Lessons to be learned from ‘Galapagos’

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Abstract:

This paper draws insights from the 'Galapagos' judgments to make a case for harmonisation of the rules on recognition of third-Countries' insolvency proceedings within the EU. It examines how shifts in the debtor’s COMI, conflicts between insolvency proceedings initiated in different jurisdictions, and the interplay of the EU Recast Insolvency Regulation and national legislation on cross-border insolvency affect the overall administration of insolvency cases by bringing about a ‘conflict of recognition’, namely the situation in which insolvency proceedings in a third country predate those in an EU Member State, and the Recast Regulation and the national law applicable in another Member State mandate recognition of both proceedings.

Keywords: Cross-border insolvency; Galapagos case; recognition and enforcement; exequatur; COMI; Brexit; Recast EIR; conflict of recognition; third country insolvency.

A. Introduction

The Galápagos Islands are famous for their giant turtles. Some of them have been living for decades in Heidelberg Zoo, which I used to visit with my children at their appropriate age. Contemplating them, I considered that we could learn some lessons from them, in particular to slow down the speed of our life. Yet, with regard to the topic of this book, we seem to have already learnt the lesson, as International Insolvency Law is moving forward no faster than the turtles. For whatever reasons, a group of companies, whose principal business was the manufacture of heat-exchangers, has chosen the archipelago’s name. When one of the group members became insolvent, the case referred to the ECJ was named after the Galápagos.[1] This

1 ECJ 24.3.2022 – case C-723/20, ECLI:EU:C:2022:209 – Galapagos BidCo.

paper will exclusively deal with lessons we can learn from this case, leaving the turtles in their peaceful habitat.

The scope of application of EU regulations on recognition and enforcement of foreign judgments are restricted to judgments given in other Member States,[2] whereas Conflict of laws regulations tend to be of universal application.[3] Insofar, Art. 11, 13, 14 and 16 of the Recast EIR explicitly referring to the law of a Member State are exceptional. The restricted approach regarding recognition and enforcement is due to the fact that EU law is based on the mutual trust in the judiciary between Member States. As far as Third Countries are concerned, the question of mutual trust can only be decided on a case-by-case approach.

This restriction of the recognition and enforcement of judgments given in other Member States works well as far as *individual* proceedings are concerned. If a German court recognises and enforces an English judgment, the interests of other Member States are not affected. In particular, other Member States do not have to recognise the German exequatur-judgment (sec. 723 ZPO[4]) pursuant to Art. 36 of the Brussels I bis Regulation, as long as the principle 'exequatur sur exequatur ne vaut' is observed. It is true that this principle, confirmed by the ECJ in the 'Owens Bank' Case,[5] has been put into question in the 'H Limited' Case.[6] Yet, this paper cannot discuss this topic any further.[7] It will rather deal with the question in how far the

2 Cf. e.g. Art. 36, 39 of Regulation (EU) No 1215/2012 of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351/1 (Brussels I bis Regulation) and Art. 30, 34 of Regulation (EU) 2019/1111 of 25.6.2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178/1 (Brussels IIb Regulation).

3 Cf. e.g. Art. 2 of the Regulation (EC) No 593/2008 of 17.6.2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6, Art. 2 of the Regulation (EC) No 864/2007 of 11.7.2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199/40, and Art. 20 of Regulation (EU) No 650/2012 of 4.7.2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ L 201/107.

4 Zivilprozessordnung (Code of civil procedure) as of 6 December 2005, Bundesgesetzblatt (BGBl.), Part I, p. 3202.

5 ECJ 20.1.1994 – case C-129/92, ECLI:EU:C:1994:13, [1994] E.C.J.R. I-117, paras. 17 et seq. – Owens Bank / Bracco.

6 ECJ 7.4.2022 – case C-568/20, ECLI:EU:C:2022:264, paras. 25 et seq. – H Limited.

7 Cf. Hess, in IPRax 2022, p. 349 et seq.; Watt, in Revue critique de droit international privé 2023, p.139 et seq.; Oppolzer, in EuZW 2022, 516 et seq.

interests of other Member States might be affected by the recognition of *collective* proceedings opened in a Third Country.

