying to insolvencies of credit institutions and insurance undertakings – the Bank Resolution and Restructuring Directive (BRRD) 2014/59 of 15 May 2014[86] and

83 See also → Pannen/Riedemann.
84 See https://www.unidroit.org/work-in-progress/bank-insolvency/. As to specifics of cross-border bank insolvencies see → Pannen/Riedemann.
85 This is, e.g., the approach of the OHADA Uniform Insolvency Act 2015 (art.1 – 1).
86 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0059 (last accessed 07.07.2025).

for the insurance sector the IRRD directive of 27 November 2024[87] These directives contain very detailed provisions also on cross-border matters, some of which are identical to the EIR. A typical particularity in these two areas is the existence of governmental supervision authorities, which relates also to insolvency matters and may lead to particular rules on jurisdiction, right to file for bankruptcy, insolvency administration, exclusion of parallel proceedings etc. Insolvencies in these sectors are excluded from the sphere of application of the European Insolvency Regulation (art.1 (2) EIR). The MLCBI in principle does not exclude insolvencies in such sectors but leaves the decision to the implementing legislators (art.1 (2) MLCBI).

Some countries exclude the banking and insurance sectors from the sphere of application of their international (or even domestic) insolvency legislation[88], but usually they are not excluded, but priority is given to special legislation in these sectors[89]. An interesting example in this respect is the U.S. Bankruptcy Code, which excludes banks and insurances from domestic proceedings under the Code (sec.109 (b)) but includes foreign insurance companies in Chapter 15 of the Code (sec.1501 (c)(i)).

In Austria, the Insolvency Code does not exclude banks and insurances, but its chapter on international insolvency law contains quite detailed specific provisions for these sectors (sec.243 – 251). Similarly, the Czech Private International Law Act contains specific provisions for cross-border bank and insurance insolvencies (Art.112 – 116 PIL Act), complementing the short general provision on international insolvency law (Art. 111 PIL Act)[90]. The German Insolvency Code also does not exclude banks and insu-

87 Directive (EU) 2025/1 of 27 November 2024 establishing a framework for the recovery and resolution of insurance and reinsurance undertakings, https://eur-lex.europa.eu/eli/dir/2025/1/oj/eng (last accessed 07.07.2025).

88 See e.g. sec. 274 subs.2 of the Romanian Insolvency Act 2014 (as to international insolvency law), the same was true under the former Romanian International Insolvency Law of 2002 (art.2 subs.2).

89 See e.g. sec.2 subs. 4–8 of the Latvian Insolvency Act of 2010, similar Estonia, Lithuania and others.

90 In addition, the Czech Insolvency Act contains detailed provisions on EU-related bank and insurance insolvencies, which address also cross-border situations (sec. 367 – 388c). To compare with, Slovakia has not passed special cross-border rules on banking or insurance insolvencies, but regulates banking and insurance insolvencies (including some cross-border aspects) extensively in Part 6 (sec. 176 – 195a) of its Bankruptcy Act 2004.

rance companies, but special (EU-based) legislation[91] largely supersedes the Code.

3. National legislation

The basic structures of the EIR and the MLCBI can also be found, though with various modifications, in national legislation. Leaving apart those jurisdictions which have more or less literally adopted the MLCBI, one can distinguish legislations which have oriented themselves basically at the EIR but adopted some modifications to deal with non-EU countries, and legislations which have significantly modified the MLCBI or even developed their own original approaches.

The following overview, basically in alphabetical order, will describe in some more detail, though still with a focus on major aspects, the approaches developed by EU and some non-EU countries.

a) EU Member States

The Austrian legislator has tailored its rules of international insolvency law along the lines of the EIR, but chose a somewhat different approach, both in structure and numerous details. The Austrian Insolvency Code begins the Chapter on International Insolvency Law also with general provisions, but they are basically limited to a statement on the priority of the EIR (§ 217). Thereafter, the Code lays down some provisions on the implementation of the EIR, which are followed by provisions on cross-border insolvency not covered by the EIR. Here, the Code starts with provisions on the conflict of laws in insolvency[92] (§§ 221 – 234), followed by some provisions on domestic (Austrian) insolvency proceedings (§§ 236 – 239) and, thereupon, recognition of foreign proceedings (§§ 240 – 242). The following and final subpart of this Chapter deals with specifics of cross-border insolvencies in the financial sector (§§ 243 – 251). Like under the EIR, recognition of foreign insolvencies in Austria is judgment-based and automatic and includes detailed conflict of laws rules. The Austrian law

91 E.g. sec.46b, d e, 53b – d KWG (Kreditwesengesetz), sec.153 – 171 SAG (Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen).

92 As an exception, § 235 contains a substantive rule on protection of good faith recipients of payments.

provides for recognition of foreign main proceedings only on the basis of COMI. Differently from the EIR, Austrian law does not foresee the recognition of foreign non-main proceedings[93]. The number of specific substantive provisions for cross-border insolvencies in the Austrian Insolvency Code is very limited and, basically, reflects provisions of the EIR.

Insolvencies in the financial sector are under the Austrian Code in principle covered by the same rules as other insolvencies. However, cross-border insolvencies of institutions covered by the EU Bank Recovery and Resolution Directive 2015/59/EU and corresponding EU legislation in the insurance sector are the subject of special legislation. §§ 243 – 251 of the Austrian Insolvency Code provide for similar provisions on cross-border insolvencies of banks and insurance companies licensed in other Member States of the European Economic Area (§ 243). Several of these provisions apply also to banks and insurances established in other (third) countries provided they have an establishment or branch in Austria (§ 243 subs.2).

Belgian law regulates cross-border insolvencies mainly in two texts: the Code of Private International Law (Chapter 11), and the Code of Economy Law (Book XX, chiefly in Title VII). The basic provisions are contained in the former text, which contains provisions on their sphere of application (art.116), definitions (art.117), international jurisdiction (art.118), conflict of laws (art.119), and recognition of foreign insolvencies (art.121). Belgium extends to non-EU insolvencies the judgment-based approach of the EIR (cf. art.121 § 1). Recognition of foreign insolvencies from non-EU countries, however, seems to require formal recognition (cf. art.121 § 3 of the Code); in addition, the law refers to the provisions in the Code on the exequatur of foreign judgments, which also requires a particular proceeding. Whether recognition or the exequatur have in this case *erga omnes* effects is not evident (cf. art.121 § 1 in conjunction with art.22 and 23 of the Code). The provisions of the Code of Economy Law on cross-border insolvencies merge elements of the EIR and the MLCBI on cooperation with foreign courts and insolvency representatives. Although they do not explicitly create discretionary powers of the court, they refer at several places to the standard of reasonableness, which may come close to discretion (see in particular art.XX.217 and art.XX.219 § 2).

Croatia is one of the pioneers in legislation on cross-border insolvencies since its first legal regulation of this subject-matter in 1996. Chapter XI

93 As far as direct jurisdiction is concerned, § 63 of the Code goes beyond the EIR, including, in particular 'doing business' and 'property' as grounds for jurisdiction.

of its Bankruptcy Act of 2015, contains rules on international insolvency law (art. 394-427), which apply with respect to states to which the EIR is not applicable. The chapter starts setting international jurisdiction of Croatian courts (art.392 – 393). Thereafter come general provisions (art.394 – 399), followed by detailed provisions on recognition of foreign insolvencies (art.400 – 417 and 424 – 427). A particular subchapter is devoted to the opening of a secondary proceeding in Croatia as a consequence of recognition of a foreign proceeding (art.418 – 423). Croatia follows also in relations with non-EU insolvencies the judgment-based approach (cf. art. 402, 403), referring subsidiarily to general provisions on recognition of foreign judgments (art. 400). Like the EIR, the Croatian law includes in its general provisions detailed rules on conflict of laws, as well as some substantive provisions. Additionally, the subchapters on recognition contain further substantive provisions. In contrast with the EIR Croatia has established a formal recognition proceeding with *erga omnes* effect (art.401 – 408). It has also provided, as an exception to the general rule, for the possibility that the question of recognising a foreign decision opening insolvency proceedings may be determined as a preliminary issue in judicial proceedings (incidental recognition). However, such recognition has only *inter partes* effect (art.409).

The Czech Insolvency Code contains only few summary provisions on cross-border insolvency law, not addressing recognition of foreign insolvencies in a general manner[94]. However, the Czech Private International Law Act of 2012 contains a particular division (Part 6) on cross-border insolvency law. Taking a closer look, it turns out that only one provision in this Part, sec.111 of the PIL Act, deals with cross-border insolvency law in general, while sec. 112 – 116 address bank and insurance insolvencies. One subparagraph deals with recognition of 'foreign decisions in matters of insolvency proceedings' (sec. 111 (5) PIL Act). Prerequisites for recognition are indirect jurisdiction of the foreign court (defined by the debtor's COMI), reciprocity and the non-existence of a Czech territorial proceeding (as to assets in Czechia). In addition, compatibility with Czech public policy is also a prerequisite of recognition (sec. 4 PIL Act). Sec.111 PIL Act does not provide for a special proceeding on recognition of foreign insolvencies. It also does not expressly provide for conflict of laws in the recognition

94 Sec. 7b and 182 of the Insolvency Act. Some complementary provisions to the EIR are laid-down in sec. 426 – 430a of the Insolvency Act, but they do not deal with issues of recognition.

context, but sec. 112 (3) states that the conflict of laws provisions of the EIR 'can be applied' also in cases outside the scope of the EIR, which seems to open a degree of discretion for Czech courts as to conflict of law in the recognition context surprisingly similar to the MLCBI. Sec. 111 (6) PIL Act expressly extends these rules also to 'public preventive restructuring proceedings', along the lines of the EU Restructuring Directive of 2019.

Cyprus, Ireland and Malta can be mentioned here very briefly, as they apply Common Law rules on recognition of (or assistance to) foreign insolvency proceedings[95].

France has a rich practice of recognition of foreign insolvencies on the basis of general rules on recognition of foreign judgments in civil and commercial matters, although the French legislator has not yet passed any specific legislation on cross-border insolvency law. Like the EIR, French law also regards recognition of foreign insolvencies as a matter of recognition of foreign decisions in insolvency matters, primarily of the 'opening' decision of the foreign insolvency proceeding[96]. The prerequisites of recognition are, basically, the existence of a foreign 'insolvency proceeding'[97], indirect jurisdiction (today under the flexible standard of 'characteristic links'/liens caractéristiques)[98] and compatibility with French public policy[99]. Under French law, the full effects of a foreign insolvency proceeding are recognized only on the basis of an exequatur proceeding in France[100]. On the basis of the exequatur, the effect of the foreign proceedings in France are, in principle, determined by the foreign lex fori concursus, but exceptions are under discussion[101].

The German Insolvency Code resembles the EIR in so far as it also distinguishes between general provisions, recognition of foreign insolvencies, and secondary proceedings (in Germany). It also takes the judgment-based approach with the main focus on recognition of the foreign decree opening

95 For Ireland see, e.g. https://bhsm.ie/insights-news/the-recognition-by-irish-courts-of-insolvency-proceedings-instituted-in-the-united-kingdom/ (last accessed 07.07.2025).
96 Cf. Dammann/Sénéchal, p. 707 et seq.
97 Often discussed under the category that the foreign proceeding must nr 'susceptible d'exequatur', see Dammann/Sénéchal, p. 716 – 717.
98 For details see Dammann/Sénéchal, p. 711 – 712.
99 See Dammann/Sénéchal, p.714 – 716. Often, the lack of 'fraude à la loi' is mentioned as a separate category.
100 Dammann/Sénéchal, p.704 – 708.
101 Cf. Dammann/Sénéchal, p.718 – 719.

the insolvency proceeding, adding particular rules on recognition of other insolvency-based or insolvency-related decisions. Like the EIR, the German Insolvency Code contains detailed conflict of laws provisions (which have, like in the EIR, in principle been included in the 'general provisions' on international insolvency law). It also distinguishes between foreign main and non-main proceedings, but in contrast with both the EIR and the MLCBI[102] it accepts also the location of property as a jurisdictional ground for non-main proceedings. In line with the EIR, German law foresees also the recognition of foreign non-main proceedings. In addition, the German Insolvency Code provides for several specific rules of a substantive character, applicable particularly to the recognition context, but there are also some substantive rules in the general provisions of the international insolvency law part of the Code, which apply both to domestic and (recognized) foreign proceedings.

Greece, Poland, Slovenia and Romania have chosen the MLCBI as a basic approach towards recognition of non-EU insolvencies[103]. They provide for a formal recognition proceeding, while restraining the discretionary powers of the court foreseen under the MLCBI. Poland and Romania do not use the conflict of laws rules of the EIR outside the sphere of application of the EIR. Art.397 nr.1 of the Polish Insolvency Act contains only one specific provision on conflict of laws referring to Polish procedural law (lex fori processus) as to the effects of a recognized foreign insolvency proceeding upon civil proceedings in Poland. In contrast, the Slovenian Insolvency Act uses the EIR conflict of laws provisions also for autonomous cross-border insolvency law.

Hungary and Italy have not passed detailed legislation on cross-border insolvency law, but apply general rules on recognition of foreign judgments, which also leads, basically, to the prerequisites of the existence of a foreign insolvency proceeding, indirect jurisdiction and public policy, in the case of Hungary adding the requirement of reciprocity (Art. 114 (1) Hungarian PIL Act).

Portugal has codified its autonomous cross-border insolvency along the lines of the EIR, without adoption of the MLCBI, but with its own concep-

102 The MLCBI does not prohibit this ground of jurisdiction but does not include such proceedings into its rules. The EIR, however, excludes property as a basis for jurisdiction if the debtor's COMI is situated in the EU.

103 For a more detailed analysis see Trunk, in Pannen/Riedemann/Zeuner, p. 453 et seq.

tual deliberations. Title XV of the Portuguese Insolvency Code regulates cross-border insolvency law under the heading of 'Conflict of laws' (in the large sense). It starts – like the EIR – with General provisions, thereafter, follows chapters on Recognition of foreign insolvency proceedings and on 'Particular' insolvency proceedings[104]. The General Provisions include mainly conflict of laws provisions closely following the EIR and which apply also to foreign insolvency proceedings. The chapter on recognition begin with prerequisites of recognition: indirect jurisdiction mirroring Portuguese direct jurisdiction (basically: COMI, registered office or domicile; but extended to cases of an 'equivalent connection') and compatibility with Portuguese public policy. Thereafter come provisions on protective measures, on publication of the foreign proceeding and some technical issues. A particular recognition proceeding is not required, but Art. 293 of the Code refers to 'enforcement' of foreign decisions implying a particular enforcement proceeding.

Slovakia has regulated cross-border insolvencies rather briefly in Part 5 of its Bankruptcy and Restructuring Act, including recognition of foreign proceedings. Foreign decisions in insolvency matters[105] are recognized on the basis of reciprocity (sec. 173 and 175 of the Act). It would seem that indirect jurisdiction and public policy control are further requirements, even though they are specifically mentioned. An interesting provision is sec. 175 (2) of the Act, which grants the recognizing court the seemingly discretionary power (comparable to the MLCBI?) to recognize only 'some' effects of the foreign proceeding and to determine that 'certain effects' of the foreign proceedings are not recognized. Another similarity with the MLCBI can be seen in sec. 175 (3) of the Act, which state that a court has to 'revoke' recognition ex officio if it finds that the prerequisites of recognition are not (or no longer) given. The Act does not mention a formal recognition proceeding, but sec. 175 (3) might imply that such formal recognition can exist.

Spain codified its International Insolvency Law as Book 4 of the Insolvency Code of 2020 (art.721 – 755). Recognition of foreign insolvencies (outside the sphere of application of the EIR) is addressed in art.742 –

104 Secondary proceedings are explicitly treated as a particular case of particular (territorial) proceedings.

105 Recognizable proceedings are defined flexibly: foreign proceedings 'similar' to a bankruptcy (or restructuring?) proceeding under Slovak law (Art. 175 (1) of the Act).

