Europe’s approach to international insolvency law at a time for choosing legal methods

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Abstract:

In the wake of Brexit, the European Union is paving the way for work towards a future international insolvency law addressing also third countries. While the European Insolvency Regulation (EIR Recast, Regulation (EU) No 2015/848 of 20 May 2015) already governs insolvency situations arising on both sides of the external borders of Europe when the debtor's centre of main interests is located in the territory of a EU Member State, it refers to the law of its Member States whenever this connecting factor is not met. However, such an approach, which maintains national rules of international jurisdiction and conflict of laws, raises the question, in a context reshaped by Brexit, of the relevance and suitability of these solutions to the contemporary objectives of European international insolvency law. The developments in recent years towards the restructuring, rescue, and recovery of debtors, as well as the consideration of specific interests[1], cannot be ignored. Also, in the game of legal sovereignty played by the major economic powers, and in which the European Union intends to participate, the competition between models – Common Law, Civil law, European law—is becoming increasingly evident. Faced with this challenge, the European Union is confronted with a choice of legal methods upon which the future of international insolvency law will depend.

Keywords: Brexit, European Union; Third States; contemporary international insolvency law; restructuring; public policy; harmonization of law; conflict of laws

1 One need only consider the special conflict of laws rules of the EIR, which attest to the modernity of European private international law in this area, protecting certain particular interests by subjecting them to the application of a law other than the lex fori concursus (Art.8 – 18 EIR).

A. Introduction

Four years after the United Kingdom withdrew from the European Union, the shockwaves of Brexit are being felt also in the field of European insolvency procedures, and their magnitude is already significant. While the UK officially became a third country on January 31, 2020, a transition period was in place until 31 December 2020, during which EU law continued to apply also in relations with the UK[2]. Since that date European international insolvency law[3] no longer applies between the EU and the UK.

Thus, Brexit has reactivated previously dormant solutions under general international insolvency law. This is the case when the debtor's centre of main interests is located in the United Kingdom[4] or whenever an English court is seized of a request to open an insolvency proceeding. Since Brexit, the jurisdiction of English courts is once again governed by English law, and instead of the lis pendens mechanism under the Brussel Ibis Regulation[5], the doctrine of forum non conveniens will return and anti-suit injunctions will again have to be expected in relations between the UK and the EU. Furthermore, traditional English conflict-of-laws rules have regained their authority, and with them, when English law is applicable, the Scheme of Arrangement procedure, which the transposition of Directive (EU) 2019/1023 on preventive restructuring frameworks[6], concurrent with Brexit, did not alter. Above all, the exequatur procedure reappears under the conditions set by national law and the treaty law to which the United Kingdom is a party. Thus, the entire Anglo-Saxon law world awakens on the doorsteps of Europe.

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2 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, OJ L29, 31 January 2020. – Dec. (EU) 2020/2252 of 29 December 2020. On the question see also Fabriès-Lecea, RLDA 2020, suppl. Apr. 17 (17).

3 The EIR and other EU legislation in insolvency matters, e.g. on banking and insurance insolvencies (see, in particular, the texts of the BRRD and IRRD).

4 The EIR applies only to proceedings in which the debtor's center of main interests is located in the territory of a Member State (recital 25, Regulation (EU) No 2015/848). In other situations, it is referred to national solutions under private international insolvency law. On this point, see Fabriès-Lecea, Société de législation comparée, coll. 'Trans Europe Experts', 2015, 23 (23).

5 CJEU, 24.03.2022 -C-723/20, ECLI:EU:C:2022:209 – Galapagos BidCo. S.a.r.l. v DE and Others., Fabriès-Lecea, BJE 4/2022, n°BJE200q8, (30).

6 Directive (EU) 2019/1023 of 20 June 2019, OJ L 172, 26 June 2019. For a study of the directive, see Fabriès-Lecea, Revue Europe 2/2022, 5 (5).

While the United Kingdom is not the only EU Member State to escape European international insolvency law – Denmark, for example, has never been subject to the EIR due to an opt-in clause[7] – the implications of Brexit take a decidedly unprecedented turn here because of the nearly 20 years of application of European international insolvency standards in the UK, and the resulting established practices. Currently, the English system remains heavily influenced by European solutions, but over time, the divergence between the two legal models will widen.

