Europe and beyond: What can the EIR learn from the UNCITRAL Model Law?

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Abstract:

This article discusses the European Insolvency Regulation (EIR) and its limitations in governing insolvency proceedings involving third countries. It argues for aligning the EIR with the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) to expand its outreach beyond the EU. The authors submit a proposal for aligning the EIR with the MLCBI by examining which concepts of the latter instrument are suitable to be adopted by the EIR, with the intent to encourage European legislators to consider the possibilities of expanding the Insolvency Regulation's outreach to third countries.

Keywords: European Insolvency Regulation (EIR), UNCITRAL Model Law (MLCBI), cross-border insolvency, harmonization, international insolvency law

A. Introduction

It is a striking feature of the European Insolvency Regulation 2015/848 (EIR) that the EIR only governs internally, among member states of the European Union, and does not speak to member states' treatment of insolvency proceedings pending in third countries. In this way, the EIR resembles a treaty premised on principles of territoriality, whereby the territory is extended to the aggregated territories of the 27 member states, even though principles of universalism ostensibly guided its inception and revision.[1] This territoriality is visible throughout the EIR: in artt. 25 and 87, which provide for the interlinking of member states' insolvency registers; in artt. 54(3) and 55(1), which oblige the national notification forms to be accompanied by a translation of the title's headline in all languages

1 See Westbrook et al., p 259.

of the member states; in art. 3, with its reference to the centre of main interests, which has to be within that extended European territory; and so on. These provisions of the EIR make clear that non-member states, such as Switzerland, the United States, or South Africa, are intentionally excluded. If there happens to be an overlap with insolvency proceedings pending in both a member state and in a third country, the EIR governs 'internal' issues (such as how the case is treated by other members of the EU), while the autonomous national international insolvency and other procedural laws govern external issues, such as how the European case relates to the other case.

This complexity is not unintentional, but rather intentionally baked into the design of European cross-border insolvency practice. The design has been complicated by the European Court of Justice ('CJEU'), which rendered a decision[2] that was both predictable and surprising. The court's decision in *Hertel* was predictable in light of an earlier decision by the CJEU[3] on a parallel question under the Regulation on the Recognition and Enforcement of Civil and Commercial Judgments[4]; but it was also surprising because nothing in the text of the EIR or other explanatory documents necessarily justify the court's deviation from the territorial design of the EIR.

Taking this state of affairs as our starting point, we submit in this article a proposal for aligning the EIR with the MLCBI by examining which concepts of the latter instrument are suitable to be adopted by the EIR. We do this with the intent to encourage European legislators to consider the possibilities of expanding the Insolvency Regulation's outreach to third countries beyond the CJEU's ruling – based on the reasoning of the CJEU in *Hertel*. After all, when and if the EU Commission's ambition is to harmonise the member states' insolvency laws, the external effects should not be seen as sacrosanct.

Our argument begins, in Part A, with a comparison of EIR and MLCBI. Comparison of these texts is expanded in Part B, with reference to the interpretation of this text in case law; this section explains in greater detail the CJEU's introspective approach to the EIR. And that leads us, in Part C, to our proposal, where we specify which provisions of the MLCBI are

2 ECJ, 16.1.2014 -C-328/12, ECLI:EU:C:2014:6- Ralph Schmid (liquidator of the assets of Aletta Zimmermann) v Lilly Hertel (described below extensively).

3 ECJ 1.3.2005 -C-281/02, ECLI:EU:C:2005:120- Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others.

4 Brussels Ia, art. 4.

appropriate to include in the EIR and how they should be incorporated consistent with principles of European law. Part D circles back to the question of format and discusses possibilities for combining the advantages of both instruments into one European law applicable uniformly across EU member and non-member states. For political and not policy reasons, the Commission may prefer to structure our proposal as one contained in a Directive that sits alongside the Second Recast EIR (or the Recast EIR left otherwise in place after 2025). We explore the implications of balancing uniformity and sovereignty.

B. EIR and MLCBI: a comparison

I. EU Regulation 2015/848 on insolvency proceedings

The EIR is based on the fundamentals of modern international insolvency law: the idea that efficiency, fairness, and political advantage are best achieved when the financial distress of an insolvent entity with assets and liabilities in more than one country is redressed by means of a single insolvency proceeding with effects on a global (or, in this case, a regional) scale; that this one proceeding should be governed by one set of insolvency laws; and that the existence and consequences of this proceeding and this law should be recognised automatically and simultaneously in all member states of the EU. Accordingly, the EIR determines in art. 3 where an insolvency proceeding has to be opened. Art. 7 then declares the insolvency law of the member state in which the proceeding has been commenced to be the *lex concursus*. And artt. 19–20 provide that the effects of any such insolvency proceeding spill over automatically to the entire area governed by the EIR.

To be sure, the EIR is realistic enough to recognise that the ideals of modern insolvency law are bound to fail in practice due to the innumerable differences in the member states' laws. Therefore, exceptions are built in so that it is justified to qualify the EIR as adhering to what is commonly called 'modified universalism.'[5] The ideal of universalism is modified in the EIR in several ways.

First, the rule of *lex fori concursus,* i.e., that the insolvency law of the opening state should govern not only in the forum of the opening state but

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5 See Westbrook 17 Brookl J Int'l L. 1991, p. 499 et seqq.; Mevorach 96 Tex. L. Rev. 2018, p. 1403 et seqq.; Walters 93 A. Bankr. L.J. 2019, p. 47 et seqq.. See also Anderson 21 U.

throughout the EU, is tempered. Certain restrictions on or exemptions from the rule of *lex fori concursus* exist. They are listed in artt. 8 to 18 EIR, which contain choice of law rules that determine other laws to be applicable with regard to specific legal positions, such as labor contracts or rights in rem, etc. In addition, a sort of general stop mechanism is built in by art. 33 EIR, which allows a rejection of recognition in cases of a grave violation of the *ordre public* of a particular member state.

There is also a second important limitation on the ideal of universalism, however, which involves the opening of parallel proceedings under given circumstances, listed in art. 3(2–4) of the EIR. Both parallel proceedings are full-fledged insolvency proceedings but limited to the territory of the opening state, because the jurisdictional basis for commencement is a debtor's establishment rather than the debtor's center of main interests.[6] The difference between these two proceedings is mostly (but not totally) one of timing: The so-called secondary proceeding, as set out in art. 3 par. 3 EIR, is designed as a territorially limited proceeding running under its own domestic insolvency law but deals with a debtor whose estate is already subject to a main proceeding commenced in another (member state's) jurisdiction. The so-called territorial proceeding, art. 3 par. 4 EIR, differs from a secondary proceeding insofar as there is no (or not yet a) parallel main proceeding. In other words, that territorial proceeding is necessarily a stand-alone proceeding. A territorial proceeding can only be commenced before a main proceeding is opened under the circumstances set out in art. 3 par. 4 no. 2 EIR.[7]

Pa. J. Int'l Econ. L. 2000, p. 679 et seqq.; Gopalan/ Guihot 48 Vand. J. Transnat'l L. 2015, p. 1225 et seqq.

6 To clarify the jurisdictional limits of territorial or secondary proceedings, art. 35 provides that 'the law applicable to secondary insolvency proceedings shall be that of the Member State within the territory of which the secondary insolvency proceedings are opened,' save unspecified express exceptions set out in the Regulation). Art. 21 par. 2 EIR provides for an exception to this rule.

7 Art. 3(4) provides as follows:
The territorial insolvency proceedings referred to in paragraph 2 may only be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 where
(a) insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the
Member State within the territory of which the centre of the debtor's main interests is situated; or
(b) the opening of territorial insolvency proceedings is requested by:

These concepts in the recast EIR 2015/848 are more or less similar to those set out in the original Regulation EU 1346/2000. Although the Recast EIR expanded on these core concepts to reflect more than a decade of experience, in most cases, this was done along the lines of decisions of the CJEU so that a certain continuity and predictability was guaranteed. Accordingly, the recast EIR, in art. 6, expands the recognizable decisions to those of insolvency-related judgments; it obliges the member states to connect their insolvency-related publication and notification systems in artt. 25 ff.; it allows for virtual secondary proceedings, thereby following UK precedent, in art. 36; and its artt. 56 to 77 foresee rules for the handling of group insolvency cases, which likely constitute the majority of all border-crossing insolvencies.