748, which resemble the provisions of the EIR. In contrast with the EIR, the Spanish Insolvency Code contains separate sets of conflict of laws rules for domestic and foreign insolvencies. However, the conflicts rules in the recognition context are determined by reference to the conflict of laws rules in domestic cases, with a small add-on regarding employment contracts (see art.745 subs.1 and art.745 bis). The Spanish Code contains a reciprocity requirement and an additional comity requirement for recognition of non-EU insolvencies (art.721 subs.2). As to recognition of foreign insolvencies, the Code also contains an interesting definition of foreign restructuring proceedings as proceedings 'functionally equivalent' to Spanish proceedings (art.753 subs.2), while insolvency proceedings generally are directly defined in art.742 subs.1 nr.1)[106].

b) Third countries

Outside the EU, Switzerland has well before the EU developed its own approach to cross-border insolvencies. The Swiss Private International Law Act (IPRG) of 1987 contains a chapter on recognition of foreign insolvencies (Chapter 11, art.166 – 177)[107]. The basic approach to recognition of foreign insolvencies is judgment-based. Recognition of the foreign decree opening an insolvency proceeding leads, in principle, to a simplified liquidation proceeding in Switzerland under Swiss law ('*Minikonkurs*'). As this approach turned out to be too restrictive and costly in many cases, the Swiss legislator revised these rules in 2019, allowing (under certain conditions) for recognition without the simplified Swiss 'mini proceeding', and renouncing also to the earlier reciprocity requirement for recognition. However, Swiss law still does not provide for a differentiated set of conflict of laws rules for cross-border insolvencies, which would also apply to foreign insolvencies. A brief conflicts rule has, however, been introduced in 2019 in art.174a subs.4 IPRG, which refers to the lex fori concursus of the foreign proceeding 'under the observance of Swiss law'. One element

106 Cf. https://www.garrigues.com/en_GB/new/international-insolvency-three-novelties-introduced-insolvency-law-reform-bill.

107 Cross-border aspects of Swiss insolvencies are – with the limited exception of art. 174 bi IPRG – not regulated in the Private International Law Act, but briefly and rudimentarily addressed in the Swiss Execution and Bankruptcy Act. Further on the topic → Staehelin/Kleider; Spahlinger, p. 220; Dutoit, p. 747 et seq.

of Swiss recognition law is some preference for Swiss-domiciled creditors (art.172 subs.1 b) and subs.2, art.174 and art.174a IPRG).

Norway, a non-EU country, which is however a member of the European Economic Area agreement and in close relations with the EU, has adopted rules on recognition of foreign insolvencies which closely resemble the EIR. North Macedonia, a non-EU country, but EU accession candidate, has adopted rules on cross-border insolvencies, which are mainly inspired by Croatian law and thus indirectly by the EIR. The same is true for Bosnia and Herzegovina, with the particularity that each of its constituent entities (Federation of Bosnia and Herzegovina, Republika Srpska and Brčko District) have passed their own Bankruptcy Acts, which apply both to 'interlocal' and to 'international' insolvencies.

In recent years numerous countries have aligned their cross-border insolvency law with the MLCBI[108], which has thus grown into a sort of standard for good rules on cross-border insolvency worldwide. In addition, UNCITRAL has continued its work, having added the MLIJ and the MLEGI, and conducting currently work on an instrument about conflict of laws which will – though probably in a very mitigated form – also apply to the recognition context[109]. This does not mean, of course, that the MLCBI is perfect and could not be improved. The comparative overview shows, however, that the MLCBI is not necessarily incompatible with the EIR, but can be combined with it in different ways.

B. Prerequisites of recognition

1. Prerequisites of recognition in general

The term 'prerequisites of recognition' refers to a set of elements that, in current cross-border insolvency law regimes, often appear under other labels. Some of these elements define the scope of recognition rules (when specifically tailored for insolvency cases); others serve as grounds for refusing recognition; some define the object of recognition, i.e. determine what must be present for recognition to be possible, while others constitute explicit requirements for recognition. Additionally, certain elements may

108 For example, Australia, Brazil, Canada, Japan, Mexico, Panama, Saudi Arabia, Singapore, South Africa, South Korea, the UAE (for the DIFC), the UK, Ukraine, the U.S. Reports from selected individual countries are contained in Ho (2017), passim.

109 See supra note 67.

influence the legal effects of recognition or the granting of measures that follow from it.

In systems where recognition is not automatic but requires a judicial decision, the procedural steps involved may themselves be considered a recognition requirement.

Broadly speaking, any factor that determines whether recognition produces legal effects qualifies as a recognition requirement. Such effects include the extension of legal effects under the lex fori concursus, the recognition-related effects stipulated by the law of the recognizing state, or effects established independently by cross-border insolvency regulations such as the MLCBI.

Despite variations across legal systems and the inherent flexibility of 'recognition requirements' as a category, certain fundamental elements remain consistent and warrant closer analysis.

First, there must be insolvency proceedings pending in the forum concursus. The proceedings may be required to meet specific criteria for recognition. These criteria can be structural, i.e., the process must be judicial or administrative, involving the debtor's divestment, a debtor-in-possession regime, or both. Additionally, a qualified receiver may need to be appointed. Furthermore, they might be procedural prerequisites, i.e., the debtor must meet certain conditions, such as being insolvent, in financial distress, or subject to proceedings for other legally recognized reasons. Finally, further criteria might be debtor-specific: some legal systems impose restrictions on which debtors qualify—for example, the debtor may need to be a trader or may be excluded if operating in certain sectors (e.g., banking and insurance).

Often, recognition is not granted merely because insolvency proceedings exist in a foreign state. Instead, the forum must be determined based on specific criteria of so-called indirect jurisdiction.

Another universal requirement is that recognition must not violate the fundamental values and principles of the recognizing state, commonly referred to in private and procedural international law as 'public policy'.

Let us examine how these three core requirements—pending insolvency proceedings, jurisdictional criteria, and public policy considerations—are reflected in current legislation, particularly in the EIR and MLCBI. In the next section, we will also discuss the procedural aspect of recognition.

2. A pending foreign insolvency proceeding: proceedings covered by recognition regimes

The existence of foreign insolvency proceedings is explicitly recognized as both an object and a prerequisite for recognition in the MLCBI. Article 17 states that 'a foreign proceeding shall be recognized if ... [it] is a proceeding within the meaning of subparagraph (a) of article 2.'

In contrast, the EIR defines 'insolvency proceedings' as a way of establishing its scope of application. Article 1 states: 'This Regulation shall apply to public collective proceedings' followed by a definition of the necessary characteristics for recognition under the Regulation.

Importantly, a foreign procedure that does not meet these definitions is not necessarily excluded from recognition entirely—it may still be recognized under other legal frameworks. However, such recognition would fall outside the specific scope of the EIR or the MLCBI, raising broader questions about the interplay between different legal sources governing recognition. The topic cannot be fully addressed here[110]; suffice it to mention that in EU law, insolvency proceedings are excluded from the main framework of judicial cooperation in civil and commercial matters, i.e. Brussels Ia Regulation, whose article 1, second paragraph, letter b), provides that the regulation does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings'. It is a matter of debate whether this provision excludes only the proceedings to which the EIR applies, or those falling under the insolvency matter at large, regardless of their inclusion into the remit of the EIR. This issue used to be less problematic in the past, when the Regulation 1346/2000 applied to insolvency proceedings of all sorts, with just a few minor exceptions. Since the reception of Directive 2019/2013 in Member States, however, the question whether pre-insolvency proceedings and restructuring frameworks aimed at ailing companies can, at once, fall under the carve-out of article 1 of Brussels Ia Regulation and out of the sphere of application of the EIR has become increasingly relevant. Evidently, this is not only an issue regarding the wording of the Brussels Ia provision, since it involves general questions regarding the very nature of such innovative proceedings and framework,

110 On the complex interactions between different cross-border insolvency regimes in English law: see, McCormack, p. 218 et seq.; Wilson/Perkins, in Moss/Fletcher/Isaacs/Smith/Paulus, mn 5.04 ss.

whose features oftentimes make it hard to fit them into the traditional categories underlying the structures of EU instruments of cross-border civil procedure and insolvency law[111].

Both the MLCBI and the EIR provide definitions of 'insolvency proceedings.' The MLCBI's definition in Article 2(a) is broad, describing insolvency proceedings as 'a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' This definition closely mirrors that of the 1995 Brussels Convention, which later became Regulation 1346/2000[112].

The recast EIR adopted a more detailed definition, adding publicity as a requirement—something the MLCBI does not explicitly mandate (but may be implicit in the 'collective' requirement, since the involvement of creditors intuitively requires that they are informed that the proceedings are underway).

Despite their similarities, the two definitions serve different purposes. Under the MLCBI, the definition determines what may be recognized. In contrast, under the EIR, the definition guides Member States in identifying which national procedures qualify for inclusion in Annex A—a list of recognized insolvency procedures[113]. In fact, recognition under the EIR is only available to procedures listed in Annex A, regardless of whether they meet the definitional criteria of Article 1(1). Conversely, procedures not listed in Annex A—even if they meet the definition—are excluded from the EIR's recognition rules and must rely on other legal instruments[114].

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111 For a general overview of the debate, and for further literature references, see Schmidt IIR 2021, 86.

112 On the MLCBI notion of 'foreign insolvency proceedings', Mevorach in Bork/Veder, mn. 1.2.02 et seqq.; Silvestri Dir. fall. 2025, 694 (705).

113 Bork/Mangano, mn 2.51; Dammann/Sénéchal, p. 115 et seq.

114 See recital no. 9 to the EIR: 'This Regulation should apply to insolvency proceedings which meet the conditions set out in it, irrespective of whether the debtor is a natural person or a legal person, a trader or an individual. Those insolvency proceedings are listed exhaustively in Annex A. In respect of the national procedures contained in Annex A, this Regulation should apply without any further examination by the courts of another Member State as to whether the conditions set out in this Regulation are met. National insolvency procedures not listed in Annex A should not be covered by this Regulation'. The recast Regulation, thus, adopts (and expands) the position taken by the ECJ, 22.11.2012 -C-116/11, ECLI:EU:C:2022:783- *Bank Handlowy w Warszawie SA* case, §§ 31–35.

The EIR's 'list approach' works effectively within the EU, where Member States operate within an integrated legal framework. However, it presents challenges when Member States reform their insolvency laws. For example, when implementing Directive 2019/1023, disputes arose over whether certain new procedures should be included in Annex A. Nevertheless, the list approach has a key advantage: it eliminates litigation over whether a specific proceeding falls within the EIR's scope, as recognition is automatically granted to listed procedures. This suits the EIR's automatic recognition model, which seeks to minimize the recognition requirements.

On a global scale, however, the list approach is impractical due to the significant diversity of legal systems and frequent, uncoordinated legislative changes[115]. The MLCBI instead adopts an open-ended definition, requiring courts to assess whether a foreign procedure meets the criteria of Article 2. In practice, courts often rely on expert testimony on the insolvency law of the foreign state. While this adds costs (mainly financial rather than time-related), it can deter the use of the MLCBI in smaller cases.

The MLCBI's deliberately broad definition has allowed it to adapt over time, accommodating evolving insolvency frameworks. Over the past two decades, insolvency law has shifted focus away from traditional liquidation proceedings, and away from the assumption that judicial proceedings are the primary mechanism for handling financial distress. This trend has led toward the emergence of negotiation-based approaches, where courts play a limited oversight role to safeguard stakeholder interests. As a result, procedures traditionally not classified as insolvency proceedings—such as voluntary winding up of solvent companies or England's Part A1 moratorium—have been recognized under the MLCBI[116]. Furthermore, in jurisdictions enacting the MLCBI recognition has been at times granted to proceedings whose opening was required by supervisory regulations applicable to that

115 Further guidance on the notion of 'foreign insolvency proceedings' can be found in the Guide to Enactment and Interpretation to the MLCBI (mn 65 et seq.): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf

116 An Australian judgment recognized an English Part A1 moratorium under the MLCBI: see *Re Hydrodec Group Plc* [2021] NSWSC 755, in *jade.io*; foreign voluntary winding up proceedings have been regularly recognized by US courts: e.g., *In re Betcorp Ltd.*, 400 B.R. 266 (Bankr. D. Nev. 2009), in www.casetext.com.

debtor[117], or stemming from a deliberation of the shareholders[118], merely because under the *lex fori concursus* such proceedings were designed to address *also* situations of insolvency.

The EIR, by contrast, has been more selective. Annex A does not include many modern insolvency mechanisms, despite EU encouragement for their adoption. This is due not only to the list approach but also to four additional factors.

First, the definition in Article 1 EIR is stricter than that of Article 2 MLCBI, particularly by requiring proceedings to be public. This has, for instance, prevented a significant number of restructuring frameworks adopted by Member States in the enactment of Directive 2019/1023. A case in point is the German *Restrukturierungssache*, which, if held confidentially, with no notice of its filing being given on public registers, does not fall under the remit of the EIR[119].

Second, proceedings listed in Annex A not only qualify for expedited recognition under the EIR but are also affected by rather restrictive rules on direct jurisdiction. If the debtor's COMI is within the EU, only the Member State where such COMI is to be found will have, in principle, jurisdiction to open a proceeding, while a more limited competence is left for Member States where the debtor has an establishment. No other State may open a proceeding, namely relying on less restrictive criteria (such as the debtor having assets within the territory of the State). Such considerations have led some Member States to exclude some proceedings from Annex A. For instance, the UK retained company voluntary arrangements and schemes of arrangement outside Annex A during the EIR recast, to ensure their accessibility to foreign European companies with limited UK ties[120].

The third and main factor contributing to the EIR's restrictive stance lies in a key distinction between the EIR and the MLCBI, already mentioned above: the EIR focuses on recognizing judicial decisions within insolvency proceedings, while the MLCBI recognizes the proceedings themselves, or

117 Re Standford International Bank Ltd [2010] EWCA Civ. 137, where an English court recognised a liquidation pending in Antigua and Barbuda against a company that had not met certain disclosure obligations under the International Business Corporation Act in force in that jurisdiction.

118 In re Betcorp Ltd, 400 B.R. 266 (Bankr. D. Nev. 2009).

119 For further discussion on whether confidential *Restrukturierungssachen* qualify for recognition, see Abel/Herbst in Morgen StaRUG § 86, mn 16 et seq., and literature cited therein.

120 → McCormack.

rather treats the pending of a foreign insolvency proceeding as a precondition for grating relief.

This fundamental difference shapes how recognition operates under each framework and explains their divergent approaches to defining insolvency proceedings.

The EIR requires not only that the procedure to be recognised be among those listed in Annex A, but also that in the same procedure a court must have rendered at least a decision qualifying as a 'judgment to open the procedure', as defined in Art. 2, n. 7. The recognition of an opening decision conditions the recognition of all subsequent decisions made by the insolvency court, as it appears from the wording of art. 32: recognizable judgments must have been handed down by the court 'whose judgment concerning the opening of proceedings is recognised in accordance with Article 19' (however, 'judgments deriving directly from the insolvency proceedings and which are closely linked with them' may exceptionally qualify for recognition under the EIR). Subsequent judgments are those concerning 'the course and closure of insolvency proceedings, and compositions approved by that [the opening] court'. Finally, judgments 'relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it' also fall under the EIR's recognition regime (art. 32, § 1, last sentence). Despite such judgments are made before the formal opening of the proceeding, they usually aim at anticipating some of the effects that will stem from the opening judgment and are given in the expectation that the proceeding will be eventually opened.

Article 32 essentially requires insolvency proceedings to follow the traditional model, whereby proceedings begin with a court order that establishes the necessary conditions and initiates the process. These proceedings are marked by a predefined series of judicial measures and ultimately conclude with a closure order that fully or partially reverses the effects of the opening decision. It is true that the term 'opening decision,' as defined by the EIR, is broad in scope, since it encompasses not only the formal decision to commence proceedings but also the appointment of a provisional liquidator - an act that, strictly speaking, would more appropriately fall under the 'provisional decisions' mentioned in the final sentence of Article 32(1)[121]. Despite its arguably excessive breadth, the concept of an opening decision remains essential to the EIR. Consequently, the regulation is ill-suited

121 Bork/Mangano, mn 5.15 et seq.

to cover procedures where court intervention is merely optional (as in instruments similar to the English Part A1 moratorium) or where the only judicial decision is the closure of proceedings. This occurs, for instance, in certain Italian restructuring agreements (*accordi di ristrutturazione*, which are listed in Annex A but may involve court intervention solely to approve an agreement between the debtor and creditors, with no actual 'opening decision' ever being rendered)[122].

National legislations based on the 'decision-recognition paradigm' face the same issue. Italian law, for example, treats foreign insolvency proceedings under general provisions on recognition of civil and commercial judgments. In one instance, a territorial court (*Tribunale* of Perugia) was faced with a request of recognition of the automatic stay stemming from the filing of a Chapter 7 petition; noting that the representative for the U.S. proceedings did not seek the recognition of a court order under article 67 of Law No. 218/1995, the *tribunale* managed to overcome the obstacle by recognising the U.S. court clerk's certification of filing of the petition under article 68 of the same Law (providing recognition of acts from public officials)[123]. Such a pathway looks rather serendipitous, and the case in question shows that such legislative obstacles pay little service to a seamless management of cross-border cases.