Consequently, the question arises in situations relating to non-European countries as to the relevance of reactivating national solutions and their suitability to the contemporary objectives of European international insolvency law, whose evolution towards debtor recovery, rescue and recovery, as well as the consideration of specific interests, cannot be ignored. Certainly, this discussion extends beyond the sole context of Brexit, as general international insolvency law continues to apply whenever the EIR is not applicable, i.e. when the debtor's centre of main interests is located in a third country[8]. However, while aligning Member State legislation with European solutions is conceivable in such situations[9], the same cannot be expected from the legislation of third countries, which will continue to use their own standards.

In this melting pot of models, the European Union must find its own path to assert its legal sovereignty, as it is difficult to claim to be a great power if its law is never applied[10]. Faced with this challenge, several legal approaches are available, and the future of international insolvency law will depend on the choices made.

B. Recognition of legal situations

The method of recognition of situations, developed in the 17th century by the Dutch school, is posed in similar terms for a new legal situation

7 Recital 88, Regulation (EU) No 2015/848.

8 Rec. 25, Reg. (EU) No 2015/848. On this point, Fabriès-Lecea, Société de législation comparée, coll. « Trans Europe Experts », 2015, 23 (23).

9 This approach could be opportune, as it would unify the rules relating to international insolvency, regardless of where the proceedings are initiated.

10 In this sense, Abitbol: 'We are not a great power when we apply the law of others. We are not a power at all when we submit to the courts of others,' BJE 4/2022, No. BJE200r4, (33).

established by a public authority or a foreign judgment[11]. The question is no longer which law applied when a right was created, but rather how to recognize a right lawfully established abroad, in order to respect the parties' expectations regarding established rights. In this respect, the method of recognition tends to overshadow the conflict of laws approach[12].

While appealing, the method of recognition of legal situations cannot be exercised without a review of international regularity according to criteria set by the host State. While this review is less stringent in the presence of a community of harmonized legal systems and laws, such as mutual recognition within the European Union[13], its level of rigor increases when the rights conferred were established in a State outside this community. In addition to verifying the existence of a sufficient connection between the situation and the State in question, the absence of fraud in resorting to the foreign authority, and the regularity of the act according to the law of origin or the conflict-of-laws rules of the host State, particular attention will be paid to the absence of any conflict between the legal situation created and the international public policy of the host State. Thus, in the event of significant divergences between legal systems, the public policy exception will play its prohibitive role.

In this regard, French case law illustrates the importance of the international public policy exception in matters of insolvency. While the Court

11 Niboyet uses the concept of 'conflict of authorities' (Niboyet, no. 1571).

12 In French law, the control of conflict of laws has been abolished for the recognition of foreign judgments (Cass. 1re civ., 20 February 2007, Cornelissen, n°05–14082, RCDIP 2007, 420, note Ancel and Muir Watt; JDI 2007, 1195, note F.-X. Train; D. 2007, 1115, note d'Avout and Bollée, and chron. 892; Gaz. Pal., 29 April-3 May 2007, nos 119–123, sp. cont. jud. int. et europ., 2, note M.-L. Niboyet). However, the question remains of distinguishing the cases in which a public act must involve the control of conflict of laws for its recognition, because it is not a question of encouraging recourse to foreign authorities to escape the binding provisions of a given law.

13 Since Regulation (EU) No 1215/2012, the requirement for prior exequatur has been abolished, and the review of the international validity of a judgment rendered in civil and commercial matters is carried out only after the fact in the event of a dispute. This review consists of verifying the absence of manifest conflict with the public policy of the host State, the fairness of the summons, the absence of irreconcilable judgments, and, exceptionally, verifying the jurisdiction of the foreign court in areas of exclusive jurisdiction under Article 24, the rules on insurance, consumer affairs, or contracts and contracts entered into by consumers or workers. In insolvency proceedings, mutual recognition consists of the automatic recognition of judgments, subject to their conformity with the public policy of the host State (Articles 32 and 33, Regulation (EU) No 2015/848).

of Cassation has established the essential principles of French international insolvency law (principle of equality of creditors[14], principle of filing claims[15], principle of staying individual proceedings[16]), it has also clarified that not all aspects of French insolvency law are deemed to be an expression of such essential principles[17]. It remains that the content of international public policy, which is in principle freely determined by States, is influenced by European law for those States, which are members of the European Union. Thus, the Court of Justice of the European Union, through its preliminary reference procedure[18], provides guidance as to what constitutes the public policy exception within the European Union. In this regard, it has stated that Member States may refuse to recognize a decision to open an insolvency proceeding if such decision was taken in manifest violation of the fundamental right to be heard of a person concerned by such a proceeding[19]. Along the same lines, the French Cour