Regarding both the original as well as the recast EIR, the Commission was convinced that territorial proceedings pursuant to art. 3 par. 4 EIR seemed a bit like an outdated or even alien concept in an otherwise modern statute; it is treated like an 'unloved child'. Although their retention in the recast EIR might be questioned on this ground, recital 37 of the recast EIR is remarkably critical of this type of proceeding and suggests that the opening of territorial proceedings should occur as seldom as possible. The recast EIR corrected some of the deficits of the original provisions on parallel proceedings. For instance, by simply erasing the previous second sentence of art. 3 par. 2 EIR 2000, it is now no longer mandatory for a secondary proceeding to be directed towards liquidation. And the rules on communication and coordination, in artt. 41–43 and 56- 58, are no longer confined to administrators alone, but now also include the courts among themselves and toward the administrators. Probably the most important distinctions are: the right to give an undertaking (i.e., a bond) to avoid the opening of secondary proceedings (art. 36 EIR); and the possibility of a temporary stay of the opening of secondary proceedings (art. 38 para. 3 EIR). Together these provisions allow for a so-called 'virtual secondary

(i) a creditor whose claim arises from or is in connection with the operation of an establishment situated within the
territory of the Member State where the opening of territorial proceedings is requested; or
(ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.
When main insolvency proceedings are opened, the territorial insolvency proceedings shall become secondary insolvency proceedings.

proceeding' to protect the claims of creditors located in the member state in which a secondary proceeding could but has not been opened, as well as to preserve the possibility for reorganizing the debtor through coordination of main proceeding and other proceedings.[8]

In sum, although it did not address, nor did it purport to resolve, every problem raised under the original Regulation, the Recast Regulation has evolved into a well-accepted and well-managed instrument. It is part of its remarkable flexibility that art. 90 of the EIR obliges the European Commission to provide yet another assessment report on the EIR's successes and deficits, this time by mid-2027. Given that insolvency law in general, and cross-border insolvency law in particular, are areas of enormous changes and challenges, it is predictable that this next report will lead to new amendments in a then Second Recast Regulation. This new set of revisions should look to correct persistent deficits of the EIR, such as its exclusively internal efforts to resolve problems of cross-border insolvency. Although quite often a debtor's financial distress may extend beyond the territories of the EU member states, the Recast Regulation steadfastly maintains its inward-looking gaze in search of a remedy, and the Second Recast Regulation should address this myopia.

II. UNCITRAL's Model Law on Cross-Border Insolvency

Even before the original EIR entered into effect, successful negotiation of the contours of the original Regulation inspired lawmakers working on a global stage to attempt to replicate it as best they could. Work within the United Nations (UN) on coordination of cross-border insolvency practices differed from the EU draft.[9] The EIR was a treaty-like instrument that bound nations already committed to each other economically and politically. As such, replication *in toto* of the EIR on a global scale was understood to be impossible. Nonetheless, in short order, delegates to the UN's Commission on International Trade Law (UNCITRAL) succeeded in revising the core terms of the original Regulation[10] so that they could be applied as a soft law instrument – a model law – for implementation in any (and

8 See, e.g., Pottow, Texas Intl L.J. 2011 579 (586). It should be noted, though, that – to the best of our knowledge – so far not a single application of this feature is recorded. This might be due to the overly complex and inflexible design of the instrument.

9 For some details, see Paulus, in Ballesteros Barros / Morán Bovio p. 395 et seqq.

10 What later became a regulation was originally envisioned as a convention.

hopefully in every) country in the world. Since UNCITRAL's promulgation of the Model Law on Cross-Border Insolvency (MLCBI or 'the Model Law') in the late 1990s, domestic legislation in more than 62 countries has been enacted to implement the Model Law.

Although it was inspired by the EIR, MLCBI differs from it in important ways. Each of these differences is met by some family resemblance, however.

Unlike the EIR, recognition under MLCBI is not automatic. Like the EIR, the MLCBI enables recognition of either a main or non-main 'foreign proceeding' on a streamlined basis. And like the EIR, recognition under the MLCBI is understood to enable the recognizing 'ancillary' court to provide jurisdictional and practical support to the pending foreign proceeding, with the aim of promoting a successful and efficient conclusion to a multinational debtor's financial distress.

Differences in the type of ancillarity exist, however. Unlike the EIR's secondary or territorial proceedings (as described supra), an ancillary proceeding opened through MLCBI is not a full-fledged insolvency proceeding but one that adjusts the application of its territorial toolbox to the particular needs of the foreign proceeding. It might, for example, simply stay pending domestic enforcement proceedings. For this, no insolvency administrator would be necessary -- a judicial order would suffice. In other cases, it might be necessary to grant the foreign administrator a broader array of protection over the debtor's assets or creditors' interests (see, e.g., art. 21 par. 1 MLCBI).

Unlike the EIR, MLCBI does not specify the jurisdiction of a state to open insolvency proceedings. The MLCBI does, however, signify indirectly the consequences of assertions of jurisdiction according to standards that resemble the jurisdictional provisions in art. 3 of the EIR – the 'centre of main interests' and 'establishment' tests set out in artt. 3(1) and 2(10) of the EIR. Adoption of parallel direct and indirect jurisdictional provisions in the Regulation and the Model Law was no accident!

Although the MLCBI provides neither automatic recognition nor jurisdictional mandates by means of its soft laws, it does specify the consequences of streamlined recognition. Some of these consequences follow automatically upon recognition (per art. 20), and others are available only after the 'foreign representative' of the debtor requests them and the recognizing court agrees based on arguments raised by the affected parties (per artt. 19 and 21).

The MLCBI is, arguably, *more* universal in its outlook than the regionally focused EIR. But it is also *less* universal in that the MLCBI never presumes there will be only one pending insolvency proceeding applying only one *lex concursus*. With the Model Law, there is always more than one proceeding: There is, at least, a 'main foreign proceeding' and a recognizing ancillary proceeding. Worse, there may be multiple foreign proceedings (whether main or non-main) recognised with an ancillary proceeding; there might even be multiple ancillary proceedings initiated to recognise multiple (main and possibly non-main) foreign proceedings.

In addition, unlike the EIR, MCLBI says nothing explicitly about applicable law. Indeed, the MLCBI necessarily envisions that more than one country's insolvency law will govern resolution of insolvency through ancillary assistance. The various national legislatures that have enacted legislation to implement the Model Law may specify what law governs in the relevant ancillary proceeding. But, significantly, the insolvency law applied in an ancillary proceeding is invariably the insolvency law of the state in which the ancillary court is located rather than the insolvency law of the main proceeding. The MLCBI is, thus, premised on the notion that at least two sets of insolvency law will govern resolution: the insolvency law of the state in which the foreign proceeding is pending will govern resolution of the foreign proceeding; the insolvency law of the ancillary proceeding will govern that ancillary proceeding.

Since it promulgated MCLBI, UNCITRAL has not stood still. It pressed for harmonization of insolvency laws around the world through its Legislative Guide on Insolvency Law (2004), which then got expanded with additional parts on the treatment of micro-small-and-medium sized entities and of (often very large) enterprise groups, as well as directors' responsibilities in the period approaching insolvency (2010, 2019, 2023). It built on these guides with additional model laws, including a model law on the recognition and enforcement of insolvency-related judgments (2018) and a model law on enterprise group insolvency (2019).

C. The introspection of the EIR and Hertel

The text of the EIR expanded the territoriality principle from the territory of an individual member state to the region covered by the territories of the 27 member states joined in a European-wide Union.[11] This extroverted approach to territoriality has been further expanded by the CJEU's decision in the case *Hertel*.[12] There, the Court construed EIR's rules on jurisdiction as presumptively universal in application – suggesting that the EIR extends, at times, beyond its express European boundaries. The confinement of the decision's reasoning to the rules on jurisdiction appear to be somewhat arbitrary. If the Court's argument is to be taken at face value, the Regulation should be understood as extraterritorial in application unless the text of the Regulation expressly adopted language of territorial or regional application.[13]

I. The facts

Hertel involved a German insolvency proceeding with assets located exclusively within the territory of Germany. One would assume (and rightly so) that this is a matter to be left exclusively to the German national insolvency law, i.e., to the Insolvency Ordinance (InsO). However, the administrator of that case saw a possibility to recover assets by means of an avoidance action. The defendant, the mother-in-law of the debtor, was domiciled in Switzerland. Here, we come to the cross-border aspect in this insolvency proceeding and, thus, into the domain of international insolvency law. Since Switzerland is not member state of the EU, one would assume (and rightly so) that the rules to be applied in this case and any avoidance action brought by the administrator would be those of the autonomous German international insolvency law[14] or of the autonomous German international law of civil procedure.[15] But the administrator and plaintiff of the case sued the defendant not in Switzerland but in Germany, at the place where the insolvency proceeding was opened. After all, a foreign administrator has no standing in Switzerland for lawsuits of this kind but has to undergo somewhat complicated steps in Switzerland.