In summary, the EIR appears to require insolvency proceedings to follow a defined structure. In contrast, the MLCBI simply mandates the existence of insolvency proceedings, however structured —with the proviso that they are collective, either judicial, or administrative, and that they involve judicial oversight, fall under insolvency law, and aim at the debtor's reorganization or liquidation. Unlike the EIR, the MLCBI remains neutral regarding the sequence of acts and judicial pronouncements shaping the proceedings.

The downside of the MLCBI approach of not addressing recognition of judgments specifically has notoriously emerged in the context of cross-border restructurings, whereby courts of enacting States, seized with requests of recognition of debt discharge orders effecting schemes of arrangements, have shown diverging stances regarding the possibility of using the MLCBI

122 More on the *accordi,* D'Attorre, p. 72–73. However, oftentimes a *commissario giudiziale* (a practitioner listed in Annex B) may be appointed by the court as soon as the debtor files the petition: the court decree appointing the practitioner seems to be falling under the EIR notion of 'opening judgment'.

123 Trib. Perugia, 1.3.2021, in Il Fallimento e le altre procedure concorsuali (Fall.) 2021, 1124 et seqq., with comment by Panzani.

for such purposes[124]. These divergences have prompted UNCITRAL to pass the 2018 Model Law on the Recognition of Insolvency Related Judgments to address an issue that the EIR, on the contrary, has dealt with from its inception.

The fourth and last factor lies with the fact that, unlike the MLCBI, the EIR seems to require that proceedings eligible for recognition must be opened upon the showing of a state of financial distress of the debtor (however defined): such a requirement is apparent, *inter alia*, from article 34 EIR, which prohibits the re-examination of the debtor's insolvency by the judge requested of the opening of a secondary proceeding, implying that the debtor's financial state must have been scrutinised by the court opening the main proceeding. This is true also for proceedings which share a common structure with traditional insolvency court proceedings, despite being designed for additional purposes (e.g. for supervision on certain entities, like cooperatives or financial undertakings)[125].

In conclusion, a few legislations of EU Member States finally deserve a mention. In jurisdictions with regimes specifically designed for recognition of decisions rendered in foreign insolvency proceedings, the requirement under examination aims at telling decisions made in insolvency proceedings (whose recognition is regulated by special rules) from ordinary civil and commercial judgments (whose recognition is regulated by ordinary provisions). It is the case, e.g., of Spain (article 742 LC), Germany (§ 343 InsO) and Portugal (art. 288 CIRE). Statutory definitions of insolvency proceedings, however, are rare: among the three provisions just mentioned, only the Spanish contains an express definition, that is based on that of the MLCBI. Whilst notions of '*ausländischen Insolvenzverfahren*' and '*processo estrangeiro*' are thus left to interpreters. German commentators predominantly employ an open-ended definition highlighting a few pivotal

124 The UK Supreme Court declined recognition of judgments under the Cross-border Insolvency Regulations in Rubin v. Eurofinance SA [2012] UKSC 46, § 144, in *supremecourt.uk/cases*. US courts tend to be favourable: e.g., In *re Diebold Nixdorf Dutch Holding B.V., Case No. 23–90729, DRJ, Banrk. S.D. Texas, 7/8/2023*, recognising a Dutch 'WHOA'; *In re Oversight and Control Commission of Avanzit*, SA 385 BR 525, Bankr. S.D.N.Y. 2008, recognising a Spanish *convenio*.

125 A case in point is the Italian *liquidazione coatta amministrativa*, whose structure closely mirrors that of liquidation proceedings for ordinary companies (and it is thus listed in Annex A), but whose opening does not always require the debtor's insolvency.

structural and functional similarities between German and foreign insolvency proceedings[126].

In jurisdictions where 'insolvency decisions' are recognised under the general regime for civil and commercial judgments, the notion of 'judgment', instead, is decisive, though structural and functional commonalities between the local and the foreign proceedings may still be relevant to identify the insolvency process as a judicial proceeding from which a 'judgment' may emanate[127].

3. Indirect jurisdiction

Having concluded the analysis of the first constant requirement for the recognition of foreign insolvency proceedings across various regimes, we now turn to the second requirement: that the proceedings seeking recognition must be pending not just in any foreign State, but in a State identified by precise jurisdictional criteria.

This requirement, commonly found in general recognition regimes for civil and commercial judgments across many legal systems, serves together with other criteria, to minimize conflicts of recognition. It prevents situations where the State receiving the recognition request is confronted with multiple insolvency proceedings pending in different states, each claiming exclusive authority over the debtor's assets and insolvency process. Such conflicts could arise between competing insolvency bodies or in terms of the substantive effects of the proceedings, impacting the debtor's management powers, creditor rights, and ongoing contracts.

Theoretically, such conflicts may be resolved by other means—such as prioritizing the first proceedings to be opened or the first to seek recognition—the reliance on indirect jurisdiction criteria ensures that recognition is granted based on a substantial connection between the debtor and the forum concursus. Without such criteria, recognition would be determined by arbitrary factors, such as which court processed the opening or recognition more quickly, rather than by substantive legal considerations.

126 Trunk, p. 267 et seq.

127 For Italy, e.g., see Baccaglini, p. 42 et seqq., who concludes that an opening 'judgment' should be understood as a judgment ascertaining the preconditions required by the foreign *lex concursus* for the opening of the insolvency proceedings, much in the same way as an ordinary judgment ascertains rights, liability and obligations of the parties in dispute.

On the other hand, indirect jurisdiction alone does not prove effective in cases where jurisdiction is disputed, and concurrent 'putative' proceedings in different States each claim to have been opened in the proper forum (in other words, in cases of positive jurisdictional conflict)[128].

This is the reason why usually different methods concur, as it is the case of the EIR, whose rules on recognition allow the circulation of effects of proceedings regarding debtors whose COMI is found within the EU, and grant recognition to the first of such proceedings opened in time (so-called 'prevention criterion').

Additionally, an indirect jurisdiction test aims at discouraging foreign States from adopting exorbitant direct jurisdiction criteria—those that establish jurisdiction based on a tenuous or even fictitious connection between the debtor and the State. This, in turn, helps preventing forum shopping, which, while not inherently problematic, can lead to abuses detrimental to creditors. Creditors have a legitimate expectation that insolvency proceedings will be handled in a jurisdiction foreseeable to them, governed by laws they can anticipate. This expectation aligns with the principle found in many insolvency regimes that jurisdiction also determines the applicable law (*Gleichlaufsprinzip*).

The jurisdictional test in the recognition context may present itself in significantly different shapes.

Under the MLCBI, as well as under many national regimes[129], the requirement of indirect jurisdiction leads to a formal judicial review during recognition proceedings. The court in the recognizing state must assess whether the foreign court had appropriate jurisdiction based on established criteria. Furthermore, under the MLCBI the jurisdictional basis influences the effects of recognition: proceedings in the debtor's 'COMI' produce broader effects than those based on the debtor's 'establishment' in a foreign state.

In contrast, the EIR does not require courts of recognition to examine indirect jurisdiction. Instead, courts must accept the jurisdictional assessment made by the opening court. However, the debtor's COMI within the EU determines whether the automatic and facilitated recognition system of

128 A further problematic case, where COMI is shifted across two States' boundaries pending the opening of one the 'putative' proceedings is examined by → Piekenbrock, who argues that the solution of such cases warrants different criteria than indirect jurisdiction and prevention (i.e., lis pendens).

129 Italy: article 64(1)(a) of Law no. 218/1995; Spain: article 742(1)(3) LC; Germany: § 343(1)(1); Portugal: article 288 CIRE.

Articles 19 et seq. of the EIR applies. This system is reserved for debtors with the strongest ties to the EU—those 'essentially at home' in the Union. If a debtor's COMI is outside the EU, recognition depends on national laws, which are often more restrictive than the EIR's automatic recognition framework.

In the EIR, COMI and establishment thus serve as direct jurisdiction criteria, determining which EU courts may open insolvency proceedings and which insolvency law applies.

The structure of the EIR aims to replicate a national-level insolvency system across the EU: insolvency proceedings are concentrated in a single court, which assesses all legal prerequisites, including insolvency status and the debtor's qualifications. EU law adds jurisdictional criteria to this assessment, ensuring that courts of other Member States only need to verify that proceedings do not violate public policy. The logic of automatic recognition aligns with this approach by minimizing potential grounds for refusal.

The feasibility of concentrating insolvency proceedings in a single court within the EU is justified by mutual trust among Member States. EU courts are presumed equally competent in applying EU law, and national insolvency procedures are assumed to respect party rights at all stages, including appeals. This trust is absent at the global level, making it necessary for both the opening court and the recognizing court to evaluate jurisdiction independently, often following MLCBI-inspired models. Such a system can accommodate both automatic and formal recognition approaches, as seen in jurisdictions like Germany and the MLCBI framework.

To complete the analysis of the second constant requirement for recognition, it is important to acknowledge that COMI and establishment are not the only possible jurisdictional criteria. In fact, the use of COMI has been increasingly criticized. Despite the longevity of the EIR and the MLCBI, the precise meaning of COMI remains controversial. Additionally, critics argue that rigid reliance on COMI discourages alternative jurisdictional approaches that could better respect party autonomy and efficiency considerations. For instance, a debtor may prefer to initiate proceedings in a jurisdiction with more effective insolvency procedures or better-qualified professionals, or where the legal framework is more robust than in the COMI state. To this end, some authors have suggested that COMI should give way to a rule whereby the debtor is entitled to elect its insolvency forum in advance and obliged to 'commit' to its choice in case of insolvency; thus -these commentators argue- the debtor's commitment ought not be disregarded altogether when deciding on the recognition of the proceedings initiated in the elective forum[130].

Nevertheless, despite these criticisms and alternative proposals, COMI retains *de jure condito* its dominant role in cross-border insolvency law.

Finally, it should be noted that indirect jurisdiction criteria do not necessarily have to mirror the direct jurisdiction rules of the recognizing state. That is, a state may apply different standards when defining which foreign proceedings it recognizes versus which domestic proceedings its own courts can open (contrary to the *Spiegelbildprinzip* in German legal doctrine). However, maintaining separate standards for direct and indirect jurisdiction increases the risk of parallel proceedings—where a domestic proceeding coexists with a foreign-recognized one. If such a scenario is adequately regulated, as in the MLCBI, it may not pose significant issues. However, where the goal is to avoid parallel proceedings altogether, aligning direct and indirect jurisdiction rules may be preferable.

4. Public policy

The final constant requirement for recognition is respect for public policy, ensuring that recognition does not conflict with fundamental principles of the recognizing legal system. Public policy considerations may influence both whether recognition is granted and what effects recognition produces.

Under the EIR, violation of public policy is the sole ground for refusing recognition of judgments rendered in foreign insolvency proceedings (Article 33)[131]. The MLCBI, by contrast, adopts broader language, stating that 'nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State' (Article 6).

The distinction in wording reflects differences in the roles played by the recognizing courts in each framework. In the EIR, courts outside the opening state play a largely passive role: upon recognition of a foreign insolvency judgment, they acknowledge its effects and adjudicate disputes accordingly, respecting the lex concursus. Thus, public policy considera-

130 See Casey/Gurrea-Martínez/Rasmussen, passim.

131 Bork/Mangano 5.43 ss.; Thole in Brinkmann EIR art. 33; Undritz in Schmidt EuInsVO art. 33, with extensive reference to German caselaw; Thole in Stürner/Eidenmüller/Schoppmeyer EUInsVO art. 33; Paulus EUInsVO art. 33; Oberhammer/Scholz-Berger in Bork/van Zwieten EIR art. 33, mn.

tions may only lead to non recognition of the foreign judgment. The MLCBI, however, envisions a more active role for the recognizing court, which may assist the foreign court by granting necessary relief measures. This greater involvement justifies the broader wording of Article 6 MLCBI, whereby public policy becomes a key consideration in deciding not only whether, but also how, to grant assistance to the foreign proceeding's representative[132].

The content of public policy is largely left to the interpretation of courts and to a case-specific assessment[133], that adds a layer of discretion to both recognition regimes. A widely accepted view holds that public policy may be either substantive or procedural[134]. Substantive public policy refers to a set of fundamental rights and values (usually set down in constitutions, human rights law conventions, or sources of law ranking higher than ordinary legislation) that might be touched upon by the effects that the opening and the course of the foreign insolvency proceedings bears on the individual rights of persons involved (mainly, the debtor and its creditors[135]), or on wider policies pursued by the recognizing State, on which cases involving larger businesses may have a significant impact (labour or industrial policies; fiscal or monetary policies; national security etc.). Procedural public policy, on the other hand, includes minimum standards of due process, that need to be observed in the foreign insolvency proceedings, such as the right to be heard, timely notice of the commencement of the proceedings, procedural fairness, equal treatment of the parties, judicial impartiality, and availability of appeals.

Infringement of public policy may stem either from significant differences between the insolvency regime of the foreign country and of the recognizing country, or from a wrongful conduct of the proceedings abroad, or a gross mistake in the application of the lex fori concursus by the

132 Van Zwieten in Bork/Veder, mn 1.6.01 et seq.

133 A reasoned report on caselaw on the public policy exception within MLCBI can be found in the Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency (p. 20 et seq.): https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf

134 ECJ 2.5.2006 -C-341/04, ECLI:EU:C:2006:281- *Eurofood IFSC Ltd.*; Bork/Mangano, 5.54 – 5.56.

135 For instance, *In re Toft*, 453 B.R. 186, 55 Bankr. Ct. Dec. (LRP) 61 (Bankr. S.D.N.Y. 2011) (CLOUT case 1209), in *casetext.com* (Stati Uniti) dismissed a request for relief aimed at enforcing an e-mail interception order made by a German court, citing 18 U.S. Code § 2511 (the Wiretap Act) and the Fourth Amendment to the U.S. Constitution.

foreign insolvency court. In the latter case, a review of the case under the public policy exception may even cross the line of a *revision au fond*. Each of two prongs of the public policy exceptions listed above (substantive and procedural) may be successfully pleaded independently from the other: thus, a foreign judgment consistent with the recognizing country's procedural public policy may yield results that go contrary to the same country's substantive public policy[136]. Conversely, a judgment that basically upholds the recognizing country's fundamental substantive law values (or even bears the same effects that an equivalent judgment would have had if passed under the local insolvency regime) may be the result of an unfair proceeding, thus denied recognition.

5. Reciprocity

A further prerequisite of recognition that deserves a separate mention is reciprocity. This requirement is obviously absent from multilateral regimes, such as the EIR, from bilateral treaties, and is not found in numerous legislations unilaterally adopted by States. Importantly, it is not included in the MLCBI, although a few enacting States have added a reciprocity clause to their national regimes based on the UNCITRAL instrument[137]. Only a few jurisdictions maintain this tool in place. Notable examples (China, Russia, and South Africa) are explored in other contributions of this book.

The purpose of reciprocity may be twofold. On the level of relations between States, it may work as a tool for encouraging foreign States to espouse a friendly posture in handling the recognition of their insolvency cases by threatening to retaliate by denying recognition to any future proceedings of the requested State. On a different level, reciprocity may be employed to discourage debtors from forum shopping in certain jurisdictions, namely those in which a potential parallel proceeding opened in the recognizing country may not, in turn be recognized, thus jeopardizing the interests of local creditors, and hindering attempts at achieving some workable form of coordination of proceedings.

136 E.g., *In re Metcalfe Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) in *casetext.com* sanctioned a third-party non-debtor release ordered by a Canadian bankruptcy court under less stringent conditions than those prescribed by U.S. law.

137 South Africa, Mauritius, Mexico, the British Virgin Islands, Romania, Uganda and Zimbabwe: → Boraine; generally, on the MLCBI and reciprocity, Yamauchi IIR 2007, 145.

The scrutiny of the reciprocity requirement may range from a strict, *de facto* reciprocity test, whereby recognition is granted if and only the foreign jurisdiction has ever recognised a proceeding initiated in the requested stay, to a looser, *de jure* reciprocity assessment, whereby it suffices that under the law of the foreign insolvency forum proceedings commenced in the recognising state may be granted recognition under comparable circumstances. As illustrated in another contribution contained in this book[138], China has shifted from the former standard (developed under article 204 of the 1982 Law on Civil Procedure[139]) to the latter standard over the years.