14 Cass. civ., March 11, 1913, Nebel, DP 1914, 185, note Pic; JDI 1913, 910, note Perroud; RCDIP 1913, 453.- Cass. com., January 19, 1988, BCT Computer, D. 1988, 365, note Rémery; RCDIP 1990, 527.- Cass. com., May 14, 1996, BCCI, D. 1996, 586, note Vasseur; RCDIP 1996, 475, rapp. Rémery.

15 Cass. civ., 29 Sept. 2004, RCDIP 2005, 322, note Rémery; JDI 2005, 378, note Mélin; D. 2005, jurispr. 2159, note Henry.

16 Cass. civ., 5 Feb. 1991, Rev. arb. 1991, 625, note Idot. – Cass. 1st ch. civ., 24 Mar. 1998, JCP G 1998, 1712, note Kerckhove.- Cass. 1st civ., May 6, 2009, Bull. civ. 2009, I, n°86; APC 2009, pers. 182, notes Mastrullo; JCP G 2009, act. 255, obs. Beguin; LEDEN July 2009, 5, obs. Mélin; JCP E 2009, 1814, n°2, obs. Petel; D. 2009, 1422, obs. Delpech; RTD com. 2009, 546, obs. Loquin; JCP E 2009, 1814, n°2, obs. Petel; Rev. proc. coll. 2010, 29, n°9, obs. Staes – Cass. com., Nov. 12, 2020, n° 19–18.849, APC 2021, n°1, comm. 5, Fin-Langer notes.

17 On the conditions for opening, see Cass. com., 18 Jan. 2000, RJDA 2000, no. 233; JDI 2001, 539, note Poillot-Peruzzetto; JCP E 6 Apr. 2000, 611, note Chaput; LPA 2000, no. 7, 12, note Vallens; RCDIP 2000, 442, note Bureau; D. 2000, act. jurispr. 105, note Faddoul; APC 2000, no. 4, note Regnaut-Moutier. – On the duration of the suspect period, see Cass. civ., 20 May 1967, JDI 1967, 629, note Bredin. – Cass. 1st civ., 15 July 1975, Bull. civ. I, no. 236; JDI 1975, 847, note Kahn.- Cass. com., 5 Feb. 2002, JCP G 2002, I, obs. Fabries, no. 7; JCP E 2002, 500; RJDA 6/2002, no. 676; D. 2002, 957, obs. Lienhard; RJ com. Apr. 2002, 162, note Menjucq; Gaz. Pal. 19 and 20 Feb. 2003, 26, note M.-L. Niboyet; JCP E 2003, 955, note Raimon.

18 ECJ, 28.3.2000 -C-7/98, ECLI:EU:C:2000:164- Dieter Krombach v André Bamberski, Gaz. Pal. 2000, 1731, chron. M.-L. Niboyet; RCDIP 2000, 473, note Muir-Watt; RTD civ. 2000, 944, obs. Raynard.- ECJ, 11.5.2000 -C-38/98, ECLI:EU:C:2000:225- Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento, RCDIP 2000, 497, note Gaudemet-Tallon; JDI 2001, 696, note Huet.

19 ECJ, 2.5.2006 -C-341/04, ECLI:EU:C:2006:281- Eurofood IFSC Ltd., JCP G 2006, II, 10089, note Menjucq; D. 2006, 1286, note Lienhard; D. 2006, 1752, note Dammann;

de cassation has held that the failure to hear employee representatives does not constitute a manifest violation of the fundamental right to be heard of a person concerned by such proceedings[20]. Furthermore, the new Regulation (EU) No 2015/848 defines the parameters of the public policy exception by stipulating respect for fundamental rights and the principles enshrined in the Charter of Fundamental Rights of the European Union, and in particular the protection of personal data, the right to property, and the right of access to a court[21]. In this respect, the Cour de cassation held that the English rule transferring ownership of jointly owned assets of a debtor in judicial liquidation to the trustee does not produce effects manifestly contrary to the French conception of international public policy[22]. A little earlier, the Court had censured the lower court judges, citing Article 6 of the ECHR, for having disregarded the right of access to a court by declaring inadmissible the third-party objection of creditors domiciled in another Member State, thereby depriving them of any remedy[23].