11 More precisely, 26 member states, as Denmark had decided to opt out from the adoption of the EIR; *cf.* EIR at recital 88. In 2015, the UK was still a member state of the EU.

12 ECJ, 16.1.2014 -C-328/12, ECLI:EU:C:2014:6- Ralph Schmid (liquidator of the assets of Aletta Zimmermann) v Lilly Hertel.

13 See Paulus Insolvency Intelligence 2014, 70 et seq.

14 See sec. 335 ff. InsO.

15 See sec. 12 ff., 328 of the Civil Procedure Ordinance (Zivilprozessordnung, ZPO).

The justification for such a flagrant violation of the time-honored civil procedural principle according to which the plaintiff must go to the defendant's residence for purposes of bringing suit against him (*actor forum rei sequitur*) was based on another decision of the CJEU. In the *Deko Marty* case,[16] the Court allowed a German administrator to bring suit in an avoidance case against a Belgian company in German courts because avoidance actions were said to be covered by the wording of art. 25(1) subpar. 2 of EIR 2000/1346. Note, however, that Belgium is a member state of the EIR. The question referred to the CJEU in *Hertel* was whether the rule in *Deko Marty* relating to EU member states should be extended to defendants residing in non-member states. The ruling in *Deko Marty,* that the EIR governed the authority of the insolvency administrator to bring the avoidance action in that case, rather than the Brussels Regulation, could have been distinguished by the Court. In other words, the Court had to decide whether application of the EIR is dependent on a specific member state connection or whether any connection to a foreign jurisdiction, such as Switzerland, the United States, or Burkina Faso, is sufficient to trigger application of EIR. In *Hertel*, CJEU answered this question in the latter sense – unless the wording of the relevant rule has an explicit member state reference, connection to any foreign jurisdiction is sufficient for application of the jurisdictional rules of EIR.

II. The reasoning

The Court's reasoning in *Hertel* is two-fold: first, in recitals 19 to 29 of the preamble to EIR, the Court first examines on a general level whether the EIR is restricted to intra-Union relations or whether there are indications for an outward stretch of its applicability. By primarily looking at the wording of these paragraphs and the articles of the Regulation, the Court finds ambiguity – it concludes that some suggest the former whereas others are silent in this respect. By applying such a narrow perspective, it is easy to then see, for instance, in recital 11's (now 22) announcement of the 'universal scope' of the EIR, a confirmation of this kind of mixed approach. Moreover, by speaking of the particular 'objectives' of art. 3(1) – actually referring thereby just to its wording – the court finds support for its interpretation. The second step in the Court's reasoning is consequential in applying those

16 Case C-339/07, Christopher Seagon v Deko Marty Belgium NV (12 Feb. 2009).

general considerations to resolution of the case in *Hertel*. The CJEU saw no friction between the result achieved in *Hertel*, i.e., the jurisdiction of an EU court to decide a dispute against a non-member-state defendant, and foreseeability, nor is it much concerned about the recognizability of such judgments – after all, if the defendant has assets in other member states of the EIR, the judgment is to be recognised automatically pursuant to art. 25 of the EIR (now 6); or there might be bilateral enforcement conventions.

III. Conclusion

The CJEU's conclusion is that the rules on jurisdiction – more precisely, courts' competences to decide on insolvency-related matters – are to be interpreted as implying an outward reach of the EIR. The Court went in later decisions even so far to decide that the jurisdictional rules impose exclusive jurisdiction[17] – thereby imposing a strange burden on administrators who know beforehand that the judgment will not be recognised in the home country of the defendant. Administrators are bound by this exclusivity to sue at their home court in order to receive a judgment, which is possibly good for no execution, but if they sue instead at the defendant's forum, they have to reckon that the defendant might question the forum court's competence to decide the matter before it.

Putting aside these follow-up complications, the CJEU's line of argument is so broad that its restriction of the question posed in *Hertel* to questions of competence appears to be somewhat artificial. The issue at stake in this case is the applicability of art. 3 of the EIR in relation to third countries, i.e., the jurisdiction of courts to enter insolvency-related judgments with implications that extend beyond the member states. By eliminating the need for the involvement of at least one more member state in a particular case, the CJEU refers to recital 8 from which the court derives the promotion of *foreseeability* and *legal certainty* for particularly the competences under art. 3 of EIR. These two fundamental aspects or pillars of that norm would hold true not only with regard to other member states but to all states worldwide. Therefore, the Court concluded that legal competence to decide insolvency-related lawsuits, irrespective of a defendant's location, residence, or seat, is based on competence of the court in the member state in which the debtor's COMI is located pursuant to art. 3 par. 1 of the EIR.

17 ECJ, 4.12.2019 -C-493/18, ECLI:EU:C:2019:1046- UB v VA and Others; ECJ, 14.11.2018 -C-296/17, ECLI:EU:C:2018:902- Wiemer & Trachte GmbH v Zhan Oved Tadzher.

Perhaps this decision was predictable in light of its previous decision in *Owusu*,[18] regarding the Judgments Regulation. When looking, however, exclusively to the EIR's wording and its entire concept of a strict introspection, limiting the Court's argument to the issue of jurisdiction alone is somewhat random. After all, the purpose of any norm in the EIR (as with all other statutes and laws) is to provide foreseeability and legal certainty. This is, more or less, the main reason for any written law in the previous centuries if not millennia until today all over the world. Accordingly, it is hard to see any inherent reason why – just and only – the issue of jurisdiction would justify special treatment or elevated qualification. It should instead be concluded from the CJEU's line of argument that more or less all European legislation is to be interpreted as having an outward reach beyond the member states unless there is an explicit member state-reference in the wording of that norm. Thus, when the CJEU's argumentation of the *Hertel* case is generalised, it seems to be a rule of thumb that the EIR should be viewed as applicable extraterritorially unless there is an explicit reference to a member state in the Regulation's wording. References to member states are peppered throughout the EIR, but art. 3 of the EIR is not the only provision without such references. Artt. 6(1), 17, 18, 53, 56, 58, 60, 61, and all of chapter V regarding group proceedings do not refer explicitly to member states, although some of these implicitly do so through use of the defined term 'court.'

The immediate objection against this conclusion, however, will be a reference to the lack of the EU's competence to regulate the outer affairs of the member states. Artt. 2(1), 4(2)(a), 4(2)(j), and 81 of the Treaty of the Functioning of the European Union (TFEU) confine the Union's power to the internal market's relationships. This, of course, is a profound and grave counter argument against incorporating the MLCBI in a separate part in the EIR. It would, therefore, be fully understandable to abstain from any attempt to align those two instruments in any way whatsoever.

But as understandable as such a negative approach might appear on first inspection, a closer look raises at least some doubts. To begin with, MLCBI and EIR can be said to be the two most influential and effective instruments worldwide in cross-border insolvency law. The MLCBI has by now been adopted in more than 62 jurisdictions and the EIR has elevated the member

18 ECJ 1.3.2005 -C-281/02, ECLI:EU:C:2005:120- Andrew Owusu v N. B. Jackson, trading as 'Villa Holidays Bal-Inn Villas' and Others.

states of the EU literally overnight into a new dimension of international insolvency law. While before 31 May 2002, it took three years to for a Spanish court to recognise a pending German insolvency proceeding through a process of exequatur,[19] the opening of an insolvency became automatically recognised throughout Europe from 1 June 2002 on; whereas the lodging of tax claims had been one of the serious stumbling blocks for any furtherance of the (more or less) existing cross-border insolvency law, this legal act no longer raises concerns since 1 June 2002; whereas it was before hardly imaginable that one insolvency judge would communicate with another (whether these judges sat in different member states or even within one and the same jurisdiction), this is now almost a standard feature from one jurisdiction to another – certainly after the Recast Regulation EU 2015/848 went into effect. These are but a few of the steps forward made by the EIR.