Furthermore, reciprocity may be positive or negative, that is recognition may be granted if and only the requesting State would be ready to recognise the forum's proceedings (positive reciprocity), or recognition may be denied to the extent the law of the requesting State does not allow recognition of the forum's proceedings (negative reciprocity). The former (stricter) approach is the most common. The latter (somewhat more defensive) approach is followed, for instance, by Zimbabwe and Spain[140].

These two jurisdictions also exemplify two further versions of reciprocity that are worth mentioning: Zimbabwe, that has enacted a modified version of the MLCBI, has opted a 'blacklist' approach, meaning that proceedings pending in State included in a list made by the Minister of Justice will not be given recognition in the African State. Spain, on the other hand, denies recognition to foreign proceedings either 'absent reciprocity' or in case of 'repeat lack of cooperation' by the authorities of the requesting States ('*falta sistemática a la cooperación por las autoridades de un Estado extranjero*': art. 721(2) *Ley Concursal*, or LC). Thus, Spanish law envisions a combination of *de facto* and negative reciprocity, leaving in the hands of its judges a significant amount of discretion.

Lastly, reciprocity is a concept contiguous to that of comity, which is in turn a central notion in American international private law and procedure, though often employed also in other common law jurisdictions[141]. It is well known that, since the Supreme Court handed down the famed judgment in *Hilton v Guyot*[142], American courts have cited comity conspicuously, and in

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138 → Shi/Yan.

139 Cuniberti, p. 279 et seqq.

140 On sec. 152(3) and (4) of the Zimbabwean Insolvency Act 7 of 2018, see → Boraine.

141 E.g. South Africa: → Boraine.

142 Hilton v. Guyot, 159 U.S. 113 (1895): ''Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to

all areas of (private and even public) international law[143]. In the context of cross-border insolvency, the notion of comity has long prevented virtually any recognition of foreign insolvencies[144], and it has often hindered cooperation with bankruptcy courts abroad even after the enactment of section 304[145]. Curiously, judgments made in recent years have instead employed comity as an argument in support of enhanced cooperation[146]. Being that notion so closely tied with developments of U.S. law particularly, it warrants no further examination here, although it may still be relevant for a few jurisdictions within the EU with a common law heritage (Cyprus, Malta, Ireland).

C. Procedure for recognition

I. In general

As previously mentioned, existing cross-border insolvency frameworks generally follow two main approaches to the recognition of foreign proceed-

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the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws'.

143 Dodge Columbia LR 2015, 2071.

144 Matter of Berthoud 231 Fed. 529 (S.D.N.Y. 1916) dismissed in 238 Fed. 797 (2d Cir. 1916). See Krause/Janovsky/Lebowitz Fordham LR 1996, 2591; Lee BLJ 2001, 624; Becker ABAJ 1976, 1292; Nadelmann NYULR 1977, 7.

145 Rimel BDJ, 1992, 459 et seq. Notably, comity appeared in subsection (c) among the factors U.S. courts had to consider in deciding an application for relief under sec. 304: 'In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with:
(1) just treatment of all holders of claims against or interests in such estate;
(2) protection of claim holders in the United States against prejudice and inconvenience
in the processing of claims in such foreign proceeding;
(3) prevention of preferential or fraudulent dispositions of property of such estate;
(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
(5) *comity*; and
(6) if appropriate, the provision of an opportunity for a fresh start for the individual that
such foreign proceeding concerns.

146 Comity is considered at length in *In re Metcalfe Mansfield Alternative Investments*, 421 B.R. 685 (Bankr. S.D.N.Y. 2010) in *courtlistener.com*, paragraphs III.A and III.B particularly.

ings. The first is automatic recognition, where foreign insolvency proceedings take effect in the recognizing jurisdiction without requiring a court decision. The second approach, by contrast, makes recognition contingent on a formal review and decision by an authority in the recognizing state—typically a court—based on the prerequisites outlined above.

A mixed approach is also possible, as seen in Spain. There, recognition of the opening decision requires an exequatur (Article 742 LC), while subsequent decisions related to the conduct and closure of the insolvency proceedings are recognized automatically (Article 744 LC).

This section will examine the two primary approaches, each of which presents distinct features and challenges, though some common issues arise in both.

II. Automatic recognition

1. Key issues

The automatic recognition model raises several questions[147]. First, from what point in time do foreign insolvency proceedings produce legal effects in the recognizing country? Second, are additional formalities required for certain effects to materialize, such as registering an order in a public register? Third, in the absence of a formal recognition ruling, what mechanisms exist for ex-post review by those who wish to challenge recognition? Lastly, how and when do the effects of recognition come to an end?

2. Timing of effects

There are two main approaches to determining when foreign proceedings produce effects in the recognizing state:

- As soon as the foreign judgment or order becomes effective in the originating jurisdiction.
- Only once the foreign judgment has become final (i.e., after all appeals have been exhausted).

The first approach—followed by the EIR (Article 19), Germany (§ 343 InsO), Portugal (Articles 288 and 293 CIRE), and Belgium (Articles 22(1)

147 On disadvantages of the system of automatic recognition more in detail see Garašić, Recognition of Foreign Insolvency Proceedings, pp. 343–344.

and 121(1) DIP)—creates a mirroring mechanism, ensuring that the foreign insolvency order produces identical effects in both jurisdictions. This model requires a high level of trust between legal systems, particularly to protect the rights of local creditors who may seek to challenge the foreign order in its original forum. This is why article 5(2) EIR explicitly mandates Member States to make appeals against opening decisions available to all parties in interests. Without such safeguards in place, objections based on procedural public policy may often arise.

The second approach—adopted, for example, by Italy (Article 64(1)(d), Law No. 218/1995) and Spain (Article 742(1)(2) LC)—introduces a potential gap between the moment when the foreign insolvency order takes effect and when it is recognized in the receiving jurisdiction. To mitigate risks during this interim period, courts in the recognizing state may consider imposing precautionary measures to protect creditors' interests.

3. Additional formalities

In some cases, specific effects of an insolvency proceeding—especially those affecting third parties unaware of the case (e.g., a debtor's debtors or immovable property owners)—depend on registering the decision in a public register. Jurisdictions that apply automatic recognition may still require foreign insolvency decisions to be entered into local registers to ensure they have full legal effect.

For example, under German law (§ 350 InsO), a foreign insolvency decision must be registered for certain effects to apply (e.g., preventing a debtor's debtor unaware of the proceeding from being discharged by paying in the hands of the insolvent debtor), in the same way as domestic decisions (§ 350 InsO). The EIR -Article 31(2)- contains a similar provision, supplemented by Article 28 EIR, which obliges insolvency practitioners to request the publication of judgments in any Member State where the debtor has an establishment (thus, presumably, most of its debtors).

4. Ex-post review of recognition prerequisites

Challenges to recognition can arise either:

- Incidentally, during a lawsuit or proceeding where the recognized foreign decision's effects are contested (e.g., a dispute over the validity of a contract signed by a debtor after their divestment in a foreign proceeding).

- As a stand-alone action, via a declaratory judgment (e.g., Article 67(1), Italian Law 218/1995; Article 744, Spanish Law 29/2015, for judgments other than the opening decision).

A key difference between these methods is res judicata: a declaratory judgment has conclusive legal force (thus prevents the parties to it to relitigate recognition), whereas an incidental review may not, depending on whether local procedural law extends the scope of res judicata to incidental questions.

5. Termination of recognition

In jurisdictions following the automatic approach, recognition of the foreign closing decision will typically terminate the effects of the insolvency case without requiring a separate court ruling. Since the original opening decision was recognized automatically, there is no need for a local court order to remove its effects. For instance, once the foreign closing decision becomes effective or final, the debtor regains control over their assets in the recognizing state (Article 32(1) EIR).

III. Formal recognition (or 'non-automatic' recognition)

A non-automatic recognition system raises different procedural questions:

- Who has standing to apply for recognition?
- Which court has jurisdiction to hear the recognition request?
- Is the recognition proceeding published?
- What evidence is required to prove that the prerequisites for recognition are met?
- What interim measures can be granted to preserve the effects of the foreign proceedings pending recognition?
- What are the effects of recognition? Are they limited to the country where the proceedings is carried-through or are they (should they be) recognized in other countries as well?
- How can the recognition's effects be modified or revoked in response to later developments abroad?

Some of these questions are briefly addressed below.

1. Standing to apply for recognition

Standing may be either:

- Broadly available to any interested party (e.g., creditors, affected employees, etc.), as under Spanish law (Article 54, Law No. 29/2015).
- Restricted to the foreign insolvency administrator or debtor-in-possession, as in the MLCBI.

A broad approach recognizes that creditors have a legitimate interest in securing recognition, especially to prevent asset dissipation before the foreign proceeding takes effect locally. Similarly, employees or other stakeholders may have an interest in preventing disorganized liquidation. Arguably, public authorities (such as prosecutors or financial regulators) should also have standing to seek recognition, especially when they can instead open local insolvency proceedings.

A restrictive approach to standing could lead affected parties to pursue local proceedings instead, potentially disrupting the orderly administration of the insolvency case as a whole.

2. Jurisdiction for the recognition process

This question is highly dependent on national regimes of judicial organization.

The competent court for recognition may be determined based on:

- Territorial proximity—typically, the court in the jurisdiction where the debtor has an establishment or assets.
- Judicial specialization—courts handling recognition should have expertise in insolvency law, as the process often involves technical concepts like COMI, establishment, and insolvency effects.

Even in jurisdictions that follow automatic recognition, specialized courts may still play a role. For example, they may issue precautionary measures before the foreign proceeding is opened or order the publication of the foreign decision in local registers (§ 348 InsO; Article 291 CIRE).

3. Publicity of the recognition proceeding

The MLCBI does not contain provisions on the publicity of recognition proceedings or the decisions in such proceedings. Slovenia, which has adopted the MLCBI, provides for publication of the decision on recognition (Art.463 of the Slovenian Insolvency Act)[148]. In Croatia, both the commencement of such proceedings and the decision are published (Art.405 and Art.407 (3) of the Croatian Bankruptcy Act.)

4. Interim measures pending formal recognition

Securing the effects that will follow the formal recognition of the foreign proceeding may be necessary if the recognition process takes time. This is usually achieved by way of interim measures ordered by the same court before which recognition is sought. Obviously, the content of such measures is determined by the lex fori, and may either mirror that of measures that may be available pending the opening of a local proceeding, or be specifically tailored for cross-border cases; the latter approach seems prevalent (see, e.g., art. 748 of the Spanish *Ley Concursal*, or provisions based on art. 19 MLCBI), and is arguably based on the assumption that the impact of such measures will be, most times, different than that of interim measures ordered under the local insolvency law with regard of 'national' debtor (which have presumably a more significant degree of contact with the local forum than a debtor made insolvent abroad).

5. Effects of formal recognition in general

Countries which provide for a formal recognition proceeding following the MLCBI determine the effects of such recognition basically by substantive (procedural or material) rules, distinguishing between recognition of foreign main or non-main proceedings[149]. Croatia as a country, which also provides for the possibility of formal recognition, but has developed its own rules in this respect (see Art. 400–409 of the Croatian Bankruptcy Act), determines the effects of recognition more generally: the foreign decision

148 In contrast, for example, Poland and Romania do not contain any provisions on publication in this context.

149 Cf. the example of Art.466 – 468 of the Slovenian Insolvency Act (ZFPPIPP).

opening an insolvency proceeding is given, in principle, the same effects as a Croatian decision[150], but this does not appear to modify the general conflict of laws rules[151]. This is to say, that the foreign decision has, with some exceptions the effects foreseen under the foreign lex fori concursus. The reference in Art.407 (1) of the Croatian Bankruptcy Act seems mainly to mean that formal recognition has an *erga omnes* effect.

Nothing specifically is said in this context about the effects of formal recognition in other countries. It may be argued, however, that formal recognition in a separate, published proceeding giving a broad circle of participants the right to start such a proceeding or intervene in it and which gives the decision *erga omnes* effect, is comparable to recognition of a foreign judgment in an action upon the judgment which has been decided by the CJEU in the H Limited case[152] to have EU-wide effect.

6. Termination of effects of recognition

Termination of the effects of recognition, finally, requires the repeal of the exequatur order, that is achieved by way of a specific procedure, often an extremely simplified one. Since this feature is something unusual for cross-border civil procedure generally, when specific provisions for insolvency cases are in place, the revocability of insolvency exequaturs is usually explicitly foreseen: see article 742(5) LC (Spain), and article 17 MLCBI. The latter provision mentions, as grounds for removal of the recognition judgment, both the lack of prerequisites of recognition, and their subsequent ceasing. The two aspects should remain distinct: lack of grounds for recognition are to be pleaded by way of appeal against the exequatur order; while their subsequent ceasing should be ground for a removal of the order. The difference between the appeal and the removal lies in the fact that the former is usually time limited. If the (initial) lack of grounds for recognition could be pleaded with no time limits, the main advantage of the exequatur approach (that is, certainty) would be taken away. Thus, conveniently, the Spanish law distinguishes between the removal (*modificación*, *revocación*: article 742 LC, limited to subsequent changes or cease of

150 Art.407 (1) Croatian Bankruptcy Act.
151 Cf. Art.407 (2) Croatian Bankruptcy Act in conjunction with Art.395 – 397 Croatian Bankruptcy Act.
152 Judgment of 7 June 2022, J v. H Limited, case C-568/20, ECLI:EU:C:2022:264.

recognition grounds) of the exequatur, and its challenge (*recurso*: article 55 of Law no. 29 of 2015).

D. Effects of recognition of foreign insolvency proceedings

Whatever approach to recognition is taken (MLCBI approach, EIR approach or other), the legal consequences of recognition of foreign insolvency proceedings need to be determined. This will now be addressed in more detail.

I. MLCBI concept – EIR concept – other approaches

Under the MLCBI, the term 'recognition' refers to a formal proceeding, granting in case of recognition far-going (though still including elements of judicial discretion) effects to the foreign insolvency proceeding[153]. Recognition in this sense is just one, albeit very important element of giving assistance to (or cooperating with) a foreign insolvency proceeding. Assistance to a foreign insolvency proceeding can, however, also be granted outside formal recognition[154]. Formal recognition leads to a broader range and higher intensity of support measures, also at later points in time after the formal recognition has been granted. Some legal consequences may be discretion-based[155], other consequences follow directly from recognition[156]. Assistance to a foreign insolvency proceeding outside formal recognition is, basically, obligatory, but its limits are not clearly defined[157] and it includes significant elements of judicial assessment up to discretion[158].

Under the EIR recognition is a general concept describing the prerequisites and legal consequences of giving effect to a foreign insolvency proceeding (Art.19 EIR). The legal consequences of recognition are stated

153 MLCBI Chapter III.
154 MLCBI Chapters II and IV, partly also Chapter V.
155 In particular Art.19, 21 and 22 MLCBI.
156 E.g. Art.20 MLCBI.
157 Art.9 and 11 MLCBI deal with the right of foreign insolvency representatives to courts in the requested country, Art.25 – 27 MLCBI address in a general manner 'cooperation' and 'information exchange'.
158 Compare Art.9 and 11 MLCBI (no mention of discretion) with Art.25 (1) [duty of cooperation 'to the maximum extent possible'] and Art. 27 [implementation of cooperation 'by any appropriate means].

clearly, at least in theory, in the EIR: Recognition of the foreign decision opening the insolvency proceeding leads to the attribution of legal consequences to this decision in the recognizing State (Art.20 EIR). The legal consequences are determined at first according to the conflict of laws method (lex fori concursus and exceptions), which is complemented by various particular substantive rules dealing with particularities of the recognition situation. Recognition of other foreign decisions rendered either 'in' the foreign insolvency proceeding, in particular by the foreign insolvency court, or rendered by other courts, even in other countries than the forum concursus, in insolvency-related cases (cf. Art. 32 EIR) has similar consequences, which are however more limited corresponding to the subject-matter of such decisions.

Both the EIR and the MLCBI distinguish recognition (automatic or formal) from the conduct of a secondary insolvency proceeding, which is typically more costly, but also potentially more far-going than recognition and is governed by its own lex fori concursus. However, a secondary insolvency proceeding can also serve as an instrument for cooperation with foreign insolvency proceedings, in particular a foreign 'main' proceeding.

As the foregoing comparative overview has shown, today basically three approaches to recognition of foreign insolvencies exist in the world. A large number of countries, among them four EU member states[159], have adopted the MLCBI[160]. These EU member states apply the EIR to inner-EU relations, the MLCBI for relations with non-EU countries.