Apart from this, without affecting the content of the international public policy exception, the UNCITRAL Model Laws on International Insolvency[24], insofar as they govern the recognition of insolvency decisions and procedures, offer a real advantage to insolvency practitioners and national

Bull. Joly 2006, 907, note Fasquelle; Rev. sociétés 2006, 360, note Rémery; JCP E 2006, I, 2071, note Vallens; JDI 2007, 5, note Khairallah; Europe 2006, comm. 230, note Idot. – Jault-Seseke and Robine, RCDIP 2006, 811 (811).

20 Cass. com., June 27, 2006, D. 2006, act. jurisp. 1816, obs. Lienhard; D. 2006, case law. 2257, notes Vallens; JCP G 2006, II, 10147, note Menjucq.

21 Rec. 83, Reg. (EU) No 2015/848. For a study of art. 33 of Reg. (EU) No 2015/848, Fabriès-Lecea, Société de législation comparée, coll. « Trans Europe Experts », 2015, 219 (219).

22 Cass. com., 16 July 2020, No. 17–16200, Fabriès-Lecea, BJE 5/2020, No. BJE118e0, (53). Therefore, the ground based on the violation of Article 1 of the First Protocol to the European Convention on Human Rights cannot succeed.

23 Cass. com., June 30, 2009, Eurotunnel, Rev. proc. coll. 2009, no. 16, with the conclusions of Advocate General Bonhomme. – Menjucq, Rev. proc. coll. 2009, reference 4. – Cass. com., February 15, 2011, no. 09–71.436, Rev. proc. coll. 2011, no. 174, commentary by Mastrullo and Menjucq; APC 2011, no. 115, observations by Mastrullo; RCDIP 2011, 903, note by Jude.

24 Model Law on Cross-border Insolvency of 1997 and Guide for Incorporation and Interpretation 2013.- UNCITRAL Legislative Guide on Insolvency Law: Parts One and Two 2004, Part Three on the Treatment of Business Groups in Insolvency 2010, Part Four on the Obligations of Directors of Enterprises in the Pre-Insolvency Period, 2nd ed. 2019.- UNCITRAL Practical Guide on Cooperation in International Insolvency 2009.- Model Law on the Recognition and Enforcement of Insolvency Judgments of 2018.- Model Law on the Insolvency of Business Groups of 2019.

courts operating in accordance with common principles, which are shared with their foreign counterparts[25]. This phenomenon of internationalizing the legal framework for recognizing insolvency situations is gaining momentum and could affect the European Union in the near future[26]. The EIR already refers, for cooperation between insolvency practitioners and between jurisdictions, to international trade practices and the practices set out in the UNCITRAL Model Laws on International Insolvency[27]. Within this framework, the EU could soon go further by transposing, during the revision of Regulation (EU) 2015/848, the UNCITRAL Model Laws on International Insolvency.

Certainly, such an action would require the establishment, within the European Regulation, of two distinct regimes – mutual recognition and the elimination of the exequatur requirement for intra-European situations, on the one hand, and recognition and simplified enforcement for extra-European situations, on the other[28] – but it would allow insolvency practitioners and the courts of Member States and third countries to operate within the framework of their cooperation on a common basis. Above all, it would lead to the emergence of new standards, derived from best practices, capable of providing international insolvency with its own specific regulatory framework, free from any national or regional considerations[29].

While the method of recognizing legal situations is attractive in many respects, it cannot, however, on its own, provide a satisfactory response to the contemporary challenges of international insolvency. The various legal regimes surrounding it (UNCITRAL Model Laws, OHADA Uniform Act, European principles of mutual recognition), and the diversity of international public policy conceptions, encourage forum shopping and undoubtedly hinder the implementation of such an approach.

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25 The MLCBI is applicable in over 50 countries (U.S., UK, Canada, etc.), from which European countries are largely absent.

26 Similar to the work of UNCITRAL, and the revision of the OHADA Uniform Act in 2015, which also deals with international insolvency procedures beyond the borders of the OHADA area.

27 Recital 48, Regulation (EU) No 2015/848.

28 This could take the form of a new chapter dedicated to the recognition and enforcement of decisions rendered by the courts of a third State.