B. The 'Galapagos' Case

Galapagos S.A. was a holding company registered in Luxembourg without any employees. In June 2019, the COMI was transferred to England. On 22.8.2019, the directors lodged a request to open insolvency proceedings (administration) before the High Court in London (England, UK). On 23.8. 2019, the directors were removed at the instigation of a group of creditors holding a share pledge and the COMI was transferred to Düsseldorf (Germany). The lawyers representing Galapagos were instructed to withdraw the request pending in England. Yet, the withdrawal was not effective because a group of creditors had already joined the request. The new director lodged a request to open insolvency proceedings before the Local Court (*Amtsgericht*) in Düsseldorf. The same day, the Local Court appointed a temporary insolvency administrator (*vorläufiger Insolvenzverwalter*). As the German temporary insolvency administrator is listed in the Annex B, the court hereby delivered a judgment opening (main) insolvency proceedings within the meaning of Art. 2(7)(ii) of the Recast EIR. The question whether or not this judgment had to be recognised in the UK pursuant to Art. 19 of the Recast EIR lead to a stay of the proceedings pending in the High Court.[8] On 6.9.2019, the Court revoked its order and dismissed Galapagos's request as inadmissible due to the lack of jurisdiction. The same day, two creditors lodged a new request to open insolvency proceedings at the Local Court in Düsseldorf. On 9.9.2019, the Local Court appointed the same person as temporary insolvency administrator, asserting that the COMI had been moved to Düsseldorf.[9]

Another creditor brought an 'immediate complaint' (*sofortige Beschwerde*) against the decision regarding the appointment of the temporary insolvency administrator before the Regional Court (*Landgericht*) in Düsseldorf. On 30.10.2019, the Regional Court set aside the complaint, yet

8 Re Galapagos SA, [2019] EWHC 2355 (Ch) (HC 29.8.2019 per Norris J.), unreported, mentioned by Re Galapagos SA, [2022] EWHC 1633 (Ch) = [2022] B.C.C. 1113 = WL 02347612 para 12 (HC 22.8.2022 per Bacon J.).

9 Amtsgericht Düsseldorf 9.9.2019, 501 IN 150/19, ECLI:DE:AGD:2019:0909.501IN150.19.00.

allowing a 'complaint on points of law' (*Rechtsbeschwerde*) to the Federal Court of Justice (*Bundesgerichtshof*).[10] The next day, the Local Court in Düsseldorf formally opened insolvency proceedings.[11] The same creditor also brought an immediate complaint against this opening decision. On 17.12.2020, the Federal Court of Justice referred the Case regarding the appointment of the temporary insolvency administrator to the ECJ.[12] On 24.3.2022, the Luxembourg Court gave three answers. Firstly, the Court ruled that, from the 'outbound perspective', the jurisdiction to open main insolvency proceedings had remained unchanged even after the COMI had been transferred out of the UK after the filing of the request.[13] This ruling was in line with the first case the ECJ ever had decide on the EIR, the 'Staubitz-Schreiber' Case, in which the Court had established the *perpetuatio fori* rule in insolvency matters.[14] Secondly, from the 'inbound perspective', the Court came to the conclusion that German courts did not have jurisdiction to open main insolvency proceedings regardless of the COMI shift to Germany as long as UK courts had not denied their jurisdiction. Before this ruling, the predominant opinion in legal doctrine and jurisprudence in Germany, followed by the Düsseldorf courts, had voted for the contrary because the EIR, in contrast to Art. 29(1) of the Brussels I bis Regulation, does not explicitly provide for the *lis alibi pendens* rule in insolvency matters.[15] After the ruling in the 'Galapagos' Case, we know that the Local Court in Düsseldorf has violated Art. 3(1) of the Recast EIR when it appointed the temporary insolvency administrator and opened main insolvency proceedings in 2019.