The most significant deviations from the MLCBI shows the law of Poland. Poland has kept, also with regard to non-EU insolvencies, the general concept of recognition of foreign decisions, with a particular focus – like under the EIR – on the decision 'opening' the foreign insolvency proceeding[161]. However, Poland has integrated the MLCBI into its provisions on cross-border insolvency law, often with modifications. Following the MLCBI, Poland foresees for recognition of foreign insolvencies a formal recognition proceeding (Art. 386 – 396 Polish Bankruptcy Law), leaving open whether 'automatic' (incidental) recognition is also possible. Again,

159 Greece, Poland, Romania, Slovenia.

160 See the status information by UNCITRAL, https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status (presently 60 states) (last accessed 11.07.2025).

161 See Heading of Part II Title III of the Polish Bankruptcy Law and Art. 392, 394 Polish Bankruptcy Law.

following the MLCBI, the Law contains provisions on cooperation with foreign insolvency courts and insolvency representatives, which do not explicitly require (formal) recognition[162]. Following the EIR (and in contrast with the MLCBI), the Polish Bankruptcy Law contains a conflict of laws rule relating to the effects of foreign (recognized) decisions. In contrast with the EIR, however, this provision does not refer to the lex fori concursus of the foreign proceeding, but to Polish law (Art. 397 (1) Bankruptcy Law; see also Art. 403 (1) of the Law). This somewhat resembles Art. 170 of the Swiss PIL Act but does not include a separate 'Minikonkurs' (with, e.g. a Polish ancillary administrator) as the one foreseen under Swiss law.

Slovenia has also integrated the MLCBI in its provisions on cross-border insolvency law[163]. Following the MLCBI more closely than the Polish legislator, the Slovenian Act does not primarily use the concept of recognition of foreign insolvency 'decisions', but of foreign insolvency 'proceedings'[164]. In contrast with Poland, however, the Slovenian Act provides for detailed conflict of laws provisions (Art. 479 – 484 ZFPPIPP) which appear to apply also to foreign insolvencies, in so far at the Act does not provide for other rules, in particular substantive rules based on the MLCBI.

A smaller, but still significant number of countries (mostly members of the European Union) use for cross-border insolvency relations with non-EU countries the approach of the EIR, though also with modifications[165]. Austria, Belgium[166], Germany and Portugal follow by and large the EIR model: recognition of foreign insolvency decisions as basic approach, combined with rules on conflict of laws and some substantive provisions. Czechia, Hungary and Slovakia also follow, in principle the EIR approach, but provide only for very few rules on recognition of foreign insolvencies[167].

162 Polish Bankruptcy Law Part II Title V, Art. 413 – 416.
163 Slovenian Insolvency Act (ZFPPIPP) Chapter 8.
164 See heading of Chapter 8.3 ZFPPIPP and e.g. Art. 459 – 463 ZFPPIPP.
165 Supra at A.II
166 In contrast with the EIR, however, Belgium provides – line with the French legal tradition – for a formal 'exequatur' proceeding as a prerequisite of full recognition, Art. 121 § 1 Belgian PIL Code.
167 Art.111 (5) and (3) of the Czech PIL Act (2012) [recognition of foreign decisions in insolvency proceedings], Art. 109, 113 and 114 of the Hungarian PIL Act (2017) [not expressly mentioning conflict of law with regard to foreign insolvencies], Slovakian Bankruptcy and Restructuring Act (2005), Part 5, sec.172 – 175. Sec. 173 and 175 deal with recognition of foreign insolvencies, sec. 173 referring to decisions in insolvency proceedings, sec. 175 to recognition of insolvency 'proceedings']. Seems to be based

Croatia and Spain have chosen more independent approaches. Both countries share the EIR approach based on recognition of foreign insolvency 'decisions'[168]. Both countries also address issues of conflict of laws in the recognition context but use different techniques: Croatia provides for 'general provisions' including rules on conflict of laws[169], but adds various substantive rules in the recognition context (Art. 412 – 426 Croatian Bankruptcy Act). The Spanish Act separates conflict of laws rules for domestic proceedings (Art. 723 – 725 bis) and for the recognition context. The effects of recognized foreign proceedings are also determined by the lex fori concursus, but with fewer exceptions than in domestic insolvencies (Art. 745 and 745 bis of the Spanish Act[170]). Both Croatia and Spain provide for formal recognition proceedings[171], but admit also incidental recognition (cf. Art. 409 of the Croatian Act[172]). It should also be mentioned that both Croatia and Spain provide for some effects of foreign proceedings (or cooperation with foreign proceedings) without making mention of recognition (cf. Art.399 Croatian Act, Art. 734 nr.2 and Art.748 (2) Spanish Act).

A third group of countries have chosen their own approach, usually providing for only few specific rules or applying general rules of recognition of foreign judgments or traditional common law rules of comity[173]. This does not exclude, of course, the existence of rich and recognition-friendly jurisprudence on recognition of foreign insolvencies on the basis of patchy

on lex fori concursus rule but grants the court discretion (cf. sec. 175 (2) of the Slovakian Act.

168 See Croatian Bankruptcy Act, Chapter 11 (International bankruptcy law), Subchapter III, see also Art. 400 – 410, 427 of the Act. For Spain see Art. 742, 744 Spanish Bankruptcy Act [though the heading of the chapter on recognition mentions 'proceedings'; similar to the EIR).

169 Art. 395 – 397 Croatian Bankruptcy Act. Their applicability also to the recognition context is confirmed in Art. 411 (1) of the Act.

170 They cover mainly only labour relationships (lex contractus laboris).

171 Very detailed and differentiated regulation of this issue in Art. 400 – 409 of the Croatian Act. The Spanish provisions are shorter (Art. 742 – 743).

172 Incidental recognition is also mentioned in Art. 744 (2) sentence 2 of the Spanish Act, but the provision might apply only to insolvency-related decisions, not to the opening decision. Both laws distinguish also the insolvency-specific recognition proceeding from enforcement strictu sensu (cf. Art. 412 Croatian Act, Art. 746 Spanish Act). However, Spanish law refers subsidiarily to general rules on exequatur also for the recognition proceedings under the Bankruptcy Act (see Art. 741 (1) of the Act).

173 Supra at A.II.

legislation[174]. A remarkable special case in this group is Switzerland, which has developed its own particular approach to recognition of foreign insolvencies (decisions in insolvency proceedings) – a combination of elements of the EIR and secondary proceedings ('mini-proceeding').

II. Conflict of laws?

Inspired by its regulations on different matters of conflict of laws (Rome I, Rome II and other regulations) as well as on recognition of foreign judgments (in particular the Brussels Ia Regulation), the EU has inserted in the EIR a complete set of conflict of laws rules for cross-border insolvencies[175]. A peculiarity of this approach is that it applies both to domestic insolvency proceedings (in the EU) and to recognition of foreign proceedings. However, the EIR deals only with recognition of insolvency proceedings between EU member states, while recognition of non-EU insolvencies is left to the rules of the EU member states. Some of them have chosen to adopt the EIR rules, with some modifications, also in relations with third countries, others have insofar opted for the MLCBI or have for the time being passed only selective or no particular legislation.

The EIR approach is to apply the lex fori concursus to insolvency proceedings (domestic or foreign) and their legal consequences. Relating to recognition of foreign proceedings, this corresponds to the general approach as to the effect of foreign judgments under the Brussels Ia Regulation[176]. However, the effects of a foreign insolvency proceeding are much broader and develop over the time of a proceeding, which differs significantly from a typical judgment in a civil or commercial dispute. Judgments in cases under the Brussels Ia Regulation deal with specific, limited disputes. In contrast, insolvency proceedings are the basis for a significant number of further procedural steps and numerous legal consequences both of a procedural and material character. They do not only decide on a

174 Examples are France, Italy and many Common Law jurisdictions.

175 Forerunners of this approach were the Council of Europe's Istanbul Convention on Certain International Aspects of Bankruptcy (cf. Art. 10 (1) of the Convention) and other international treaties, e.g. the Austrian-German Bankruptcy Treaty of 1979.

176 ECJ, judgment of 04.02.1988, Hoffmann v. Krieg, ECLI:EU:C:1988:61. Note that even under the Brussels Ia Regulation, modifications of this approach are discussed, based on ECJ jurisprudence (judgment in Gothaer Allgemeine Versicherung v. Samskip of 15.11.2012, ECLI:EU:C:2012:719).

specific case of the past, but they carry an enduring character with strong business content. The EU has taken this into account, creating a significant number of special conflicts rules deviating from the lex fori concursus. Such rules include, mainly, the effects of the insolvency proceeding on employment contracts, the rights of secured creditors (rights in rem), set-off, contracts relating to immovables, the effect of insolvency proceedings on pending litigation or arbitration and the law applicable to the avoidance of transactions[177]. In some instances, the EIR provides also particular substantive rules or combines the conflict of laws provisions with substantive rules.

The MLCBI, on the other side, has left the question of conflict of laws in insolvency largely open. Some provisions of the MLCBI contain limited references to conflict of laws[178]. The MLCBI is implicitly based on the conflicts rule of lex fori concursus, sometimes referring also to the law of the recognizing country. Other possible exceptions to the lex fori concursus are not defined. Some courts exercising their discretion under the MLCBI have from time to time chosen to apply or at least consider application of foreign law[179] The lack of conflict of laws rules has, however, been found to be a weakness of the Model Law by many observers, and UNCITRAL has therefore decided to take-up work on a new, additional legal instrument on conflict of laws[180]. As the project stands now[181], it will formulate a set of conflict of laws rules, based on the lex fori concursus principle, but providing for some exceptions: labour contracts and relationships; payment,

177 The application of these particular conflicts rules has led some courts to de facto non-recognition of the effects of foreign insolvency proceedings in the area of the special conflicts rules, arguing that domestic law (e.g. property law or labour law) presupposes the opening of a domestic insolvency proceeding. This argumentation misunderstands the sense of the respective conflicts rules: In so far as they refer to the law of another country than the lex fori concursus, that law is to be applied 'as if' a (functionally equivalent) insolvency proceeding had been opened in the respective country, see, e.g. Bork/Mangano p.140 note 4.35. This ambivalence should be clarified at a future revision of the EIR, but this is a general issue, not specific for relations with non-EU countries.

178 E.g. Art.5, 7, 11, 13, 20 (2), 21 (1)(g) and (3) EIR.

179 Cf., e.g. U.S. Bankr. Ct. for the District of Virginia, In re Qimonda AG, 462 B.R. 165; Federal Court of Australia — Victoria District Registry, Appleyard v. Crawford Farms Ltd. [2012] FCA 1373, and numerous others.

180 Cf. https://uncitral.un.org/en/working_groups/5/insolvency_law (Applicable law in insolvency proceedings project) (last accessed 17.07.2025).

181 See the UNCITRAL Secretariat's note on 'Applicable Law in Insolvency Proceedings', A/CN.9/WG.V/WP.202, prepared for Working Group V (Insolvency Law), Sixty-sixth session, New York, 12–16 May 2025.

clearing and settlement systems, regulated financial markets and other multilateral trading facilities; close-out netting in certain situations. In contrast with the EIR, there are presently no exceptions from the lex fori concursus for transactions relating to immovables and avoidance of transaction, and no special substantive rules on rights in rem[182]. Like the EIR and the MLCBI, the future instrument on applicable law in insolvency proceedings will also apply to the recognition context, however with a significant deviation from the EIR. It contains a Chapter III on 'Recognition of the effects of the lex fori concursus and other laws applied by the foreign court', which includes, at present, the following sole provision:

> **'Giving effect to the *lex fori concursus* and other laws applied by the foreign court**
> Upon recognition of a foreign proceeding, the court may grant relief by giving effect to the *lex fori concursus* and other laws applied by the foreign court in accordance with chapter II of these legislative provisions.'[183]

In its draft commentary, the UNCITRAL Secretariat has given details about the ongoing discussions relating to this provision. Basically, the proposed provision corresponds to existing jurisprudence under the MLCBI, making the rule more explicit. In contrast with the EIR, the proposed rule grants courts judicial discretion with regard to applicable law. It specifies the potentially applicable conflict of laws rules, thus suggesting that the foreseen exceptions to the lex fori concursus (for labour contracts etc.) might be applied also in the recognition context. Other exceptions than the ones provided for in the proposed instrument are not mentioned. Also, the provision refers only to laws 'applied by the foreign court', which may cause difficulty in understanding whether this refers as such to the conflicts rules of the foreign forum concursus or whether some decision of the foreign court is required. From the EU's perspective, the proposed formula may appear to be too weak for aspired legal security and previsibility.

Existing national legislations – both within and outside the EU – differ with regard to conflict of laws in the recognition context. Austria[184], Ger-

182 See Secretariat's note (supra note 181), pp.26 – 34.
183 Secretariat's note (supra note 181), p.36.
184 Sec. 221 – 234 of the Austrian Insolvency Code ('general provisions'). Sec. 241 (1) Austrian InsO repeats the lex fori concursus principle for the powers of a foreign insolvency representative in Austria, thereafter adding some substantive provisions.

many[185] and Portugal[186] apply, basically, the EIR's conflict of laws rules (with minor modifications) also to recognition of non-EU insolvencies[187]. Belgium and Spain take a similar approach (orienting themselves also for relations with non-EU countries along the lines of the EIR) but use a different legislative technique. They regulate conflict of laws separately from recognition[188], but refer in the recognition context to the conflict of laws rules applicable in Belgian or Spanish proceedings[189]. The advantage of this approach is that it gives a basis for more specifically tailoring conflicts rules to cases of recognition of non-EU insolvencies. It is worth discussing, whether the conflict of laws rules for inner-EU cases (where all EU countries apply the same conflicts rules and are also harmonizing substantive rules of insolvency) fit also the needs of cooperation with non-EU insolvencies on a global scale.

Croatia's approach lies somewhere between the forementioned models. On the one hand, Croatia's Bankruptcy Act contains (like the EIR and Austria and Germany) 'general provisions', which include the lex fori concursus-rule (Art. 395 of the Act) and special conflicts rules for rights in rem and employment contracts (Art. 396 and 397 of the Act). On the other hand, Croatia regulates the effects of recognition of foreign insolvencies in detail, differentiating between various constellations of recognition (recognition leading to a secondary proceeding, other recognition etc.). The most general provision in this context is Art. 411 (1) of the Croatian Act, which

185 Sec. 335 – 340 of the German Insolvency Code ('general provisions'). A specific conflicts rule for the effects of foreign insolvency proceedings upon immovables situated in Germany is laid-down in sec. 351 (1) German InsO.

186 Art. 276 – 286 Portuguese Insolvency Act ('general provisions').

187 It should be noted that Art. 351 of German Insolvency Code establishes for the recognition-context only a unilateral substantive rule (territorial limitation) on rights in rem in Germany (Art. 351 of the Code), while Austria provides for this – more closely to the EIR – universal (bilateral) rules, Art. 222 and 224 of the Austrian Code. Portugal adopts at this place a bilateral conflict of laws rule (Art. 280 Portuguese Insolvency Act).

188 For Belgium: Art. 119 Belgian PIL Code (for insolvency proceedings or other court proceedings in Belgium). For Spain: Art.723 – 731 and Art.732 of the Spanish Bankruptcy Act.

189 See Art. 122 § 2 Belgian PIL Code referring to Art. 119 § 2 – 4 of the Code. For Spain: Art. 745 (1) of the Spanish Insolvency Code referring to Art. 723 – 731 of the Code. See also Art, 743 (4) of the Code (repeating the lex fori concursus principles for powers of foreign insolvency representative after recognition). Art. 745 bis of the Code provides a special conflicts (and substantive) rule on Spanish labour relations in the recognition context.

refers, similarly to the laws of Belgium and Spain, to the conflict of laws rules applicable in domestic insolvency proceedings.

Slovenia, while having adopted the MLCBI, has also passed detailed rules on conflict or laws, which correspond – by and large – to the EIR and apply also to foreign insolvencies (Art. 479 – 484 ZFPPIPP). The Slovenian example shows that the MLCBI is not in contradiction with the EIR's conflict of laws rules.

Poland offers a completely opposite model, applying to (recognized) foreign insolvencies the effects of Polish insolvency law (Art. 397 (1) Polish Bankruptcy Law; specified for some issues in Art. 403 of the Act). This resembles the Swiss 'Minikonkurs' (Art. 170 Swiss PIL Act) but does not require the appointment of a Polish insolvency representative, though some control by Polish courts exists (see Art. 401 Polish Bankruptcy Act).