29 Fabriès-Lecea, Mélanges en l'honneur du Professeur Saint-Alary-Houin, Lextenso, 2020, 181 (185).

C. Harmonization of substantive law

While substantial harmonization of insolvency laws among EU Member States was long met with strong national resistance, the path to harmonizing substantive law was first opened by Directive (EC) 80/987/EC on the wage guarantee institution[30], then by the introduction in Regulation (EC) No 1346/2000 of the first common rules on informing creditors and on filing of claims, and more recently by the adoption of the Directive (EU) 2019/1023 of 20 June 2019 on the preventive restructuring framework and of the Directive (EU) 2026/799 of 30 March 2026 harmonising certain aspects of insolvency law. The aim is then to move beyond the existence of the foreign element, at least within the European space, to develop a substantive model through the establishment of a European insolvency procedure capable of competing with the most-established international standards.

The essential question then becomes defining the degree of harmonization of this European law: as a minimum standard, like the 2019 and 2026 directives, which leave so many options open to Member States that the risk of loopholes is high, or with a maxima approach, with the difficulty here that no model naturally prevails and it will undoubtedly be necessary to draw on existing national models. The challenge for the EU will lie in its ability to offer, in the near future, a European model independent of continental legislation, capable of attracting economic actors and lenders.

While no one doubts that the development of a European insolvency procedure will contribute to a more harmonious functioning of the European internal market and offer a legal model capable of competing with those of other major economic powers, its promotion in cross-border situations outside Europe is less certain. Indeed, the strength of the European model will never be only the result of deliberate choices made by economic actors', giving preference to competing foreign models. In the absence of a common set of values and guarantees shared with third countries, exporting the European model beyond the scope of European integration will prove difficult unless it is accompanied by other major European advances, particularly in the law of security interests and guarantees. In this respect, external situations remain distinct from internal ones and require different regulation.

30 Modified by Directive 2002/74/EC of 23 September 2002 – Modified by Directive 2008/94/EC of 22 October 2008.

D. Harmonization of conflict of laws

The European Union embarked quite early on the path of harmonizing conflict of laws in matters of international insolvency[31]. However, it was only with the Treaty of Amsterdam and the adoption of Regulation (EC) No 1346/2000[32], and subsequently its successor Regulation (EU) No 2015/848[33], that this harmonization became legally binding. While there is now an area in the world where rules of international jurisdiction and conflict of laws in insolvency matters are common to several states, these rules remain limited to insolvency proceedings in which the debtor has the centre of its main interests in Europe[34]. For other situations, European insolvency law refers to domestic and treaty-based solutions.

However, in a global context of competing legal models, the question arises as to whether the concept of keeping the approach that Member States' retain the jurisdiction to regulate insolvency situations involving third countries is still justified, while either national solutions are being reactivated twenty years later, as with Brexit, or because they have not evolved even as the contemporary challenges of international insolvency have simultaneously changed. The EU's approach to international insolvency law is growingly proving ineffective today, as national models perpetuate the spectre of protectionism and leave entirely open the question of how to coordinate national systems and procedures in relations with third countries.

Furthermore, the extraterritorial effect of European international insolvency law is hampered, in matters of conflict of laws, by the almost exclusive designation in the EIR of the law of a Member State[35]. While the close link between jurisdictional competence and legislative competence

31 Convention of the Council of Europe in Istanbul on 5 June 1990 and of the Convention of the European Communities in Brussels on 23 November 1995.

32 For a study of this text, see Giorgini, Dalloz 2006, pref. Vidal.- Fabriès-Lecea, Bruylant 2012, pref. Saint-Alary-Houin.- Mélin, Bruylant 2008.- Nabet, Litec 2010, pref. Martin-Serf.

33 For a study of this text, see Cuniberti, Nabet and Raimon, LGDJ 2017.- Sautonie-Laguionie (ss coord.), Société de législation comparée, coll. « Trans Europe Experts », 2015.