10 Landgericht Düsseldorf 30.10.2019, 25 T 602/19, ECLI:DE:LGD:2019:1030.25T602.19.00.

11 Amtsgericht Düsseldorf 31.10.2019, 501 IN 150/19.

12 Bundesgerichtshof 17.12.2020, IX ZB 72/19, ECLI:DE:BGH:2020:171220BIXZB72.19.0.

13 ECJ 24.3.2022 – case C-723/20, ECLI:EU:C:2022:209, para. 36 – Galapagos BidCo.

14 ECJ 17.1.2006 – case C-1/04, ECLI:EU:C:2006:39, [2006] E.C.J.R. I-701, paras 22 et seq. – Susanne Staubitz-Schreiber.

15 Cf. e.g. Mankowski, KTS 2009, page 453 et seq.; Amtsgericht Köln 6.11.2008, 71 IN 487/07, Neue Zeitschrift für Insolvenz- und Sanierungsrecht (NZI) 2009, p. 133 at 135; correspondingly, the Austrian Landesgericht Korneuburg 12.1.2018, 36 S 5/18d – 3, Zeitschrift für Wirtschaftsrecht (ZIP) 2018, p. 393, has opened main insolvency proceedings regarding NIKI Luftfahrt GmbH despite the pending request in Germany.

Yet thirdly, considering Art. 67(3)(c) of the UK Withdrawal Agreement[16], the ECJ has come to the conclusion that German Courts were free to open main insolvency proceedings if the High Court had not decided on the pending request before Brexit became effective on 31.12.2020.[17] Actually, the High Court has opened (winding up) insolvency proceedings only on 30.6.2022, considering that the Local Court in Düsseldorf, due to the lack of jurisdiction, had not opened main insolvency proceedings within the meaning of Art. 3(1) of the Recast EIR before 31.12.2020.[18] This point of view is rather surprising as the pending 'immediate complaint' against the opening decision of the Local Court in Düsseldorf had no suspensive effect (sec. 570(1) ZPO).

On 8.12.2022, the Federal Court of Justice, following the predominant opinion, ruled that under (autonomous) German International Insolvency Law the pending of a request in a Third Country (such as the UK since 2021) is no compelling obstacle to the opening of main insolvency proceedings in Germany.[19] Therefore, we can say that German International Insolvency Law – unlike the Recast EIR – does not implement the *lis alibi pendens* rule in all cases, even if the Third Country proceedings are subject to recognition in Germany. Therefore, the English insolvency proceedings opened on 30.6.2022 cannot be recognised in Germany and the assets situated in Germany belong to the German estate.

C. Lessons to be learned from 'Galapagos'

At first glance, the 'Galapagos' Case only deals with questions such as *perpetuatio fori*, *lis alibi pendens rule* and Brexit. Therefore, one might think that the first two questions are now well settled and, thanks to Boris, Brexit has finally been done. Yet, the Case raises another question when we take a closer look at the situation of the 25 other Member States (except

16 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24.1.2020, OJ L 29/7.

17 ECJ 24.3.2022 – case C-723/20, ECLI:EU:C:2022:209, para. 39 – Galapagos BidCo.

18 Cf. Re Galapagos SA, [2022] EWHC 1633 (Ch) = [2022] B.C.C. 1113 = WL 02347612 para 70 (High Court, Judgment of 22.8.2022).

19 Bundesgerichtshof 8.12.2022, IX ZB 72/19, ECLI:DE:BGH:2022:081222BIXZB72.19.0, paras. 29 et seq.

Denmark)[20]: Do they have to recognise the main insolvency proceedings opened in Germany or the English winding up proceedings? To answer this question, we have to distinguish two settings:

1. Opening of insolvency proceedings in a Member State prior to the opening in a Third Country

In the first setting, the judgment opening insolvency proceedings has been given *earlier* in the *Member State*; this is true for the 'Galapagos' Case as the pending 'immediate complaint' against the opening decision had no suspensive effect. In such a case, there is no reason to deny the recognition of the EU insolvency proceedings under Art. 19 of the Recast EIR. It is true that a court of a Member State following the *lis alibi pendens* rule would not have opened (main) insolvency proceedings. Nevertheless, the recognition of the EU insolvency proceedings pursuant to Art. 19 of the Recast EIR does not lead to any conflict. Therefore, the other 25 Member States have to recognise the German main insolvency proceedings and cannot recognise the English winding up proceedings. Thus, the assets situated in those Member States also belong to the German estate.