III. Substantive law

Both under the EIR and the MLCBI, the effects of recognition of foreign insolvencies are determined to a high degree by specific substantive rules of a procedural or material content (e.g. stay of enforcement proceedings or modification of non-insolvency rules contained in Civil Codes). In the MLCBI the use of substantive rules is the general approach, even though the Model Law includes some more or less hidden rules on conflict of laws[190]. In the EIR, the approach is a combination of conflicts and substantive rules. Some of these rules are included in the EIR's special chapter on recognition of foreign proceedings (Chapter II), but others are contained in the general provisions of the EIR (Chapter I) and other chapters. Similarly, the MLCBI deals with legal consequences of recognition not only in Chapter III (on recognition), but also in other chapters.

In this comparative report it is not possible to examine all substantive provisions in detail, but their system will be analysed, and a focus will then be laid on individual provisions or aspects of – to the view of the authors – particular relevance. The focus will lie here on a comparison of the MLCBI and the EIR, not so much on national legislations.

190 See supra at note 179.

1. Links between prerequisites and substantive effects of recognition

In principle, both under the EIR and under the MLCBI, the prerequisites and legal consequences of recognition of foreign insolvencies are independent categories, i.e. when the prerequisites of recognition exist and, as the case may be, have been formally recognized as such by a court, the full consequences of recognition step into force. The kind of consequences depends, under EIR, on the specific kind of recognized decision (e.g. the decision opening an insolvency proceeding or more specific follow-up decisions), while under the MLCBI consequences are set out autonomously and in a largely uniform way in articles 20 and 21. On one hand the effects much depend on the type of assistance that is sought upon by the foreign representative filing for recognition, on the other hand the recognizing (or otherwise 'assisting' or 'cooperating') court retains a considerable margin of discretion in deciding the content of assistance measures granted in individual case.

There are some particular links between (at least certain) prerequisites and substantive consequences of recognition.

Firstly, public policy of the recognizing state – which is foreseen as a requisite (also) of recognition of foreign insolvencies both under the EIR and the MLCBI – may in some cases hinder recognition completely, while in other cases it may only exclude recognition of some effects of the foreign proceedings, e.g. effects against unfairly treated creditors or specific effects which are seriously incompatible with fundamental ideas of justice and policy in the recognizing state. Also, the requirement of reciprocity – in so far as it is applied in international insolvency law[191] – may lead to non-recognition of certain substantive effects of foreign insolvencies. A similar phenomenon exists, when some insolvency-based or insolvency-related decisions are not recognized, while the insolvency proceeding generally is recognized.

191 Neither the EIR nor the MLCBI contain a requirement of reciprocity. However, reciprocity is a requirement for recognition also in insolvency cases in several EU member states: Czechia, Hungary, Slovakia, Spain, also in Finland and the Netherlands (treaty-based reciprocity). In contrast, Switzerland has dropped this requirement in 2019 → see Rodriguez. Outside the EU, e.g. South Africa has introduced reciprocity into its MLCBI-based legislation. Russia has adopted de facto reciprocity as a 'liberal' standard in comparison with treaty-based reciprocity. In Common Law countries, reciprocity has sometimes been required as an element of comity.

Secondly, the MLCBI distinguishes between 'effects' (art. 20) and 'relief' (art. 21). The former stem automatically from the recognition of proceedings that qualify as 'main' (proceedings), i.e. which are pending in the State where the debtor has its COMI. The latter may be granted in any recognition case (i.e., regardless whether the foreign proceedings are pending in the COMI state or in any other state where the debtor has an establishment). Thus, under the MLCBI, the jurisdictional requirement influences the content of the effects of recognition.

A significant difference between 'effects' and 'relief', and, in turn, between recognition of 'main' and 'non-main' proceedings, is that in determining the consequences of the recognition of main proceedings the recognizing court enjoys little discretion. In contrast, in case of recognition of non-main proceedings, articles 21, § 1 and 22, § 1 MLCBI assign the court the task to weigh the interests of the parties who will benefit from the assistance (usually, the foreign representative and the foreign creditors) against those of the parties who may be affected from it (mostly, local creditors), and consequently subject relief to any condition it considers appropriate (art. 22, § 2 MLCBI).

2. Links between substantive effects and the recognition procedure

There are also links between the substantive effects of recognition and the recognition procedure. Under the MLCBI, formal recognition under Chapter III leads to a broader range of substantive consequences than other assistance or cooperation, e.g. under Chapter II or IV MLCBI or under art.7 MLCBI in conjunction with 'other laws'.

The EIR, foreseeing only automatic recognition, seems to be based on the assumption that the effects of recognition are generally accepted in a uniform manner within the EU even without a formal recognition procedure. The EIR does not provide a clear answer when recognition comes up in different contexts. In such cases, recognition may be assessed differently by various courts, as there is no judgment-based erga omnes effect of automatic recognition. National legal systems may answer this question differently under the EIR or perhaps the CJEU might find a uniform solution.

National legal systems of EIR countries, which provide for a mixed system of formal and incidental recognition, such as e.g. Croatia, sometimes distinguish between 'erga omnes' effects of formal recognition and 'inter partes' effects of incidental recognition (cf. Art. 407 (1) and Art. 409 (1) Croatian Bankruptcy Act).

3. Relationship with rules on concurrent proceedings

Thirdly, there are links between the rules on recognition (which include the legal consequences of recognition) and the rules on concurrent proceedings. Under both the MLCBI and the EIR domestic proceedings (e.g. secondary proceedings) are given priority over recognition of foreign proceedings, which however continue to be recognized even in the presence of a foreign proceeding in so far as there is no conflict between the two (or more) proceedings. This topic is discussed in more detail in the general contribution on concurrent proceedings in this book[192].

4. The issue of territorial or extraterritorial effect of foreign insolvencies (or respective decisions)

One of the basic and extensively discussed aspects of cross-border insolvency law concerns the question whether insolvency proceedings should try to extend (and regulate) all property belonging to the debtor globally or whether they should only relate to property situated in the country of the forum concursus[193]. The discussion is sometimes phrased in so-called principles of international insolvency law such as 'universality' and 'territoriality' of insolvency law and insolvency proceedings[194].

The EIR – and many national legislations – distinguish between insolvency proceedings which should extend to all debtor's property wherever situated, while other proceedings are seen as limited to property situated in the state of the forum concursus[195]. The MLCBI is more open in this respect. Although it also distinguishes between main ('COMI-based') and non-main proceedings, it leaves the intended universal or only territorial effect of non-main proceedings mostly open, providing for territorial autolimitation only in the specific case of concurrent non-main proceedings[196]

192 → Trunk (concurrent proceedings).
193 The expression 'relate to property' (worldwide or only in the state of the forum concursus) is usually seen as synonymous for the geographical application of insolvency law in general: worldwide (i.e. also extraterritorial) or only in relation to inland property of the debtor.
194 Cf →Moustaira and → Fabriès-Lecea.
195 Cf. Art. 28 MLCBI, Art. 3 (2) sentence 2 EIR. Examples from national legislations: sec. 237 (1) Austrian InsO, Art. 392 (4) and 393 (4) Croatian Bankruptcy Act, Art. 47 and 49 Spanish Bankruptcy Act.
196 'Secondary proceedings' in the terminology of the EIR.

(Art. 28 MLCBI). While many national legislations follow the EIR model[197], others do not make a clear distinction between 'universal' and 'territorial' proceedings[198].

This distinction can relate both to the conduct of domestic proceedings and to recognition of foreign proceedings. Both under the MLCBI and under the EIR recognition of foreign insolvencies means that foreign proceedings are given effect in the recognizing country. Such effects may relate to the debtor's property (e.g. when the foreign representative wishes to take such property into his administration or when creditors try to levy execution into such property) but are not limited to property issues in the strict sense. They may also concern activities of the debtor or other persons, the corporate structure of a debtor, or the existence or size of the claims of creditors.

In the recognition context this may mean that effects of such proceedings are limited to such (local) property[199]. This is true for the EIR in inner-EU relations (Art. 20 (2) of the Regulation), although it avoids the term 'recognition' in this context. In contrast, Art. 17 (2) (b) MLCBI uses explicitly the term 'recognition' of foreign non-main proceedings, but the legal consequences of such recognition are not limited along territorial lines (see Art. 19 and 21 MLCBI). Thus, the MLCBI allows recognition of foreign non-main proceedings event with regard to property located in other countries but grants the recognizing court discretion in this respect. Some national legislations provide only for recognition of foreign main (= universal) proceedings[200], while others recognize also non-main proceedings[201]. Recognition of such proceedings is sometimes limited to

197 E.g. sec. 237 (1) nr.1 Austrian InsO, Art. 118 § 1 nr.2 Belgian PIL Act, sec. 354 sentence 1 German InsO (non-main proceeding outside the scope of EIR: also, on the jurisdictional ground of debtor's assets in Germany), Art. 294 Portuguese Insolvency Code, Art. 49 (2) Spanish Bankruptcy Act.

198 Cf. Art. 34 Japanese Bankruptcy Act (not distinguishing between main and non-main proceedings), Art.3 South Korean Debtor Rehabilitation and Bankruptcy Act. Also, in Common Law jurisdictions, courts tend to exercise discretion whether to include foreign property in non-main proceedings.

199 Cf. Art. 20 (2) EIR, Art. 17 (2) (b) MLCBI uses explicitly the term 'recognition' of a foreign non-main proceeding.

200 Examples: sec. 240 (1) nr.2 Austrian InsO; similar, though more flexible, Art.288 (1) a) of the Portuguese Insolvency Code.

201 E.g. Art. 121 § 1 nr.2 Belgian PIL Act, also sec. 343 (1) nr.1 German InsO.

territorial effects (on property located in such country[202], but this is not always clearly expressed[203].

This said, it can be stated that there is at present in the EU no general or preponderant approach as to whether recognition of foreign non-main insolvencies is limited to 'territorial' effects of such proceeding or may also include 'universal' effects.

This is complicated by the fact that the national legislations take different approaches as to which (foreign) proceedings can be considered as main and non-main proceedings. These approaches often differ both from the EIR and the MLCBI. Thus, (direct) 'universal' insolvency jurisdiction is often claimed on the basis of the debtor's domicile, residence or corporate registration, and this would then also apply to the recognition context. Sometimes even flexible criteria such as 'doing business' or 'expediency' are used, also for the recognition context. Insolvency proceedings in all countries can be modern and efficient (or may lack these qualities), and they can be based on reasonable considerations of the participants why one or the other country (or countries) are chosen as a forum for the insolvency proceeding.

Summing-up, it would appear that the approach of the MLCBI to decide on recognition of foreign non-main insolvency proceedings flexibly, not based on strict territorial consideration, would fit also for the EU in relations with non-EU countries.

5. Other substantive rules

Both the EIR and the MLCBI provide for numerous substantive (procedural or material) rules, which are applicable in the recognition context, and some national legislations add further provisions.

Under the EIR, substantive rules for cross-border insolvencies, including the recognition context, are closely linked with conflict of laws provisions and qualify their application (cf. Art.20 EIR with Art.21, 23, 28 – 31 EIR). Also, some substantive provisions governing the conduct and the effects of an insolvency proceeding with cross-border components are contained in 'general provisions' of the EIR (Chapter I) or other chapters of the EIR. In several cases, Chapter I EIR puts substantive provisions excluding certain

202 E.g. Art. 121 § 1 nr.2 Belgian PIL Act and Art. 742 (5) nr.2 Spanish Bankruptcy Court: recognition 'as territorial proceeding'.

203 Cf. sec. 343 (1) nr.1 German InsO.

property from the territorial reach of the main proceeding between conflict of laws provisions (cf. Art.8 and 10 EIR).

In the MLCBI, substantive rules on recognition of foreign insolvencies are concentrated in Chapter III, but some rules relevant to recognition can also be found in other Chapters of the MLCBI. For example, Art. 20 and 21 MLCBI (on recognition) define which substantive consequences occur (or may be ordered by the court) as effects of recognition. In addition, Chapter II MLCBI (on access of foreign representatives and creditors) also deals with recognition-related situations, granting, for example, foreign representatives the right to access to courts in the requested country (art.9 MLCBI). Similarly, some provisions in Chapter IV (Cooperation with foreign courts and representative) cover recognition-related situations, e.g. Art. 25 MLCBI on cooperation with foreign courts or representatives. In so far as such provisions are tailored to parallel proceedings (e.g. Art.11, 12 MLCBI and Art.26 MLCBI), they will be addressed in the general contribution on this topic in this book.

In the following a short summary of such substantive rules will be given, taking into account also international treaties and national legislation

a) General structures

The EIR contains in its chapter on recognition, in essence, substantive provisions on the powers of foreign insolvency representatives (Art.21 and 22 EIR). The other provisions in this Chapter (establishment of insolvency registers etc.) are not specifically designed for recognition of foreign insolvency but carry an overarching character. In the general Chapter, the EIR contains two substantive provisions, which exclude certain foreign-located property from the territorial reach of the main proceeding (Art.8 and 10 EIR), a provision assigning European patents with unitary effect and Community trademarks only to COMI-based proceedings (Art. 15 EIR) and one provision combining elements of conflict of laws with a certain substantive result (Art. 9 EIR on set-off).

The Istanbul Bankruptcy Convention of 1990 had a somewhat different structure. It did not use the concept of recognition of foreign insolvencies as a basic structural element, but put-together various substantive (and partly conflict of laws) elements of cross-border bankruptcy: most significantly, on the powers of a (mainly foreign) representative (Chapter II of the Convention, Art. 6 – 15), complemented by some provisions in the general

Chapter (in particular Art. 2). Similar to the EIR, it also contained substantive provisions for domestic proceedings and for concurrent proceedings.

The MLCBI has chosen a different structure, although some of its provisions resemble the EIR very much. In its general Chapter, it contains a recognition-related provision, which allows the requested state to 'provide additional assistance to a foreign representative under other laws of this State' (Art.7), i.e. the MLCBI serves only as a minimum standard for assistance to foreign proceedings. It then deals separately with the access of foreign representatives to courts in the requested state (Chapter II, Art. 9 – 12)[204]. The Chapter on recognition of foreign insolvencies (Chapter III) provides for the following substantive effects of recognition: Art.20 (ex lege effects) and Art. 21 (optional relief)[205]. Art.20 applies to recognition of foreign main insolvencies and provides for the stay of individual actions and execution against the debtor[206] as well as for a suspension of the debtor's power dispose of the assets of the estate[207]. According to Art. 20 (2) MLCBI the scope of the stay and of the suspension of the power of disposition are determined by the law of the recognizing state. Art. 21 MLCBI (optional relief) applies to (foreign) main and non-main proceedings alike and gives the recognizing court, basically, the discretionary power to grant 'any ... relief that may be available under the laws of the [recognizing] state'. Thus, the MLCBI lays-down a broad general clause empowering the recognizing court to pass any decision in support of the foreign proceeding, which is available under its legislation. This has been interpreted by some courts as including considerations of conflict of laws (e.g. within the concept of comity) but could also be read as referring only to substantive provisions. Chapter IV MLCBI contains overarching provisions on cooperation with foreign representatives and courts, and Chapter V deals with concurrent proceedings.

204 Chapter II Art. 13 – 14 (legal position of foreign creditors) deals primarily with domestic insolvency proceedings.

205 In addition, a provision on interim relief upon application for recognition, Art. 19 MLCBI. Furthermore, there are some complementary provisions in Art. 22 – 24 MLCBI.

206 Art. 20 (1) (a) and (b) MLCBI.

207 Art. 20 (1) (a) and (b) MLCBI.

Some of these provisions address procedural effects[208], others deal with material effects[209] or have a mixed character (procedural and/or substantive)[210].

National legislators have 'transposed' these models into their autonomous legislation in quite different manners.

For example, Austria deals with the powers of foreign insolvency representative mainly through conflict of laws provisions (sec. 241 (1) Austrian InsO: foreign lex fori concursus) mitigated by a reference to Austrian law as to 'exercise of their powers', e.g. the mode of disposal of property and the information of employees (sec. 242 (2) Austrian InsO). In addition, sec. 242 Austrian InsO lays-down a duty of the foreign representative to publish the opening of the foreign proceeding in Austria (if the debtor has an establishment in Austria) and/or to apply for entry of the foreign proceeding in Austrian registers (enterprise register and land register).