Moreover, it deserves to be mentioned again that the drafting of the EU Convention (which afterward, without any major changes, was converted into the Regulation) impacted the drafting of the MLCBI enormously. Intense discussion occurred in UNCITRAL working sessions, especially among the German delegate to UNCITRAL, Manfred Balz, who had previously led the negotiations on the draft Convention, and several on the particularly influential delegates to the UNCITRAL Insolvency Working Group. The goal of these negotiations was to coordinate key concepts in both the Convention and Model Law, such as the COMI principle.[20] But even though this self-restraint became somewhat loosened with the Recast EIR, it is telling that there are not only similarities in regulating issues of cross-border group insolvency law in art. 56 of the EIR Recast and in the UNCITRAL Model Law on Enterprise Group Insolvency, but also in details such as a mediation-like proceeding or the universalistic approach in both instruments similarities are visible.[21]

Given the parallel tracks on which both instruments have been drafted, each with an eye on the other, it is hard to see any objection to searching in the later MLCBI for potential improvements or amendments to the EIR that was originally born before it. For example, we see this parallelism in UNCITRAL's several instruments on enterprise groups and revisions to address this same topic in the recast EIR. Moreover, the Court's general acceptance of universality (or its twin cousin, extraterritoriality) in *Hertel*

19 Cf. Tribunal Supremo, decision from 5 May 1999 – 8/96, EWiR 2000, at 889.
20 One might call this the KISS-principle: keep it short and simple.
21 Most of the rules in art. 56 of the EIR do not refer to member states, for example.

can be seen as applying a certain double standard. After all, the principle pursuant to which the plaintiff must go to the defendant's place in order to sue him – *actor sequitur forum rei* – is not only time-honored but also understood as being an essential emanation of the rule of law and its special facet of the equality of arms. But even breaching such a fundamental fairness principle did not give rise to greater concerns among stakeholders about the sudden opening of the EIR's applicability toward third countries situated outside the member states. One is turning a somewhat blind eye to the definitely-anything-but compelling argument of foreseeability and legal certainty without going along this path further down the road for opening the EIR's scope of application somewhat further. This expansion we address below.

IV. How to combine the advantages of both instruments, consistent with Hertel?

Having compared the two cross-border related instruments, we now confront a gap in their mutual claim to modified universalism. MLCBI is soft law, and the EIR is only partly universal in scope.[22] Courts have modified further the universalism of these texts – in the case of the CJEU, to expand on the universality of the EIR; in the case of national laws implementing MLCBI, sometimes to protect local creditors and detract from its universal potential and, at other times, to protect interests favoring reorganization of a multinational debtor corporation or corporate group and enhance on its universality.

Even when the CJEU caselaw is taken into consideration, however, the universal scope of the EIR drives on a one-way road.[23] The EIR is most universal when looking outward from the EU. A multinational corporation in financial distress could claim something very close to global recognition of its pending insolvency proceeding if that proceeding were pending before the courts of the EU member state in which its COMI is situated; that proceeding would be subject to automatic recognition throughout Europe under the EIR and the insolvency representative appointed in that proceeding also could seek recognition in the 62 countries that have enacted legislation to implement MLCBI. Recognition under MLCBI is not automatic, but

22 Cf. recitals 22 and 23 EIR.

23 E.g., Lutzi / Wilke, at 841 (with regard to the Jurisdiction Regulation).

consideration of the request would be streamlined and likely forthcoming. Outbound recognition is easily accomplished under current law because the two cross-border insolvency regimes work hand-in-hand to accomplish this near universalism.

This same result cannot be assumed under the EIR, however, when recognition looks toward the EU from outside.[24] When a multinational corporate insolvency proceeding is situated in the country of the debtor's COMI outside the EU in what is referred to as a third country, the EIR currently falls short. Inward recognition is not altogether impossible. Such a proceeding might get recognised under the domestic law of an EU member state, if such law exists. But even then, the effects of the recognition would apply only within the jurisdiction of the recognizing court and not more broadly throughout the EU because the recognition did not occur as a matter of European law.

This is a flaw in European insolvency practice and architecture. Although other flaws may exist under the UNCITRAL soft law regime for cross-border insolvency recognition, the UNCITRAL approach at least envisions a two-way road – both recognition of proceedings pending around the world and recognition by courts situated around the world. This potential for universality is – like any ideal – imperfectly realised. But it strives, nonetheless, for the ideal of universalism in earnest and with global potential.

We are of the opinion that Europe should try harder. The EIR should implement the MLCBI's broader potential for universality in cross-border insolvency practice. It should do this for at least two reasons. First, even if the present geopolitical – or better, geoeconomic[25] – situation, with increasing tensions and complications, should lead to a diminishing desire for truly global solutions, within those blocks a strong emphasis should be put on mutuality and commonality rather than exclusion and separation. A one-sided universality, thus, should be a matter of the past.[26] Second, even if geopolitical or geoeconomic concerns are put aside and we focus instead solely on European interests, it seems increasingly clear that one-sided universality is short-sighted. This myopia allows other economically

24 This is where the metaphor of the 'fortress Europe' gets spurred on. *See, e.g.,* ECJ, 9.6.2022 -C-673/20, ECLI:EU:C:2022:449- EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE) (9 June 2022) (regarding voting rights after Brexit).

25 See Aiyar et al. (2023).

26 Note that Germany had until 1999 been one of those many jurisdictions which had followed such an imbalanced approach – at least pursuant to the written law.

powerful nation-states and regions to exert their strengths in a way that may undermine Europe's interests, not only in a single unified European market for the sake of a strong EU, but also a unified European market as a global economic power.

In addition, implementation of MLCBI under European law would not be difficult to accomplish. UNCITRAL is already modernizing its legal repertoire, for example, through its Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ). MLIJ is far more detailed and elaborated than art. 6 of the EIR. Given that the EIR and the UNCITRAL soft law are no less than the global standard setting instruments for international insolvency law, the European legislation should take up this mutual inspiration and strive for a parallel progress. Since art. 90 of the EIR requires the Commission to report on the successes and deficits of the EIR by 2027, this would be a perfect opportunity to do so.

D. Proposed Revision of European Insolvency Regulation 2015/848

What would the EIR look like if it were to incorporate applicable provisions from MLCBI? We primarily have in mind a new chapter in EIR governing the cross-border treatment of third country proceedings, although we explore alternatives to a regulatory approach in Part D (below). The most successful national implementations of MLCBI closely follow the text of that Model Law. The drafting is more complex in the European context, given that the EIR is hard law binding on 26 of its EU member states. This project is nowhere near impossible, however. The difficulties of combining the two instruments fall into several categories that relate to issues typically confronted when attempting to draft transnational standards governing private international law – jurisdiction, applicable law, recognition and enforcement, cooperation and coordination.

I. Scope

Being aware that it is one thing to proclaim as academics the need for an encompassing solution and another one for the legislature to do at least something that might lead in this direction, we submit here a wish-list of what should be done. One way to recognise the need for political restraint and mitigate the rigidity of our proposal could be to confine the revisions in this chapter to establishing minimum standards instead of imposing strict rules, at least as a first step toward convergence. Moreover, discussion of the need for these minimum standards should emphasise the importance of expanding the 'outward universality' that has been present in the EIR from its inception with a means for realizing a correlating 'inward universality.' After all, the rule of law is undeniably a (if not 'the') central pillar of European law.[27] The rule of law as it applies to cross-border insolvency practice should, therefore, do justice to the procedural cornerstone of equality of weapons and, thus, enable both outward and inward focused expressions of universality. Therefore, we address each of the previously mentioned issues – i.e., jurisdiction, applicable law, recognition and enforcement, cooperation, and coordination – on the assumption that all of them should be addressed in the new chapter.