2. Opening of insolvency proceedings in a Third Country prior to the opening in a Member State

In the second setting, the judgment opening insolvency proceedings has been given *earlier* in the *Third Country*. For example, a court in Third Country A opens collective proceedings; afterwards, a court in Member State B opens EU insolvency proceedings listed in the Annex A. Such a situation can arise for different reasons. *Firstly*, the court in Member State B was not aware of the judgment opening the collective proceedings in A. *Secondly*, the International Insolvency Law of Member State B does not provide for the recognition of insolvency proceedings in Third Countries in general. *Thirdly*, Member State B does not qualify the collective proceedings opened in A to be insolvency proceedings. *Fourthly*, Member State B recognises insolvency proceedings opened in Third Countries only on re-

20 Cf. recital 88 to the Recast EIR.

quest. This is true for Member States such as Greece,[21] Poland,[22] Romania[23] and Slovenia,[24] which have implemented the MLCBI[25], but also for other Member States providing for *exequatur*-proceedings in insolvency matters such as Belgium[26] and Spain.[27] If such a request had not been lodged, the national courts might be free to open EU main insolvency proceedings regardless of the opening of such proceedings in the Third Country A. *Fifthly* and finally, Member State B considers the opening of the collective proceedings in A to have taken place after the opening of the EU insolvency proceedings by its own court. We must keep in mind that Art. 2(7) and (8) EIR provide for a definition of the terms 'judgment opening insolvency proceedings' and 'the time of the opening of proceedings'. Member State B may have a narrower understanding of the notion 'judgment opening insolvency proceedings' in its autonomous International Insolvency Law. Under one of these circumstances, the Member State C may encounter a 'conflict of recognition'.

a) Resolving the 'conflict of recognition'

Member State C may have recognised the proceedings opened in Third Country A on request. Thus, the question arises to which estate do the assets situated in Member State C belong. The recognition of the opening of EU main insolvency proceedings in Member State B would be irreconcilable with the earlier judgment providing for the recognition of the main

21 Cf. Art. 15 of the Act n° 3858 of 28.6.2010, Εφημερίς της Κυβερνήσεως της Ελληνικής Δημοκρατίας, First Part, n° 102 of 1.7.2010, p. 2663.

22 Cf. Art. 386 Prawo upadłościowe (Insolvency Law) as of 19.6.2020, Dziennik Ustaw Rzeczypospolitej Polskiej 2020, Pos. 1228.

23 Cf. Art. 287 Lege privind procedurile de prevenire a insolvenței și de insolvență (Act on procedures to avoid insolvency and on insolvency proceedings) of 24.6.2014, Monitorul oficial al României 2014, Part I, Nr. 466 of 25.6.2014, n°85, p. 2.

24 Cf. Art. 460 Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (Act on financial conduct, insolvency proceedings and compulsory winding-up) as of 4.2.2014, Uradni list Republike Slovenije 2014, n° 13, Pos. 361, p. 1213.

25 Regarding Poland, Romania and Slovenia, cf. in detail Trunk, in Pannen/Riedemann/Zeuner (Ed.), p. 453 (457 et seq.).

26 Cf. Art. 121 Wetboek van internationaal privaatrecht / Code de droit international privé (Code of private international law) of 16.7.2004, Belgisch Staatsblad / Moniteur Belge n° 269 of 27.7.2004, p. 57374.