Germany regulates the effects of recognition of foreign insolvencies in much more detail. As a supplement to the general lex fori concursus-rule (sec. 335 German InsO) it adds substantive provisions on interim measures (sec. 344 InsO), domestic publications of the foreign insolvency proceeding (sec. 345 and 346 InsO), information duties of the foreign representative (sec. 347 InsO), provisions on the jurisdiction of German courts in matters relating to recognition (sec. 348 (1) InsO), establishment of a power (not duty) of cooperation of the German court with the foreign insolvency court in recognition-related matters (sec. 348 (2) InsO). Sec. 349 and 350 InsO provides for substantive (material) rules on good faith protection if the debtor has disposed over immovables located in Germany or if third parties have made payments to the debtor instead of to the foreign representative. Sec. 351 (1) InsO exempts rights in rem[211] in German-located assets from the effects of the foreign insolvency, 'unilateralizing' the bilateral provisions of Art. 8 and 10 EIR to the recognition context outside the scope of the

208 E.g. Art. 20 (1) (a) and (b) MLCBI (stay of proceedings and execution).

209 E.g. Art. 20 (1) (c) MLCBI (suspension of power of disposition).

210 E.g. Art. 21 and 22 EIR (powers of foreign representative).

211 More exactly: 'Aus- und Absonderungsrechte' according to sec. 47 – 52 German Insolvency Code.

EIR[212]. Sec. 352 InsO stays domestic court (and arbitration) proceedings[213], and sec. 352 InsO provides for execution of decisions rendered 'in' foreign insolvency proceedings on the basis of a German exequatur. A characteristic of the German approach is to provide in several cases for substantive rules applicable in case of recognition of foreign non-EU insolvencies where the EIR establishes – between EU member states – either bilateral conflict of laws provisions or bilateral substantive rules.

Another, particularly differentiated example is the law of Croatia. The Croatian Bankruptcy Act (Chapter 11 on International Insolvency Law) blends the rules on recognition of foreign (non-EU) insolvencies with the rules on concurrent proceedings. Its Title on recognition of foreign insolvencies (Title 5) starts with the case when the foreign proceeding becomes recognized after a domestic Croatian (main or non-main) proceeding has already been opened (Art. 410 of the Act). In this case Art. 410 of the Act refers, with some particularities, to the general provisions on concurrent proceedings (Title 6)[214]. Thereafter, Art. 411 – 416 of the Act deal with 'simple' recognition of foreign insolvencies, i.e. without the opening of a concurrent proceeding in Croatia. It has been remembered that recognition of foreign insolvencies in Croatia is based, in principle, on a formal proceeding similar to the MLCBI. A third constellation is the opening of a concurrent insolvency proceeding in Croatia as a consequence of recognition of the foreign main proceeding (Art. 417 of the Act).

Art. 411 of the Act starts with the basic conflicts rule of the (foreign) lex fori concursus. Art. 412 contains a substantive rule on restitution of payments (or preferential rights acquired) in execution proceedings in Croatia in the time between the opening of the foreign proceeding and its recognition in Croatia. Art.413 – 415 deal with different cases of protection of good faith in the recognition context. Art. 413 is a substantive rule on protection of good faith acquisition of assets from the debtor after the opening of the foreign proceeding. Art. 414 provides a rule on good faith protection for third party payments to the debtor instead of to the foreign representative. Art. 415 protects good faith in set-off in certain recognition-

212 Sec. 351 (2) InsO contains a special (unilateral) conflict of laws rule as to the effects of the foreign proceeding on immovables in Germany; this corresponds by and large to the (universal) conflicts rule under Art. 14 var.1 EIR.

213 Substantive provision, in contrast with the (bilateral) conflict of laws provision under Art. 18 EIR.

214 See Art.410 (2) in conjunction with Art. 419 – 423 of the Act.

related cases. Art.416 grants substantive protection to certain categories of creditors (Croatian tax and social insurance creditors; local employees) and to creditors with rights in rem[215] in Croatian-located assets, complementing the special conflicts rule of Art. 396 of the Act[216].

Taken together, the EIR, the MLCBI and national legislations tend to address a core circle of legal issues: the powers (and duties) of foreign insolvency representatives, powers (and duties) of courts in the recognition context, issues of stay of proceedings, and the protection of good faith in civil and commercial relations. Beyond this, issues of interim measures and protection of certain (locally privileged or secured) creditors are frequently addressed.

b) Particular provisions

Some provisions lay the focus on the legal position of certain participants in the insolvency proceedings; others are of a more general or topic-related character. They may have a focus on procedural aspects, on substantive (material) law of or cover both aspects.

aa) Rules on powers of insolvency representatives

Several provisions deal with the legal position (rights and duties) of foreign insolvency representatives. Such provisions exist both in the MLCBI and in the EIR as well as in the Istanbul Bankruptcy Convention and in national legislations.

The Istanbul Convention devotes to the legal position of insolvency representatives (termed 'liquidators') a particular Chapter (II). The broadest provision is art.10 of the Convention, under which the representative, 'within the powers conferred on him under the law of the [forum concursus], may 'take or cause to be taken any acts to administer, manage or dispose of the debtor's assets including removing them from the territory of the Party where they are situated'[217]. However, 'implementation' of these measures shall be subject to the law of the Party in whose territory the assets are situated (art.10 II of the Convention). This is qualified by several further

215 More exactly: 'Aus- und Absonderungsrechte', similar to German law.
216 Lex loci recognitions: no general exemption from the effects of insolvency.
217 This is a general provision on substantive and procedural aspects.

provisions, e.g. a two-months suspension of the representative's powers after publication of the notice of his appointment in the recognizing country (art.11 of the Convention). However, suspension of effects is not total, as even during the suspension period only some privileged creditors 'may commence or pursue individual legal action against the assets of the debtor' (art.11 II of the Convention). Interestingly from a general perspective, the Convention allows a more liberal approach to be taken by recognizing countries as to recognition than under the Convention (art.15).

In the MLCBI, art.21 I d) grants the recognizing court the power to entrust the 'administration or realization' of all or part of the debtor's assets located in the recognizing State to the foreign representative, or another person designated by the court. Art.21 I MLCBI extends this power, under certain conditions, also to 'the distribution of all or part of the debtor's assets located in [the recognizing] State'. Furthermore, art. 19, lit. b), MLCBI gives the court seized with a request of recognition the possibility to vest the foreign representative with limited administration powers pending the formal recognition process, provided such measure is needed 'to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy'.

Finally, also art. 21, lit. g) MLCBI may be partly framed as a rule on powers of the insolvency representative, in that it may be relied upon to extend the foreign representative powers that a local representative might enjoy under the laws of the recognizing State should a local insolvency proceeding be opened.

Art.21 and 22 EIR approach this topic somewhat differently than the MLCBI, but in the same spirit. Starting – like the Istanbul Convention – from the conflict of laws rule that the legal position of the foreign representative is determined by his or her lex fori concursus (cf. Art.21 (1) EIR), they distinguish between foreign main and foreign non-main proceedings. As to foreign (EU-based) main proceedings they state only limited exceptions to the basic rule of applying the foreign lex fori concursus. In particular, a local secondary proceeding remains possible. The powers of representatives of foreign non-main proceedings are specified in Art.21 (2) EIR more restrictedly than the powers of representatives in main proceedings. Art.21 EIR states that non-main representatives may recuperate movable property which has been transferred from the State of the non-main proceeding after its opening or before that under circumstances that justify an action for avoidance of transactions. Generally, foreign representatives must observe local legislation, e.g. when selling-off property of the debtor (Art.21 (2) EIR). Art.22 EIR adds provisions on proof of the appointment of the foreign representative. Similar provisions are contained in art.15 MLCBI in the framework of the formal recognition proceeding.

bb) Rules on the position of creditors

Secondly, there are some substantive rules in the MLCBI and in national legislations on the position of creditors which may apply also to the recognition context. For example, the (procedural and/or material) treatment of creditors in the foreign insolvency proceeding is one of the considerations which the recognizing court has to take into account for its decision on recognition under Art.17 MLCBI and also for granting specific relief under art.21 MLCBI. Although the MLCBI does not require publication of requests for recognition of foreign insolvency proceedings and also does not specifically mention the right of creditors to participate in such proceedings, national legislators may provide for this, e.g. when they implement the MLCBI[218]. Recognition itself can under the MLBCI be requested only by foreign insolvency representatives, not by the debtor or creditors.

The EIR does not provide for specific provisions of this kind, but the treatment of creditors in the foreign proceeding is one of the elements to be taken into account for a scrutiny of public policy under art.33 EIR.

Under Swiss law, which may be taken here as an example for national legislations outside the MLCBI and EIR models, recognition on the form of mini-proceeding can be applied for both by a foreign representative and by the debtor and by creditors. There are no provisions on participation of other creditors in the proceeding at this stage. However, the decision on formal recognition (opening of the mini-proceeding) is published (Art.169 IPRG). As in the EIR, the fair treatment of creditors in the foreign proceeding is one of the conditions of recognition under Art.166 IPRG in conjunction with Art.27 IPRG and also at further stages of the proceeding (Art.173 sentence 3 IPRG – recognition of foreign distribution scheme; and Art.174a (2) IPRG: decision not to request a mini-proceeding; in both cases with particular reference to fair treatment of creditors with Swiss domicile).

218 Cf. Art. 405 of the Croatian Bankruptcy Act.

cc) Rules on geographical exclusion of property from otherwise universal proceedings

As was already discussed, the EIR limits the effects of foreign non-main proceedings to property situated in the country of the respective forum concursus (Art.19 EIR in conjunction with Art.20 (2) EIR). In contrast, the MLCBI avoids a general statement on this issue.

Beyond this, the EIR contains two provisions excluding certain goods from the regulatory reach of (domestic as well as foreign) insolvency proceedings according to geographical criteria. This applies, firstly, to rights in rem in assets located outside the country of the forum concursus (Art.8 EIR). The legislative reason behind this rule is to protect secured creditors. The provision goes beyond a mere conflict of laws rule and completely protects such creditors from any impact of insolvency proceeding on their security rights. Art.8 EIR applies only to property situated in other EU member states (EIR countries). Similarly, art.10 (1) EIR exempts assets, which belong to a seller of goods under a retention of title agreement and are situated in other EU member states than the forum concursus, from any effects of the (domestic or foreign) insolvency proceeding. Art. 10 (1) EIR applies both to proprietary and contractual aspects of retention of title agreements. Under art.10 (2) EIR a similar exemption is foreseen for property sold by the insolvent debtor to third parties under a retention of title agreement. Art.8 and 10 EIR have been criticized in legal literature for being over-protective[219]. On the national level, some legislators have extended these provisions to non-EU insolvencies, but do not foresee a similar limitation for their own domestic insolvency proceedings (e.g. sec. 351 German InsO). Others apply these rules also with regard to non-EU insolvencies in both directions (e.g. sec. 222 Austrian InsO).

dd) Rules on attribution of property

Apart from the rule under the EIR and various national legislations that the effects of non-main proceedings extend only to local property in the State of the forum concursus, some particular provisions attribute certain property objects to one or the other kind of insolvency proceeding with specific reference to the international context. Thus, Art.15 EIR attributes

219 Cf. Bork-Mangano, p.146 (at 4.49).

common EU patents, European Community trademarks and 'similar rights' established under EU law 'only' to the main insolvency proceeding of its owner under the EIR. The rule does not make a statement on the location of such rights, but determines their attribution exclusively for cross-border insolvency purposes.

Somewhat similarly, art.167 sentence 3 of the Swiss Private International Law Act (IPRG) locates claims, with particular reference for cross-border insolvency purposes, at the domicile of the third-party debtor. The consequence of this is that such claims are regarded as making part of the territorially limited (Art.170 IPRG) mini-proceeding under Swiss cross-border insolvency law. The provision leaves, however, open whether this approach to the location of claims applies also to Swiss domestic (main or non-main) insolvencies.

ee) Procedural effects of foreign insolvencies: stay of proceedings

Among the substantive (procedural) effects of foreign insolvencies the MLCBI addresses in Art.20 and 21 the effects of recognition on pending or new actions related to the foreign insolvency proceeding, e.g. a stay of individual court and arbitral proceedings by or against the debtor and the stay of individual execution against the debtor. Additionally, Art.21 (1) (d) MLCBI gives the recognizing court the power to take evidence or order the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities, thus supporting the foreign proceeding.

The standing for a foreign insolvency representative in avoidance actions in the recognizing state is specifically addressed in art.23 MLCBI.

The Istanbul Bankruptcy Convention also mentions among the effects of recognition expressly the stay of 'individual legal action' against the debtor (see Art.11 (2) and (3) of the Convention), without, however, introducing for this effect elements of judicial discretion. A particular provision deals with measures of protection or preservation (Art.8 of the Convention).

The EIR addresses the recognition of procedural effects of foreign insolvencies mainly by using a conflict of laws approach (see Art.20 EIR in conjunction with Art.6 EIR, for pending proceedings see Art.18 EIR). It contains in the recognition-context only two specific procedural effects-focused provisions on the local publication of a foreign proceeding (Art.28) and the entry into registers of the recognizing State (Art.29). Both provisions apply only to states where there is a local 'establishment' of the debtor, but they do not exclude further going publications or entries into register.

ff) Material effects of foreign insolvencies

From amongst the consequences of insolvencies upon legal relations under civil or commercial law Art. 20 and 21 MLCBI address in the recognition-context only 'the right [of the debtor] to dispose of any of his or her assets', which is 'suspended'.

The EIR contains some additional rules on material consequences of recognition: Art.23 EIR states that creditors who have received extra-payments by execution or otherwise abroad, have to return these to the foreign proceeding or get those payments imputed in cases of concurrent proceeding. However, despite its position in the Chapter on recognition of foreign insolvencies, this provision applies also in domestic insolvency cases and thus is not recognition-specific. The same is true for Art.31 EIR, which contains a particular substantive provision on protection of good faith payments to an insolvent debtor. The Istanbul Convention contains similar provisions on good faith payments in Art.5 and 13, addressing also payments to a representative.

Some national legislations provide for additional material effects of foreign insolvencies. For example, Art.170 of the Swiss Private International Law Act (IPRG) states that 'terms under Swiss law' begin to run only with the publication of the formal decision on recognition of the foreign proceeding. This applies mainly to limitation of actions under applicable substantive (material) law A similar provision relating to avoidance of transactions is contained in art.172 (2) IPRG.

IV. Can recognition be modified or withdrawn?[220]

Insolvency proceedings usually take a significant time, even some years. They develop over time, from the request to start a proceeding, the opening of the proceeding and various following acts and decisions up to the closure of the proceeding. The circumstances on the basis of which recognition of a foreign proceeding was granted (or denied) can change or at some time

220 See also supra at C.III.6.

information may turn-up which puts the correctness of an earlier decision on recognition in question.

The EIR does not address this issue, but the MLCBI expressly provides for the possibility to amend or even terminate recognition. According to Art.17 (4) MLCBI recognition may be modified or terminated 'if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.'[221] Basically the same rule is contained in Art.22 (1) and (3) MLCBI as to specific relief granted by the court in the recognition context.

The Croatian Insolvency Act contains provisions on the related issue of appeal against decisions on recognition. The Act refers in so far to the rules on appeal against decrees opening a Croatian insolvency proceeding (sec.408 of the Act).

V. Intertemporal aspects

In the case of formal recognition, but also in the system of automatic recognition, intertemporal issues may arise. Do the effects of recognition date back, e.g. to the time when the foreign recognized decision became effective, or do they become effective only at them moment of recognition? The same question arises if a later moment recognition is modified or cancelled.

Under the automatic recognition approach, the effects of the recognized foreign insolvency decision enter into force as soon as provided by the foreign forum concursus. If transactions were done after the opening of the foreign insolvency proceeding, e.g. between the insolvent debtor and third party, the impact of the insolvency proceeding on them is governed by the lex fori concursus, if the recognizing State does not provide for particular rules[222]. One such uniform rule, in favour of protection of good faith payments, is contained in Art.31 EIR.

Under a system of formal recognition, intertemporal issues either need to be determined in an abstract manner by the legislator, or they might be left to courts. The MLCBI does not address this issue expressly, but, e.g., the Croatian Bankruptcy Act, contains some good faith protection rules in

221 A similar, but more detailed provision contains e.g. Art. 395 of the Polish Bankruptcy Act.

222 This question arose e.g. in the CJEU case C-186/24 (Metzler v. Auto1 European Cars BV), ECLI:EU:C:2025:211.

this respect (Art. 412 – 415 of the Act). Under the MLCBI, this is probably a matter of discretion of the court.