34 Recital 25, Regulation (EU) No 2015/848.

35 With the exception of the conflicts rule set out in Article 17 on the protection of the third-party purchaser, which subjects the validity of the act concluded after the opening of the proceedings by which the debtor disposes of immovable property, a ship or aircraft or securities subject to registration, to the law of the State in whose

in this area explains why, as a general rule in EU law, the law of the Member State where insolvency proceeding has been opened is designated, Regulation (EU) 2015/848 disconnects jurisdiction from the applicable law in certain matters[36]. This leads the judge to apply another law, although the designation remains in most cases limited to that of a Member State. Such wording is regrettable when a right in question, e.g. a property right in a foreign asset, is located in the territory of a third country including, recently, the United Kingdom[37]. In such cases, it is likely necessary to consider that, failing to meet the conditions set out in the special conflict-of-laws rule, a return to the principle of the law of the Member State where the proceedings were opened is mandatory[38]. There is an inconsistency in seeing that the applicable law, and ultimately the protection of the right in question, varies depending on whether the law designated by the special conflict-of-laws rule is that of a Member State or a third country. Another difficulty lies in determining whether the return to the lex fori concursus operates in its substantive rules or in its conflict-of-laws rules, potentially leading to the designation of the law of a third country. Besides the fact that nothing justifies restricting the designated law to that of a Member State, this 'Eurocentric' approach creates a rupture within European conflict-of-laws law itself, since in other areas of law, applicable law is determined

territory that immovable property is located or under whose authority that register is kept, without requiring that this law must be that of a Member State.

36 This is also the case for Article 11 on contracts relating to real estate, Article 12 on payment systems and financial markets, Article 13 on employment contracts, Article 14 on rights subject to registration, Article 16 on prejudicial acts, Article 17 on the protection of the third-party purchaser and Article 18 on pending court or arbitration proceedings.

37 Thus, for example, the fate of contracts relating to a property located in London belonging to a debtor subject to insolvency proceedings opened in Europe will be determined not by Article 11 EIR, which designates the law of the Member State where the property is situated, but by Article 7, which establishes the principle of lex fori concursus. However, there is no justification for the effects of insolvency proceedings on such a contract to fluctuate between the law of the place where the property is situated and the law of the jurisdiction where the proceedings are opened, depending on whether the property is located in the territory of a third country or in that of a Member State other than the State where the proceedings were opened.

38 In favour of the application of the *lex fori concursus* limited to its substantive law provisions, more in line with the European Union mechanism that rejects the use of renvoi any time a law of a Member State is chosen as applicable, v. Fabriès-Lecea, Bruylant 2012, préf. Saint-Alary-Houin.- Contra, Mélin, Bruylant 2008.

independently of whether it leads to the law of a Member State or that of a third country[39].

E. For the universalization of the European Union's international insolvency law and of European standards

While initially the primary objective of European International Insolvency Law was to ensure the proper functioning of the internal market by requiring that cross-border insolvency procedures operate efficiently and effectively[40], and attention was therefore focused on the internal aspects of the integrated area[41], the increasingly pressing competition from foreign models and the need to preserve the competitiveness and attractiveness of European enterprises now compels the European Union to address the external aspects of this area. However, given the previously outlined limitations surrounding each of the legal methods available to it, the EU must seek a new path. In this regard, the universalization of its European conflict-of-laws rules appears a reasonable, even desirable, solution, since it will ultimately allow, whenever the jurisdiction of a Member State is designated, the dissemination of European standards on the international stage.

To achieve this, the European Union will have to act simultaneously on two fronts. The first step will be to 'universalize' its conflict-of-laws rules and to correct, through the upcoming revision of Regulation (EU) No 2015/848, the imperfections that have plagued them in recent years. Thus, a political choice will have to be made: either a further transfer of sovereignty by Member States to the European Union as to handling insolvencies

39 For example, Regulation (EC) No 593/2008 on the law applicable to contractual obligations; Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations; Regulation (EU) No 1259/2010 on the law applicable to divorce; Regulation (EU) No 650/2012 on international successions.

40 Recital 2, Regulation (EC) No 1346/2000 and Regulation (EU) No 2015/848.

41 Some authors at the time relied on the text of Article 65 of the EC Treaty according to which the European Union could only legislate in the field of private international law if it was 'necessary' for the proper functioning of the internal market, considering in fact that only intra-Community situations could have fallen under the control of supranational rules, any other situation necessarily being left, by virtue of the treaty, to the common private international law of the Member States or to the international agreements possibly concluded by them.