II. Jurisdiction

Art. 3 EIR is understood to establish the jurisdiction of EU national courts to commence an insolvency proceeding. It further clarifies the court with jurisdiction to assess the competence to open a proceeding in art. 4 EIR, which provides that, upon commencement, the opening court should assess whether the debtor's center of main interests is located within national boundaries or, if not, whether the debtor has an establishment within these boundaries. In the absence of either a COMI or an establishment, courts within the EU should not commence a proceeding for lack of jurisdiction. Implicitly, these articles of the EIR establish the exclusivity of such an assessment as resting in the hands of the opening court, subject only to internal appellate review, art. 5 EIR.

In contrast, MLCBI does not directly limit the jurisdiction of any state – whether considered from the perspective of the opening of either a main or nonmain insolvency proceeding, or from the perspective of the jurisdiction of the recognizing court to bring an ancillary proceeding to one of these. Jurisdictional limits are imposed indirectly, however, in that a recognizing court can recognise only 'foreign proceedings' pending in the state of the debtor's COMI (foreign main proceeding) or a state in which the debtor has an establishment (foreign nonmain proceeding). If the initial

27 See, e.g., Classen JZ 2023, 53 et seqq.

proceeding is neither a foreign main nor nonmain proceeding, an ancillary proceeding should not be opened to recognise it.

Because the definitions of COMI and establishment are either identical or nearly identical to each other under EIR and MCLBI, the provisions of MLCBI with jurisdictional implications should be adopted wholesale into the EIR. EU courts asked to open a proceeding would be subject to the jurisdiction requirements that art. 3 EIR set. In other words, EU courts asked to recognise a proceeding pending in a third country under the revisions to the EIR we propose would now be asked to assess whether the internal European standards they are most familiar with have been followed by the opening court in the third country.[28]

In theory, more than one state, including more than one EU member state, may be asked and would have jurisdiction to recognise and provide assistance to a pending third country proceeding, which raises a distinct jurisdictional question – the jurisdiction of a recognizing court to enter an order of recognition.[29] Nothing in the MLCBI limits or expressly governs this question; nor does it explicitly address coordination of multiple ancillary proceedings, other than general obligations of cooperation and coordination.[30] MLCBI is not silent on the powers of the recognizing court,

28 These COMI and establishment standards (whether set forth in art. 3 EIR or in the MLCBI) pertain to the jurisdiction of a court to open the insolvency proceeding as to which recognition is sought. Neither standard is required to establish the jurisdiction of the recognizing court to provide ancillary assistance. The recognizing court will not be situated in the state of the debtor's COMI (and there can only be one such COMI). Nor must it be shown that the debtor has an establishment in the state for the court in that state to recognise a pending proceeding. The recognizing court is directed under MLCBI to determine whether the proceeding is a main or nonmain proceeding over which it asserts ancillary jurisdiction merely to determine the nature of the ancillary jurisdiction that the recognizing court can assert – more help to a main proceeding premised on the debtor's COMI and less to a nonmain proceeding premised on a foreign establishment. Compare art. 20 and 21 MLCBI. In our proposal, recognition of a proceeding pending in a (non-EU) third country would initiate an ancillary proceeding under the EIR. The ancillary jurisdiction of a recognizing court would be more limited than an opening court's jurisdiction and authority; for example, ancillary jurisdiction is not an exclusive assertion of jurisdiction.

29 Art. 52 EIR is an already existing instrument that resembles in some ways the ancillary proceeding under the MLCBI; the scope of that norm could be extended beyond the mere commencement of proceedings.

30 See artt. 25, 26, 27 MLCBI. These general obligations have proved sufficient outside the context of Europe. European legislators might see a need for greater coordination among member states with regard to an assertion of ancillary jurisdiction in this context, either by specifying the appropriate venue in which to seek recognition,

which it refers to as the 'effects' of recognition. In this way, the issue of numerous recognizing courts working at cross purposes to each other is managed through the limited consequences of recognition under MLCBI, whether automatic (art. 20 MLCBI) or discretionary (artt. 19, 21 MLCBI).

III. Applicable Law

The distinction between the treatment of applicable law in the EIR and MLCBI appears to be more serious than in practice is the case. Formally speaking, the two instruments would seem to diverge substantially in that the EIR contains numerous precisely stated express rules on the subject (e.g., arts. 7–18, and 35 EIR), whereas the MLCBI is nearly silent on the topic of what law should govern an ancillary proceeding commenced under its provisions (e.g., art. 23 MLCBI).[31] The absence of express provisions in the MLCBI on the topic of applicable law should not be understood, however, as a rejection of the concept of *lex fori concursus* as set out in Art. 7 EIR. This is because, in practice, an ancillary proceeding is invariably considered to be a less-than-full insolvency proceeding. The recognizing court generally looks to the insolvency law of the jurisdiction in which the recognizing court is located to govern this proceeding, although usually only portions of this law rather than in its entirety. UNCITRAL's Legislative Guide on Insolvency Law, published only several years after promulgation of the MLCBI, embraces the notion that the *lex fori concursus* generally should govern an insolvency proceeding, although it is less specific on the various exceptions to this rule as is the EIR.[32] In addition, UNCITRAL's Insolvency Working Group re-opened the issue of applicable law, most re-

or by obligating all member states to recognise a single member state's recognition of a third county proceeding without the need to file further ancillary proceedings in another member state. Outside the context of Europe, the ancillary proceeding opened by a recognizing court generally extends no further than the territory in which the recognizing court is situated. Folding the provisions of MLCBI into EIR would provide an opportunity for additional coordination but may require extending the ancillary jurisdiction of the recognizing court throughout Europe.

31 See also MLCBI Guide to Enactment, para. 21, at 25 ('With its scope limited to some procedural aspects of cross-border insolvency cases, the Model Law is intended to operate as an integral part of the existing insolvency law in the enacting State.').

32 UNCITRAL Legislative Guide on Insolvency Law, Pts. I and II, Recs. 30–34 (2004).

cently Model Law on Recognition and Enforcement of Insolvency-Related Judgments.[33]

The primary difference between the EIR and MLCBI regarding the question of what law governs a dispute in a covered proceeding is not the general rule (*lex fori concursus*) but the exceptions to this general rule.[34] With the EIR, these exceptions are specified in the provisions following the general rule set out in that regulation. While MLCBI is itself silent, we understand that, if made express, a broader list of exceptions should apply in an ancillary than to either a main or nonmain proceeding; this broad list of exceptions pertains to the limited jurisdiction implied in the project of an ancillary proceeding. An ancillary proceeding is intended to act as a 'help-mate' to a main proceeding, and to a lesser degree a non-main proceeding, pending elsewhere. For this reason, ancillary proceedings are generally viewed as territorially limited. When it recognises the opening and implementation of a pending insolvency proceeding, the recognizing court agrees to assist the court in which the proceeding was opened (whether main or non-main) to the extent it can under its own insolvency laws. MLCBI formalises this idea by identifying a limited set of authorities that the recognizing court is entitled to exercise while a request for recognition is pending (art. 19 MLCBI), or after recognition is allowed (artt. 20, 21 MLCBI). These enumerated powers are territorially contained. Indeed, US courts, which generally apply insolvency laws that assert extra-territorial jurisdiction in a full-blown proceeding, generally apply a territorially limited version of those rules in ancillary proceedings brought under Chapter 15 of the Bankruptcy Code.

The concept of distinct rules of applicable law applied to distinct sorts of insolvency proceedings is not unknown under European law. Indeed, Art. 35 expressly provides that 'the law applicable to secondary proceedings shall be that of the Member State of the territory of which the secondary proceedings are opened.'[35]

33 See UNCITRAL, Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018).

34 Depending on the statute implementing the MLCBI into national law, the general rule of *lex fori concursus* and its 'exceptions' may be implicit in that the legislation identifies which of the local insolvency law provisions apply in the ancillary proceeding. This sort of drafting amounts to the same end result as a general rule with numerous exceptions.

35 Exceptions to the territorial form of *lex fori concursus* are applied to secondary proceedings, but these are limited. See, e.g., art. 21 EIR.

The rule set out in Art. 35 EIR could provide, we think, an important doorway into thinking about the topic of applicable law governing ancillary proceedings commenced in a Member State to preserve and protect a main or non-main proceeding pending in a Third Country. But, here, we caution against a simplistic cut-and-paste approach. Although there exist various rules on applicable law in the EIR – some applied to the main proceeding and others to any secondary or territorial proceeding – still, the better approach may be to err on the side of caution and consider the rules of applicable law that will eventually be establish by UNCITRAL in their recent project on this topic. Numerous EU member states are involved in this UNCITRAL project, as is the EU Commission as a nonstate delegation to the Insolvency Working Group.