E. Conclusions

I. General aspects

1. The concept of 'recognition' of foreign insolvencies is today largely accepted as a basic approach to accepting or granting effect to foreign proceedings. The dogmatic focus, either on foreign proceedings in general or on court decisions in or related to such proceeding, differs between the MLCBI (proceedings-based) and the EIR (judgment-based), but this does not necessarily lead to different outcomes.
2. There may be cases in which a full scrutiny of recognition may not be necessary or feasible. The MLCBI offers some suggestions for differentiation in this respect. This could be integrated into the basic recognition-approach of the EIR.
3. The EIR approach, which is focused on judgments, uses in this respect (subsidiarily) well-known rules on recognition of foreign judgments in civil and commercial matters, adding specifics of cross-border insolvency. The MLCBI is more flexible, being grounded to a significant degree on judicial discretion.
4. Both under the MLCBI and the EIR, recognition of foreign insolvencies is binding and does not depend on judicial discretion. This is also true for some basic consequences of recognition, but most effects of recognition involve under the MLCBI judicial discretion, while they occur ex lege under the EIR and the law of most EU member states. Nevertheless, discretionary elements or assessment considerations do exist also under the EIR and under national law and could be further developed to approximate the models of the EIR and the MLCBI.
5. Both the MLCBI and the EIR distinguish also between recognition of foreign 'main' and 'non-main' proceedings, but these categories may be defined differently. The effects of recognition may also differ to a certain degree between these categories, mainly with regard to which property is regarded as covered by which proceeding.

II. Prerequisites of recognition

The essential prerequisites of recognition are a definition of the proceedings encompassed by the special rules on recognition of foreign insolvencies, indirect jurisdiction, and the public policy clause. Further additions to this list (such as a reciprocity requirement) are most likely unnecessary, since the major instruments of cross-border insolvency law (the EIR and the MLCBI) do not set an excessively high recognition threshold.

The first element in the list (definition of the proceedings) seems the most problematic: in this respect, the approaches of the EIR and the MLCBI differ significantly, since the former instrument is applicable to a closed list of proceedings whose overall structure resembles that of traditional liquidations and reorganisation proceedings, where a court hands down an opening judgment (producing most of the legal effects whose recognition abroad is at stake) and a closing judgment (repealing most of the aforementioned effects), and enjoys a variable degree of oversight upon the development of the case. The latter instrument, on the contrary, contains a considerably more flexible definition, which might fit both traditional liquidation proceedings and reorganisations largely unfolding out of court, and even proceedings whose purpose might not be addressing the debtor's insolvency.

Mandating EU Member States to embrace such a broad definition might prove too ambitious. A more cautious, and recommendable approach, might be to adopt a minimal definition, mirroring that contained in the EIR, and using proceedings listed Annex A as touchstones, leaving it to the responsibility of individual Member States to enlarge the range of proceedings that might be eligible for recognition under national law, arguably with effects limited to the respective national territory.

III. Procedure of recognition

1. An optional particular procedure of recognition (inspired by the MLCBI and examples in some EU Member States) would be welcome in order to create legal security in cases when the general approach of automatic recognition is not deemed efficient enough. There are two major differences between automatic and 'formal' recognition. The first lies in the timing of the effects of recognition. The second is that in either scenario the burden of seizing the court to have the prerequisites of recognition

ascertained will rest upon a different party: the debtor or its representative, in automatic recognition; the creditors, or any person showing a legitimate interest countering recognition in formal recognition. The fundamental choices in this respect are to be made by the European legislator, but Member States should remain empowered to cast detailed rules of procedure.

2. A further fundamental choice deals with the territorial reach of the Member State´s judgments granting or denying recognition: in other words, the EU will have to decide whether a recognition judgment will trigger its effects only in the Member State where recognition is sought, or not; and whether a judgment denying recognition should prevent recognition in other Member States. Unlike the choice between automatic and formal recognition, that between 'universal' and 'territorial' recognition involves alternatives that are neutral regarding the respective positions of creditors and debtor: the debtor will certainly benefit from an EU-wide recognition, but so may also a State-limited recognition, insofar as recognition is denied in one or more Member States.
3. A combination of different methods and choices is envisageble, as the Spanish Ley Concursal demonstrates.

IV. Effects of recognition

1. As to the effects of recognition, the EIR, the MLCBI and national legislation are characterised by two main approaches, which depend significantly on the chosen procedure of recognition.

   The MLCBI, which as a basic principle requires a formal recognition proceeding, gives the recognizing court considerable discretion as to what legal effects are given to the foreign proceedings. This is consistent with a legal assistance approach to cross-border insolvency. A limited number of these effects are obligatory.

   The EIR, but also legislations, which provide under the EIR the possibility of a formal recognition proceedings, start with a conflict of laws approach, but add various particular substantive rules, e.g. on stay of individual actions against the debtor and on protection of good faith payments.

2. EU member countries, which have adopted the MLCBI into their autonomous insolvency law and integrated it into a systematic approach, have been able to combine both approaches.

3. While the EIR uses, also in the recognition-context, a differentiated conflict of laws approach as starting-point, the MLCBI prefers a substantive law approach, even if it does not exclude the use of conflict of laws considerations. However, the MLCBI appears to be compatible also with a more developed conflict of laws approach. In this respect, the current UNCITRAL project on applicable law in insolvency could be used as a basis also for discussion on a future EU regulation on recognition of non-EU insolvencies.

4. While the EIR grants foreign non-main proceedings only territorial effect, the MLCBI and some national legislations take a more flexible, arguably well-founded approach in this regard.

5. The present rules of the EIR on bilateral exemption of rights in certain assets from the territorial reach of main insolvency proceedings (Art. 8 and 10 EIR) do not reflect a general trend under autonomous law, though they might be kept as unilateral rules in the recognition context, if they remain unchanged in relations between EU member states.

Bibliography

Baccaglini, Il riconoscimento e l'esecuzione della sentenza fallimentare straniera in Italia, Trento, 2008

Balz, Cross-border insolvency and the EU Draft Convention, International Financial Law Review (IFLR), 1994, 17

Balz, The European Union Convention on Insolvency Proceedings, American Bankruptcy Law Journal (ABLJ), 1996, 485

Becker, 'International Insolvency: the Case of Herstatt', American Bar Association Journal (ABAJ) 1976, 1292

Boon/Wessels, Chapter 21: The realm of soft law instruments in restructuring and insolvency law, in: Omar/Gant, Research Handbook on Corporate Restructuring (2021), https://doi.org/10.4337/9781786437471.00033, 401

Bork, Advanced Introduction to Cross-Border Insolvency Law, Cheltenham/Northampton, 2023

Bork, Cross-Border Insolvency Law, Cheltenham/Northampton, 2023

Bork, Principles of Cross-border Insolvency Law, Cambridge, 2017

Bork/Veder (eds), The UNCITRAL Model Laws on Cross-Border Insolvency and on the Recognition and Enforcement of Insolvency-Related Judgments. An Article-by-Article Commentary, Cheltenham/Northampton, 2025

Bork/Mangano, European Cross-Border Insolvency Law, 2nd ed., Oxford, 2022

Bork/Van Zwieten (eds), Commentary on the European Insolvency Regulation, Oxford, 2022;

Boshkoff, United States judicial assistance in cross-border insolvencies, in International & Comparative Law Quarterly (ICLQ), 1987, 744

Brinkmann (ed), European Insolvency Regulation: Article-by-Article Commentary, München; 2019.

Carbone, Il c.d. fallimento internazionale tra riforma italiana del d.i.p. e normativa di diritto uniforme, Diritto del commercio internazionale (Dir. comm. int.), 1998, 633

Casey/Gurrea-Martínez/Rasmussen, A Commitment Rule for Insolvency Forum: A Response to Critics (September 13, 2024). Singapore Management University School of Law Research Paper No. 38/2024, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 1032, Available at SSRN: https://ssrn.com/abstract=4955313 or http://dx.doi.org/10.2139/ssrn.4955313

Corno, 'La disciplina italiana del riconoscimento e dell'esecuzione in Italia di sentenze e provvedimenti stranieri in materia di crisi e d'insolvenza', in Cagnasso/Panzani (eds), 'Crisi d'impresa e procedure concorsuali', Milano, 2025, 934

Cuniberti, Conflict of Laws. A comparative Approach, Cheltenham/Northampton, 2022

Cuniberti/Nabet/Raimon, Droit européen de l'insolvabilité*,* Paris, 2017

D'Attorre, Manuale di diritto della crisi e dell'insolvenza, Torino 2022

Dahlusein, International Insolvency and Bankruptcy, vol. I., New York, 1986

Dammann/Sénéchal, Le droit de l'insolvabilité internationale, Issy-les-Moulineaux, 2018

Daniele, 'Les problemes internationaux de la faillite: heur et malheur du projet de convention communautaire', in Cahiers de droit Européen, 1987, 512

De Cesari/Montella, Il nuovo diritto europeo delle crisi d'impresa: il Regolamento (UE) 2015/848 relativo alle procedure d'insolvenza, Torino, 2017; Lupoi, Regolamento (UE) 2015/848 del Parlamento europeo e del Consiglio del 20 maggio 2015 relativo alle procedure di insolvenza (rifusione), in Maffei Alberti, Commentario breve alle leggi su crisi d'impresa ed insolvenza, Milano, 7th ed, Milano, 2023

Dodge, International Comity in American Law, Columbia Law Rev., 2015, 2071

Dutoit, Droit international privé suisse: Commentaire de la loi fédérale du 18 décembre 1987, Basel, 2016

Duursma-Kepplinger/Duursma/Chalupsky (eds), Europäische Insolvenzverordnung, Wien/New York, 2002

Farrar, The EEC Draft Convention on Bankruptcy and Winding Up: A Progress Report and Evaluation, in Journal of Business Law (JBL), 1977, 320

Fletcher, 'Harmonisation of Jurisdictional and Recognitional Rules: The Istanbul Convention and the Draft EEC Convention', in Ziegel (ed), Current Developments in International and Comparative Insolvency Law, Oxford, 1995, 123

Fletcher, 'The European Union Convention on Insolvency Proceedings: an Overview and Comment, with U.S. Interest in Mind', in Brooklyn Journal of International Law (BJIL), 1997, 25

Fletcher, 'The Proposed Community Convention in Bankruptcy and Related Matters', in Lipstein (ed), Harmonisation of Private International Law by the E.E.C., London, 1977

Fletcher, Conflict of Laws and European Community Law, Amsterdam, 1982

Fletcher, Insolvency in Private International Law: National and International Approaches, 2nd ed. Oxford, 2005.

Garašić, Recognition of Foreign Insolvency Proceedings: The Rules that a Modern Model of International Insolvency Law Should Contain, Yearbook of Private International Law, Vol. 7, 2005, 343

Guzzi, La convenzione comunitaria sulle procedure di insolvenza: prime osservazioni, Diritto del commercio internazionale (Dir. comm. int.), 1997, 901 ss.;

Ho (ed), Cross-Border Insolvency. A Commentary on the UNCITRAL Model Law, 4th ed., Woking, 2017

Hunter, The Draft EEC Bankruptcy Convention: A Further Examination, in International and Comparative Law Quarterly (ICLQ), 1976, 310.

Johnson, 'The European Union Convention on Insolvency Proceedings: a Critique of the Convention's Corporate Rescue Paradigm', in International Insolvency Review (IIR), 1996, 80

Kayser, A Study of the European Convention on Insolvency Proceedings, International Insolvency Review (IIR), 1998, 95

Krause/Janovsky/Lebowitz, Relief Under Section 304 of the Bankruptcy Code: Clarifying the Principal Role of Comity in Transnational Insolvencies, Fordham L. Rev. 1996, 2591

Lee, Global Finance and Transnational Failure: Comity and the Bankruptcy Code, Banking Law Journal (BLJ) 2001, 624;

Lew, EEC Draft Convention on Bankruptcy, in New Law Journal (NLJ), 1975, 628

Mankowski/Müller/Schmidt, Europäische Insolvenzverordnung 2015 (EuInsVO 2015) Kommentar, München, 2016

McCormack, EU Insolvency Law: Cross Border Insolvency Law in Comparative Focus, Cheltenham/Northampton, 2022

McKenzie, 'The EC Convention on Insolvency Proceedings, in European Review of Private Law (ERPL), 1996, 181

Morgen (ed) Kommentar zum Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen (StaRUG), Köln, 2025

Moss/Fletcher/Isaacs/Smith/Paulus (eds), Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings, 4th ed., Oxford, 2023

Nadelmann, Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company, in New York University Law Review (NYULR) 1977, 2

Nadelmann, Clouds over International Efforts to Unify Rules of Conflict of Laws, Law and Contemporary Problems 1977, 54

Nocilla, Canadian cross-border insolvency law and the triumph of 'modified universalism': A retrospective, 33 IIR 2024, 399

Omar, Genesis of the European initiative in insolvency law, International Insolvency Review (IIR), 2003, 147

Omar, The case for a European Convention in insolvency, International Company and Commercial Law Review (ICCLR), 1996, 163

Omar, The Landscape of International Insolvency, International Insolvency Review (IIR), 2002, 187

Paulus, Europäische Insolvenzverordnung (EuInsVO), 5ª edition, Frankfurt am Main, 2017

Ramackers, 'Reflexions critiques sur la Convention Européenne relative a certains aspects internationaux de la faillite', in La Semaine Juridique, June 1993, 279

Ranney-Marinelli, Overview of Chapter 15 Ancillary and Other Cross-Border Cases, in American Bankruptcy Law Journal (ABLJ), 2008, 269

Rimel, American Recognition of International Insolvency Proceedings: Deciphering Section 403(c), Bankruptcy Developments Journal (BDJ) 1992, 459

Schmidt (ed), Europäische Insolvenzverordnung (EuInsVO) mit Restschuldbefreiung und Nachlassinsolvenz in der EU. Komment, 2nd ed, Hürth, 2024

Schmidt, Preventive restructuring frameworks: Jurisdiction, recognition and applicable law, International Insolvency Review (IIR), 2021, 81

Schollmeyer, The New European Convention on International Insolvency, in Bankruptcy Developments Journal (BDJ), 1997, 421

Schrag/Walker/Blumberg, Cross-border Insolvencies: Plenary Cases and Ancillary Proceedings Involving Foreign Debtors in US Bankruptcy Courts, in Business Law International (BLI), 2004, 159

Silvestri, La circolazione delle misure protettive e cautelari secondo la Legge Modello UNCITRAL del 1997, in Diritto fallimentare e delle società commerciali (Dir. fall.), 2025, 694

Smart, Cross-Border Insolvency. 2nd ed., London, 1998

Spahlinger, Sekundäre Insolvenzverfahren bei grenzüberschreitenden Insolvenzen, Tübingen, 1998

Stürner/Eidenmüller/Schoppmeyer (eds), Münchener Kommentar zur Insolvenzordnung, IV. EuInsVO, München, 2021;

Trunk, Übernahme und Adaptation des UNCITRAL-Model Law on Cross-Border Insolvency in the EU: Die Beispiele Polen, Rumänien, Slowenien, in Pannen/Riedemann/Zeuner (eds), Prozess als Wirklichkeit des Rechts Festschrift für Stefan Smid zum 65. Geburtstag, München, 2022, 453

Trunk, Internationales Insolvenzrecht, Tübingen, 1998

Vallender (ed), EuInsVO Kommentar, 2nd ed., Köln, 2020

Virgós/Garcimartín, The European Insolvency Regulation: Law and Practice*,* Den Haag, 2004;

Volken, Cross-Border Insolvency: Co-operation and Judicial Assistance, in Forum Internationale, 1993 (n. 29), p. 26.; Fletcher, International Insolvency: A Case for Study and Treatment, International Lawyer, 1993, 429

Wimmer/Bornemann/Lienau, Die Neufassung der EuInsVO, Köln, 2016

Yamamoto, New legislation on cross-border insolvency as compared with the Uncitral Model Law, in International Insolvency Review (IIR), 2002, 67;

Yamauchi, Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?, Int'l Ins Rev. Int. Insolv. Rev., Vol. 16, 145 (2007)

Yung, Cross-border Insolvency in Hong Kong: Developments and Updates, (2022) 31 International Insolvency Review 297

Zamperetti, Nodari, 'Verso l'armonizzazione comunitaria del diritto fallimentare: lo stato dell'arte', in Giurisprudenza commerciale (Giur. comm.), 1997, 607.