related to non-EU countries[42], with the difficulty of establishing specific jurisdictional criteria for non-EU situations[43], or maintaining the application of national law[44]. While this may eventually allow for the alignment of domestic jurisdictional criteria with those of Regulation (EU) No 2015/848, it also carries the risk of affecting the functioning of domestic venue criteria and protective fora[45]. Whichever option is chosen, the new international jurisdiction rules of Member State courts for insolvency situations involving third countries will have to be accompanied by an 'extra-EU' lis pendens rule, which is currently lacking. In this regard, the optional rule contained in Regulation (EU) No 1215/2012 could be a model[46], allowing for the conclusion that when insolvency proceedings are pending before a court of a third country at the time a court of a Member State is seized of a claim between the same parties concerning the same subject matter and cause of action, the latter may stay proceedings if it expects the court of the third country to render a decision capable of being recognized and enforced in that Member State, and if it is satisfied that the stay is necessary for the proper administration of justice.

Furthermore, in the area of conflict of laws, two actions by the European Union will be required. On the one hand, the European Union will have to address extra-European insolvency situations that currently fall outside its purview, and therefore abandon the requirement that the debtor's centre of main interests be located within the territory of a Member State. Thus, it will suffice for a Member State's court to declare itself competent, based on European rules or its own domestic rules when the European criteria are not met, for European conflict-of-laws rules to apply. The European text

42 The European Union only has delegated powers. For the time being, Member States have only agreed to cede sovereignty to the EU for insolvency proceedings in which the debtor has the center of its main interests in the territory of a member state.

43 The discussion should focus on the advisability, in light of contemporary challenges in international insolvency law, of a differentiated regime of international jurisdiction depending on whether the insolvency situation involves third States or not.

44 These arguments were put forward during the revision of Reg. (EU) No 1215/2012, and led to the abandonment of the project to remove the loci ratione applicability conditions from the text.

45 Recently, the Court of Cassation terminated the jurisdiction of French courts on the basis of the privilege of jurisdiction of Article 14 of the Civil Code invoked by the French creditor to open a reorganization or a judicial liquidation against a Lebanese debtor (Cass. com., June 12, 2024, No. 22–16.626, Fabriès-Lecea, BJE 5/2024.

46 Art. 33 of this Regulation.

will then be endowed with a universal geographical application criterion[47], similar to the practice of the European Union in other areas of international law[48]. On the other hand, the European Union will have to abandon any exclusive reference to the law of a Member State. Indeed, whenever third countries are involved in the international relationship, the solution to the conflict of laws must be 'universal,' designating both the law of a Member State and the law of a third country. However, while the renvoi mechanism is excluded in principle in relations between Member States, its application will have to be reinstated each time the law of a third State is designated, unless the law in question is considered to fall under the principle of party autonomy[49]. Therefore, a proposal could be made to include a provision relating to this mechanism, similar to that adopted in Regulation (EU) No 650/2012 on international successions[50]. Thus, when the application of the law of a third State is prescribed, it will apply in its current provisions, including its rules of private international law, insofar as they refer to the law of a Member State or to the law of another third State applying its own law.

Finally, the second area of action for the European Union will consist of developing European standards whose dissemination will be ensured internationally each time the law of a Member State is designated as applicable. While the question of the degree of substantive harmonization will again arise, the path of harmonizing legislation around a common minimum framework, without sacrificing national particularities, could this time be considered[51]. This would also apply to European rules concerning the notification of creditors and the filing of their claims, and those relating to the

47 Fabriès-Lecea, Bruylant 2012.
48 Regulation (EU) No 2019/1111 on international jurisdiction and the effects of decisions in matrimonial matters and matters of parental responsibility; Regulation (EU) No 650/2012 on international succession; Regulation (EC) No 593/2008 on the law applicable to contractual obligations; Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations; Regulation (EC) No 4/2009 on maintenance obligations; Regulation (EC) No 1259/2010 on the law applicable to divorce; Regulation (EU) No 2016/1103 on matrimonial property regimes; Regulation (EU) No 2016/1104 on the property effects of registered partnerships.
49 Therefore, no reference would be applicable to the laws covered by the provisions of the European regulation on employment contracts.
50 Art. 34 of this Regulation.
51 And why not revive the debate, for intra-European situations, on the degree of harmonization of the future European insolvency procedure?

protection of personal data[52]. If these European standards are intended to be developed, the question of their binding nature in situations involving third countries will inevitably be raised, and with it, their capacity to override the application of foreign law[53]. Here again, everything will depend on political choices.