IV. Recognition

More significantly than with the issue of jurisdiction, the EIR and MLCBI approach the key concept of recognition differently.

Insolvency proceedings (at least, those insolvency proceedings listed on Annex A) that are opened in the courts of the 26 member states bound to it are automatically subject to recognition per art. 19(1) EIR. Recognition is viewed as automatic because art. 19(1) provides that proceedings commenced consistent with art. 3 'shall' be recognised and that this recognition should be effective 'from the moment that it becomes effective in the State of the opening of proceedings.' Automatic recognition under the EIR holds jurisdictional implications, which art. 4(1) makes explicit: 'A court seised of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Article 3 [EIR].' The CJEU construes this language, reasonably, to preclude subsequent courts from relitigating the jurisdiction of the opening court.[36]

Recognition is more conditional under MLCBI, although the procedure for such recognition is streamlined. The conditions for recognition set by MLCBI are mostly documentary but also implicitly pertain to the jurisdiction of the opening court to commence a covered proceeding. Art. 15 ML-

36 A not infrequent tool for such relitigation involves a claim that the public ordre is violated under art. 33 EIR. See, e.g., *Virgós/Schmit*-Report, marg. no. 202, 220. See also ECJ, 16.7.2015 – C-681/13, ECLI:EU:C:2015:471- Diageo Brands BV v Simiramida-04 EOOD, Recht der Internationalen Wirtschaft (RIW) 2015, 605.

CBI requires a foreign representative to apply for recognition of a foreign proceeding and specifies that this application should include: ‘a certified copy of the decision commencing [the] foreign proceeding and appointing the foreign representative;’ ‘a certificate from the foreign court affirming the existence of such foreign proceeding and the appointment of the foreign representative;’ and ‘a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.’ These documents are presumed authentic under artt. 16(a), (b) MLCBI ‘whether or not they have been legalised.’ Based on this sparse documentation, art. 17(a) MLCBI provides that an order recognizing either a foreign main proceeding or foreign nonmain proceeding ‘shall be entered.’ The only exception is that set out in art. 6 MLCBI, which provides that nothing in the Model Law should be understood to prevent the recognizing court from ‘refusing to take an action’ if it ‘would be manifestly contrary to the public policy’ of the country in which the recognizing court is located.[37]

The streamlined procedure for recognition set out in artt. 15–17 MLCBI is distinct from the automatic recognition provided under EIR. Under the EIR, only the commencing court assesses its jurisdictional grounds for commencement of an insolvency proceeding, subject to ordinary appellate review of that decision and possible review of such action by the CJEU. Under MLCBI, the recognizing court is, implicitly at least, entitled to review the jurisdiction of the opening court to commence proceedings and make its own determination on where the debtor’s COMI and establishments are located. This power is especially important when the opening court has not indicated in its order commencing the proceeding whether its jurisdiction is based on the location of the debtor’s COMI or establishment or some other jurisdiction fact. Recognizing courts are not directed to relitigate these jurisdictional facts, however, and most of these courts only dig into the factual allegations supporting main or nonmain status if the issue was not explicitly made in the decision of the opening court or if explicitly challenged by the petitioning insolvency representative.

Despite these differences, EU member states could incorporate the practices specified in artt. 15–18 MLCBI with little if any modification to the uniform language set out in the Model Law. As noted above, the underlying standard governing the distinction between a main and nonmain foreign proceeding appears on its face to be identical with the

37 Which has its parallel in art. 33 EIR.

jurisdictional standards set in art. 3(2–4) EIR. Indeed, the UK Supreme Court in *Rubin* held, at a time when the UK was both bound to the EIR and had implemented the MLCBI through its Insolvency Regulation, that the standards in both should be construed with an eye toward uniformity in their interpretation.[38]

V. Effects of Recognition

Not only is recognition of an insolvency proceeding automatic across the EU member states (art. 19(1) EIR), it is also broad in its implications (artt. 20, 21 EIR). Art. 20(1) provides that the opening of an insolvency proceeding 'shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings.' To nail down even more expressly the breadth of this automatic result, art. 21(1) extends this recognition to the standing and powers of the insolvency representative appointed in such proceeding, who, with one exception, 'may exercise all the powers conferred on it, by the law of the State of the opening of proceedings, in another Member State.' The primacy of the insolvency law of the opening states is further made explicit in artt. 6 and 7 EIR.

The MLCBI stands is contrast. Not only is recognition conditioned under the provisions of the Model Law it is also limited in the effects or consequences of such a recognition. Art. 20 MLCBI delimits specific effects upon recognition, which differ depending on whether the proceeding is a foreign main or nonmain proceeding, although the effects of recognition set out in this provision automatically apply (see also artt. 22, 24 MLCBI). MLCBI also permits an insolvency representative, once recognised, to seek additional protections from the recognizing court; these additional protections are not available as a matter of course but only in the discretion of the recognizing court (artt. 21, 22 and 7 MCLBI). Moreover, given the possibility of a gap of time between the filing of a petition seeking recognition and an order granting recognition, art. 19 MLCBI empowers the court from which recognition is sought to grant interim protections pending such determination. Implicitly, the effects of recognition envisioned within these provisions of the MLCBI are not themselves global but rather territorially

38 Rubin v. Eurofinance SA; New Cap Reinsurance Corp. v. Grant [2012] UKSC 46; [2013] 1 AC 236.

limited as befitting the ancillary nature of such a recognizing proceeding (see art. 22 MLCBI). Although the MLCBI is (mostly) silent on what law should govern in ancillary proceedings, it is explicit in granting broad rights of standing and intervention to the foreign insolvency representative (see artt. 9–12, 24 MLCBI). It is also explicit in granting foreign and domestic creditors equal access to an ancillary proceeding (artt. 13–14 MLCBI).

All these peculiarities of the ancillary proceeding could easily be incorporated into the EIR. All that is needed is an amendment of the 'unloved child,' the territorial proceeding of art. 3(4) EIR. By expanding the scope of activities in that particular territorial proceeding it could be complemented with the ancillary functions as listed in the said articles of the MLCBI. After all, the territorial proceeding as well as the ancillary proceeding are territorial in their scope and they both are governed by domestic insolvency law.

As a consequence, despite the differences between EIR and MLCBI, courts in EU member states should have no difficulty in applying one set of standards to insolvency proceedings initiated by a court in another EU member state and a slightly different set in those proceedings initiated in a third country. The EIR should incorporate artt. 7, 9–12, 19–22, 24 MLCBI with little if any modification to the uniform language set out in the Model Law. Art. 20 MLCBI provides a list of effects of recognizing a foreign proceeding such as a stay on pending lawsuits,[39] etc. This might also be something worth considering for adaptation as it serves the purpose of foreseeability.

Art. 23 MLCBI differs from most other of the provisions of the Model Law in that it offers little if any suggestion on the language implementing countries should adopt. The UNCITRAL Insolvency Working Group failed, with this provision, to cut through knotty issues surrounding the effects of recognition on avoidance actions brought in the country in which the recognizing court is located – especially (but not only) when the proceeding is recognised as a nonmain proceeding. The primary concern here was whether (and, if so, when) a foreign representative should be able to bring avoidance actions under the law of recognizing court; it was also concerned with whether the insolvency representative should be viewed as authorised to bring avoidance actions under its own insolvency law. Whatever policy difficulties created by this scenario for jurisdiction around the globe, this issue seems mostly already to have been resolved by the

39 On this particular issue, see Garasic in de la Durantaye et al. (eds.), at 237 et seqq.

CJEU in its decision in *Hertel*. The EIR should, thus, incorporate art. 23 MLCBI with language consistent with CJEU case law.

VI. Cooperation and Coordination

In provisions that struck civil law practitioners as odd – or at least difficult to implement as relates to courts in a civilian system, artt. 25–27 MLCBI 'mandate' cooperation, communication, and coordination among recognizing courts in an ancillary proceeding and the foreign courts in which such a proceeding is pending and the foreign insolvency representative appointed by that court. Whatever one thought, in the past, about the good faith of concerns as to the impossibility of implementing such requirements across the 26 member states of the EU bound by the EIR, they would seem to have melted away with Chapter III of the recast EIR on treatment of secondary insolvency proceedings. Artt. 41–44 EIR now lay that concern to rest.