27 Cf. Art. 742 Ley Concursal (Bankruptcy Act) as of 5.5.2020, Boletín oficial del Estado N° 127 of 7.5.2020, Part I, p. 31518.

insolvency proceedings opened in Third Country A. As the EIR does not address this conflict explicitly, the solution of this 'conflict of recognition' is doubtful. Under equivalent circumstances, Art. 45(1)(d) of the Brussels I bis Regulation provides for the refusal of recognition of the later judgment. Yet, Art. 33 EIR provides for the refusal only if the recognition pursuant to Art. 19 EIR 'would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.' In order to solve the 'conflict of recognition' there are two possibilities. On the one hand, we can either apply Art. 45(1)(d) of the Brussels I bis Regulation *mutatis mutandis* in insolvency matters. This solution seems to be in line with the 'Galapagos'-judgment, which is implicitly based on an application of Art. 29(1) of the Brussels I bis Regulation *mutatis mutandis*.[28] On the other hand, we can consider the ratio laid down in Art. 29(1) of the Brussels I bis Regulation as part of the fundamental procedural principles of Member State C. It is true that the conflict situation may not be identical under the Recast EIR and the Brussels I bis Regulation because the decision of recognition only has ancillary functions and, depending on the applicable *lex fori processus*, may not enter into *res judicata*. Therefore, there might be a possibility for the court in Member State C to set aside the decision of recognition of the main proceedings opened in Third Country A and, thus, to give way to the recognition of the EU main insolvency proceedings opened in Member State B. Yet, if its decision of recognition is binding, the court in Member State C must have the possibility to refuse the recognition of the judgment opening EU main insolvency proceedings handed down by the court of Member State B. Therefore, a new provision similar to Art. 45(1)(d) of the Brussels I bis Regulation would be helpful.

b) Member States providing for the automatic recognition of insolvency proceedings opened in Third Countries

Member States such as Germany[29] and Austria[30] providing for the automatic recognition of insolvency proceedings opened in Third Countries similar

28 Cf. in this sense Knof/Mock ZIP 2006, p. 189 (191).

29 Cf. sec. 343 Insolvenzordnung (Insolvency Act) as amended by Art. 2 of the Act of 14.3.2003, BGBl. 2003, Part I, p. 345.

30 Cf. sec. 240 Insolvenzordnung (Insolvency Act) as amended by Art. I of the Act of 2003, Bundesgesetzblatt für die Republik Österreich (öBGBl.) 2003 I, N° 36,

to Art. 19 of the recast EIR do not face the same 'conflict of recognition' as those having implemented the Model Law. In particular, there is no court ruling, which might be an obstacle to the recognition of the EU main insolvency proceedings opened in Member B. Yet, the open-mindedness to give automatic legal effect to foreign proceedings would have the effect of a boomerang if these Member States were forced to recognise the proceedings opened in Member B and would be worse off than those following Member States requiring some sort of judicial exequatur. Therefore, for systematic reasons, Member States such as Germany and Austria must have the opportunity to refuse the recognition of the subsequent opening of EU main insolvency proceedings by a court in Member State B and to hand the local assets to the insolvency practitioner appointed in Third Country A. Yet, it is hard to find means of interpretation of Art. 33 of the Recast EIR to argue for this solution. Therefore, this topic needs to be addressed explicitly when the next recast is due. A solution might be to add the possibility to refuse the recognition pursuant to Art. 19 EIR if Third Country proceedings have been recognised prior to the opening of the EU proceedings either by a court ruling or automatically.

D. Conclusions

The conclusions of the aforesaid are as follows: The recognition of the opening of insolvency proceedings in a Third Country is governed by the autonomous International Insolvency Law of the Member States. This situation may cause a 'conflict of recognition', when a court in a Third Country has opened insolvency proceedings earlier than a court in a Member State. Currently, this conflict can only be solved by the application of Art. 33 EIR. To avoid a 'conflict of recognition', the recognition of the opening of insolvency proceedings in a Third Country would have to be harmonised in the EIR. It is not the topic of this paper to argue in favour of such harmonisation, which, at least politically,[31] might be difficult to achieve. Yet, at least, the 'conflict of recognition' should be addressed explicitly in the EIR.

denomination changed from 'Konkursordnung' to 'Insolvenzordnung' by Art. 1 of the Act of 2010, öBGBl. 2010, Part I, N° 29.

31 The competence to do so within the EIR might follow from the (highly disputable) opinion of the ECJ of 7.2.2006, Opinion 1/03, ECLI:EU:C:2006:81, [2006] E.C.J.R. I-1145 regarding the recast Lugano Convention.

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