As transposition of the UNCITRAL Model Laws into European legislation only partially addresses the challenges of international insolvency law, a complementary legal approach must be considered[54]. In this respect, the universalist evolution of the European Union's international insolvency law, and its European standards, appears as a satisfactory response to the linking of national insolvency systems and procedures in relations with third countries[55]. Without being hegemonic, the European Union would gain in legal sovereignty.

Bibliography

I. Monographs

Cuniberti/Nabet/Raimon, Droit européen de l'insolvabilité, Règlement (UE) 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Paris, 2017.

Giorgini, Méthodes conflictuelles et règles matérielles dans l'application des « nouveaux instruments » de règlement de la faillite internationale, Paris, 2006.

Fabriès-Lecea, Le Règlement « insolvabilité », Apport à la construction de l'ordre juridique de l'Union européenne, Bruxelles, 2012

52 Only European rules based on the principle of mutual trust, such as automatic recognition, coordination of procedures and cooperation between bodies, could not be exported to relations with third countries.

53 Considered here as the law of a third State. The question falls within the line of thought prompted by the Ingmar judgment (ECJ, 9.11.2000, -C-381/98, ECLI:EU:C:2000:605- Ingmar GB Ltd v Eaton Leonard Technologies Inc., JDI 2001, 511, note Jacquet, JDI 2001, 511, note Jacquet.

54 Pending the development of a universal international insolvency law, which could undoubtedly emerge through the work of UNCITRAL (see 60th session of Working Group V, 18–21 April 2022, New York, A/CN.9/WG.V/WP.179 on the applicable law in insolvency proceedings).

55 The path of adopting treaties between the EU and third countries is unsatisfactory, as such an approach proves too piecemeal and uncertain given the issue of ratification. Only the drafting of a text within the framework of the Hague Convention or UNCITRAL could be considered. However, the difficulty remains, for the former, that international insolvency falls outside its purview due to the close link between the issue and jurisdictional competence, and, for the latter, that it lacks binding force and its transposition into national legislation depends solely on the will of the States.

Mélin, Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité, Bruxelles, 2008.

Nabet, La coordination des procédures d'insolvabilité en droit de la faillite internationale et communautaire, Paris, 2010.

Niboyet, Traité de droit international privé français, t. VI bis.

Sautonie-Laguionie (ed), Règlement (UE) n° 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Société de législation comparée, coll. « Trans Europe Experts », 2015.

II. Articles

Fabriès-Lecea, Clap de fin pour le privilège de juridiction de l'article 14 du Code civil en matière d'insolvabilité internationale, BJE 5/2024.

Abitbol, Avant-propos, Vers une nouvelle directive sur l'insolvabilité?, ss dir. Fasquelle, BJE 4/2022, n°BJE200r4, 33.

Fabriès-Lecea, Lutter contre le *forum shopping* en matière d'insolvabilité européenne... Encore et toujours!, BJE 4/2022, n°BJE200q8, 30.

Fabriès-Lecea, La directive « restructuration et insolvabilité » : une transposition entre harmonisation et particularismes nationaux, Revue Europe 2/2022, 5.

Fabriès-Lecea, Le Brexit et les procédures d'insolvabilité, RLDA 2020, suppl. avr., 17.

Fabriès-Lecea, En attendant le Brexit…, BJE 2020, n° 5/2020, n°BJE118e0, 53.

Fabriès-Lecea, Le défi de la coopération dans les procédures d'insolvabilité transnationales, Un droit positif, un droit de progrès, Mélanges en l'honneur du Professeur Saint-Alary-Houin, Lextenso, 2020, 181.

Fabriès-Lecea, Commentaires ss Chapitre préliminaire, Le Règlement (UE) n°2015/848 relatif aux procédures d'insolvabilité, Sautonie-Laguionie (ss coord.), Société de législation comparée, coll. « Trans Europe Experts », 2015, 23.

Fabriès-Lecea, Commentaires ss art.33, Le Règlement (UE) n°2015/848 relatif aux procédures d'insolvabilité, Sautonie-Laguionie (ss coord.), Société de législation comparée, coll. « Trans Europe Experts », 2015, 219.

Jault-Seseke et Robine, « L'interprétation du règlement n° 1346/2000 relatif aux procédures d'insolvabilité, la fin des incertitudes? », RCDIP 2006, 811.

Menjucq, « Affaire Eurotunnel : une cassation bienvenue! », Rev. proc. coll. 2009, repère 4.