Art. 25–27 MLCBI should be incorporated intact into a new chapter of the EIR governing recognition of third country proceedings. These obligations of cooperation, coordination, and communication should not be limited in the EIR to secondary proceedings or third country proceedings, but should apply more generally, whenever appropriate to cross-border insolvency practice under EIR.

UNCITRAL has updated and expanded upon these obligations of cooperation with its new Model Law on Enforcement and Recognition of Insolvency related Judgments (2018), and its Model Law on Enterprise Group Insolvency (2019). Detailed treatment of the extent to which provisions of these Model Laws should be incorporated in EIR, as amended, sits outside the scope of this chapter, but should also be considered by the European Commission in the course of its upcoming study of the need for revisions.

VII. Other provisions in MLCBI

Whereas we see the preceding issues as the most relevant ones for an EIR amendment (or even: improvement), there are still further features from the MLCBI that are worth considering for adaptation in the EIR.

To begin with, there is the important rule of interpretation found in art. 8 of the Model Law. It suggests that any interpretation of any of the Model Law's norms shall have regard of their international origin and the need of uniformity of their application and the observance of good faith. This is different from the inner-European *effet utile* pursuant to which all courts within the member states have to apply that interpretation of a European norm which serves best the unifying effect for the Union as a whole. The MLCBI rule is a helpful reminder for ongoing efforts to strive for uniformity in the law's application. As such, this reminder also serves one of the eminent important purposes of the rule of law, namely, to provide uniform validity through the law.

Some of the declarations of intent in the Model Law's preamble could be adopted by, for instance, the EIR's Recitals; for instance, the reference to 'fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor,' or 'facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.' Even though all this is inherently expressed in the Recitals as currently drafted, it is nowhere so simply and clearly stated.

Art. 9 MLCBI offers a foreign representative direct access to domestic courts. An adaptation of this right would require a definition of 'foreign representative' and a specification of which remedies the foreign representative would be entitled – for instance, the right to file a petition for commencement of a proceeding. The limitation of the jurisdiction contained in art. 10 MLCBI should some way or the other be added for the protection of the foreign representative.

E. The question of format

There remains the question of format. Specifically, should the MLCBI be implemented into European insolvency practice through a Regulation or Directive and, if a Directive, what form should this Directive take? This, of course, is a decision solely dependent on questions of policy and politics, so that as academics all that we can contribute to the relevant deliberations are a few thoughts and suggestions which we think should play a role.

As academics, we have thus far assumed that European recognition of insolvency proceedings pending outside Europe should be governed by the same Regulation that governs recognition of insolvency proceedings pending inside Europe. This is the ideal if our aims are directed exclusively toward policies of uniformity and efficiency. But political resolutions may require flexibility to achieve consensus, and flexibility may in turn undermine realization of uniformity and efficiency. These policies sit in tension, in other words.

Greater flexibility would be attained through the format of a Directive than that of a Regulation. An EU Directive could 'direct' EU member states to adopt a 'uniform version' of UN's MLCBI, or to adopt provisions that resemble and converge toward the provisions of the MLCBI. This Directive could grant jurisdiction to resolve discrepancies between member states' non-uniform interpretations of their version of the MLCBI. Alternatively, an EU Directive could suggest that EU member states adopt UN's MLCBI, or to adopt provisions that resemble and converge toward MLCBI; an EU Directive could 'suggest' that EU member states adopt provisions to govern recognition of third-country proceedings, but not provide direction on what these should look like. These alternatives are more flexible, one as compared to the other, but would achieve less and less uniformity as they gain in flexibility.

We should be reminded that the MLCBI is a model law and, thus, an example of political expediency and the demands of consensus. In promulgating the MLCBI, UNCITRAL vested flexibility in the hands of enacting states. It is nowhere written in stone that the text of the Model Law has to be adopted consistent with the uniform version of the MLCBI. To the contrary, its Guide to Enactment is clear on the flexibility inherent in any model law but asks states to keep the provisions of MLCBI more or less intact. The MLCBI, nonetheless, expressly confers discretion to enacting states through several of its provisions that offer bracketed language that is intentionally open-ended. It also confers discretion to the courts situated in enacting states through broadly stated standards – 'cooperate and coordinate to the maximum extent possible' (art. XX MLCBI). Finally, even where the MLCBI offers precise text, changes are possible and have been made to various degrees by some of the jurisdictions that have adopted the Model Law.

This same politics of consensus may press against the ideal of a single Regulation to govern all questions of cross-border insolvency practice under European law. Although MLCBI leaves discretion for domestic legislatures and courts, its implementation through European law could be understood to place this gap-filling function at the level of the EU Commission and Parliament by means of a Regulation, or it could delegate more or less discretion to the legislatures of EU Member States through a Directive. If the new package would come in the form of a Directive, it would be far more flexible than as a new chapter to an already-existing Regulation.

This interest in flexibility would be most applicable to (and most appreciated by) the EU member states that have already enacted legislation to implement the MLCBI (Greece, Poland, Romania, Slovenia) or that otherwise have enacted legislation governing such recognition (Croatia). This flexibility would also be advantageous for those countries that are 'official candidates for EU accession' and that previously have enacted legislation to implement MLCBI. Albania, Montenegro, and Serbia fall into this category, for example. In theory, these five (and perhaps eight) countries' laws enacted to implement MLCBI may closely resemble the provisions of the model law and each other; we do not know – our language skills are insufficient – but a comparative study could and should be conducted on this important question.

What is important to stress is that political interests in flexibility should not wholly overtake policies favoring uniformity and efficiency and, yet, that potential inheres in any effort to rely on soft law to coordinate cross-border insolvency practices. First, there is the history of EU insolvency law. To our eyes, it would be strange and against the inner logic of the incorporating legislative body if a new package of policies – this one governing the recognition of insolvency proceedings pending in third countries – would come with the option of different national approaches, despite the insistence on uniformity of approach on other issues, for example, on how to address the problem of corporate groups and recognition of pre-insolvency proceedings. Moreover, experiences with the Preventive Restructuring Framework (EU 2019/1023) show that this Directive produced an enormous range of designs and that this lack of alignment was bound to take many years to settle. This might be seen as tolerable in a pre-insolvency context or in contexts unrelated to insolvency law, but may well be less tolerable a disturbance within an insolvency context.

F. Conclusion

From its inception, the EIR was widely understood to hold the potential to set the gold standard for cross-border insolvency law, not just within the European Union, but also globally through the Regulation's twin, UNCITRAL's MLCBI. Both the EU and UNCITRAL have not rested on these original laurels. Both the Model Law and Regulation have been subject to almost continuous renovation, improvement, and modernization.

We hope to encourage the European legislator to keep pace with the efforts of UNCITRAL and to make use of an ongoing mutual fertilization.

We are well aware that the main counterargument against our encouragement is the distribution of competences within the European Union. Somewhat simplified, this distribution foresees the Commission as charged with internal affairs, whereas the member states' legislatures hold competence outside the EU. However, the pure, introspective attitude of the EIR as written has been distorted by the CJEU's decision in *Hertel* -- without much discussion or even hints of skepticism. There should be no looking back.

On the shoulders of *Hertel,* we offer a set of suggestions for modernizing and further revising the recast EIR. One such suggestion is that the Commission should scrutinise which concepts, rules, or topics are potential improvements for the EIR; these concepts could then be adjusted to the EIR setting and become adopted. A more ambitious suggestion is that the Commission could rethink its concept of 'one-way universality,' which has always proven to be a rather inefficient and trade-averse concept.[40] It should be broadened to a two-way universality principle to accommodate the needs particularly of the current geoeconomic circumstances.

The most ambitious suggestion in this paper is that the EIR should be amended to add an entirely new chapter under the heading of 'external affairs' in which, in its most radical version, the MLCBI is adopted more or less word by word. In a less radical version, this new chapter could provide for minimum standards which are approximations to the rules in the model law, or a directive might specify minimum standards and allow member states some discretion in how they implement these standards. More important than the political question of precisely how EU law governing the recognition of insolvency proceedings pending in third countries should be formatted, however, is the imperative that a means for such recognition should be found.

Opening European insolvency practice to the outer world would enhance transparency and predictability in insolvency proceedings to the benefit of the capital markets – indeed, all goods and service markets. Openness is an important aspect of a unified European economic market. This imperative was recently demonstrated with the Commission's proposal for a new directive on harmonizing Member States' insolvency laws. But

40 For reference to the notion that Germany adhered to this concept for roughly 100 years, see, e.g., Trunk, p. 309 et seqq.

the Commission should not stop with a directive. Enabling and coordinating member states' recognition of third country proceedings would also enhance these foundational values.

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Annex:

UNCITRAL MLCBI Article	**Related Article in EU IPR recast (if any)**	**Notes**
Preamble	Note that language in the EIR preamble has influenced CJEU, so care should be taken to consider amendments to this language with caution.	Some MLCBI preamble paragraphs should be added to EIR preamble.
Art 1: Scope of application (four instances where ML applies; bracketed space for instances where ML should not apply – mostly, regulated industries)	Assistance is not much developed as a concept in the EIR. It could be introduced in relation to third countries.	MLCBI covers both inbound and outbound assistance
Art 2: Definitions		Should define 'third country court,' 'third country IR,' and 'third country main and secondary proceeding.' No need to define 'establishment' again (in any event, consistent between laws); presumably, no distinction should be drawn between 'foreign proceeding' and 'third country proceeding.'
Art 3: International Obligations	Introspectively dealt with in art. 85 EIR.	Treaties trump MLCBI; but should provisions on third countries in EIR defer to existing provisions in EIR?
Art. 4: [competent court or authority]	Should be left to Member States.	Not sure why this should get incorporated into EIR.
Art 5: Authorization of IR to Act	This corresponds roughly to art. 21.	Not sure if EIR needs this, but not a problem with explicit statement that IR in proceeding pending in courts of EU member state are authorised to seek recognition in proceedings pending before 3d country courts.
Art 6: Public policy exception	Art. 33	Not sure if EIR needs this, since it already exists there. But may need to restate existing language to cover case of third country proceedings.
Art 7: Additional assistance	To a certain degree contained in art. 21	Language in MLCBI is open-ended; inserted to cover possibility that relief offered through Art 22 is inherently limited with reference to scope of authority that IR would enjoy if proceeding pending in recognizing court, but additional assistance is appropriate.
Art 8: Interpretation		There is nothing like this in EIR. Courts in EU Member States should construe provisions

UNCITRAL MLCBI Article	Related Article in EU IPR recast (if any)	Notes
		relating to third country proceedings consistent with obligations under EIR and possibly also as consistent with other courts construction of MLCBI.
Art 9: Right of direct access		This may sound broad, but would simply enable an IR from a third country to 'access' courts in EU Members States sufficient to ask for ancillary assistance. Note that there may not be an IP pending within the courts of EU Member States.
Art 10: Limited jurisdiction		Consistent with EU procedural law more generally.
Art 11: Application by [3d Country] IR to Initiate Proceedings	Cf. art. 37 I (a) → re secondary proceedings	EU law and/or domestic law of EU member states may substantially limit applicability of this article of MLCBI; but brackets and proviso make clear that there is no intent to contradict those laws. Task of identifying precisely which laws might fit within the scope of this provision may be too complex to be handled by an annex approach.
Art 12: Participation of [third country IR] in IP [pending under EIR]	Cf. art. 45 III regarding intra-European proceedings	Applying this to courts in EU member states would presuppose their ability to provide ancillary assistance to IP pending in third country (outbound). Should consider possibility that there is no IP pending in EU member state court.
Art 13: Access of Creditors [from third countries to IP pending with EU]		Par. 1 is a common rule on public international law, called *fremdenrecht* (foreigners' rights).
Art 14: Notification to Creditors of Proceeding Pending in EU Member State	Publication is in art. 28. Individual notification currently is a question of domestic law.	
Art 15: Application for Recognition of IP		This is an important (perhaps the key) distinction between MLCBI and EIR. Recognition is not automatic; it must be sought and justified. The application is streamlined, but an application must be made. See Art 15(2)(c).
Art 16: Presumptions	Par. 1+2 → nothing similar in EIR Par. 3 corresponds with art. 3 I, EIR.	What would it mean to a civil law court that it is 'entitled to presume' per Art. 16(2)? Note here the COMI standard applies in a back-handed way. This standard should mean the same thing within the EU and as applied to 3d

UNCITRAL MLCBI Article	Related Article in EU IPR recast (if any)	Notes
		countries, and this parallelism should be made explicit in the further recast EIR.
Art 17: Decision to recognise		Perhaps there should be more detail in terms of the procedures to be followe. An EU wide law implementing MLCBI should specify that third country IR need only obtain recognition in one EU member state; once that court recognised third country IP, that recognition should automatically apply throughout EU.
Art 18: Subsequent information	Corresponds to a certain degree with art. 43, EIR.	Same as Art 17.
Art 19: Interim relief	Roughly corresponding to art. 52, EIR.	Same as Art 17, including EU wide scope of interim relief. So, for example, the relief would be available as to assets of debtor located within EU (or just within territory of the member state in which recognition is sought). Required notice bracketed by MCBI; procedures could be those set by member state or EU wide.
Art 20: Automatic relief	Should be adjusted to the member states' stay versions	Implementation of Art 20(1) seems straightforward. Subpart (2)(grounds for relief) should be subject to EU grounds rather than distinct grounds in each member state. Could have an annex that refers to possible grounds under domestic law of each member state.
Art 21: Discretionary relief	Could draw a parallel to art. 52?	What does 'any appropriate relief' mean in Art 21(1), and especially subpart (1)(g), and how should this be distinguished from relief permitted by Art 7? 'Appropriate relief' available 'in this [recognizing] state' may be viewed as limiting (as is construed under US chapter 15). Alternatively, 'appropriate relief' may be subject to some EU-wide standard. Subparts (2–3) also refer to 'debtor's assets located in this State' and to 'law of this State' respectively. Could establish an EU-wide standard instead.
Art 22: Protection of creditors and other interested persons		Should references to 'creditors' be limited to those in the member state in which recognition is sought or those located in any EU member state? How would a civil law court interpret artt. 22(2 and 3)?
Art 23: Acts detrimental to creditors	Frequently exists in national legislation.	Presumably, it should not be either harder or easier for third country IR to bring avoidance

UNCITRAL MLCBI Article	Related Article in EU IPR recast (if any)	Notes
		actions in EU than EU IR to bring such actions against defendants residing in third countries.
Art 24: Intervention		How would this work for third country IR to intervene in proceeding pending in another EU Member State? How would implementation of this article of the MLCBI interact with EIR on corporate groups?
Art 25: Cooperation and direct communication between courts	Artt. 42 and 57	The key here would be (whether in the language of the provision or in a preamble paragraph) to distinguish between 'obligations' of 'cooperation' per third countries and the automatic effects of recognition and enforcement that govern intra-EU.
Art 26: Cooperation and direct communication between courts and third country IRs	Artt. 43 and 58	See above.
Art 27: Forms of cooperation	EIR leaves this for courts to decide.	The 'forms' set out in MLCBI art 27 seem consistent with EU law; there may be inconsistencies with domestic law, but if handled through regulation rather than directive this should not be a problem.
Art 28: Commencement of concurrent proceeding after recognition of 3d Country Main Proceeding	Artt. 3 (2) to (4), and artt. 34 ff.	This provision in MLCBI may be wholly unnecessary except to allow (consistent with other provisions of EIR) commencement of secondary proceedings after recognition of main proceeding pending in third country. There can only be one COMI, per EU law.
Art 29: Coordination between proceeding(s) pending within EU and third country	New territory.	
Art 30: Coordination where more than one third country proceeding	New territory.	
Art 31: Presumption of insolvency	See CJEU case involving PROBUD.	If main proceeding pending in third country is recognised under [this] law, proof of insolvency should be presumed for purposes of commencement of proceeding under insolvency law of any EU member state. Given EIR, this should only apply to post-recognition commencement of secondary proceedings.

UNCITRAL MLCBI Article	**Related Article in EU IPR recast (if any)**	**Notes**
Art 32: Rule of payment in concurrent proceedings	Hotchpot rule as in art. 23.	