Insolvency-related proceedings in cross-border cases – with specific regard to relations between the EU and third countries

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Abstract:

The contribution gives a comparative overview over the rules of the EIR, the UNCITRAL Model Laws (MLCBI and MLIJ), some other international treaties and national legislation, in particular of EU Member States, with regard to legal issues arising in or as to insolvency-related proceedings (including judgments therein) such as jurisdiction and recognition of judgments. It also develops some recommendations.

Keywords: Insolvency-related proceedings; actions; jurisdiction; recognition; EIR; MLCBI; MLIJ; national laws.

Insolvency proceedings include different procedural steps, beginning – usually – with a private (creditor's or debtor's) request to a court to start a proceeding, the 'opening decision' of the court, and thereafter a series of follow-up decisions of the insolvency court until the closure of the proceeding, which is usually also ordered by the court. Insolvency proceedings have numerous procedural and material effects on the debtor, creditors and other stakeholders. The proceeding typically limits the rights of creditors to enforce their claims, limits the powers of the debtor to carry on his affairs and also affects legal relationships with other parties. For example, in insolvency, rights of set-off may be excluded, executory contracts may be terminated. Also, certain transactions which the debtor concluded before the insolvency proceeding may be avoided, or the debtor's corporate officers or shareholders may be made personally liable for certain acts on the basis of insolvency-specific or other general legislation. The totality of such effects can hardly be described and national legislations differ significant in this respect, sometimes also distinguishing between different types of insolvency proceedings. Evidently, such effects may cause disputes, and national legislations differ significantly as to how such disputes should be handled.

Both the EIR and the UNCITRAL Model Law family on cross-border insolvency law contain rules on insolvency-related proceedings, but they either leave relations with non-EU countries unregulated (EIR) or deal only with recognition of foreign judgments (UNCITRAL Model Law on Recognition and Enforcement of Foreign Insolvency-Related Judgments/MLIJ), not addressing issues such as direct jurisdiction.

The term 'insolvency-related' (proceedings or disputes) as used in this text relates to the procedural dimension of such proceedings, not to their merits (e.g. the law applicable to avoidance of transactions). The merits are covered by other rules of cross-border insolvency law, such as the lex fori concursus rule or its exceptions and a few substantive rules.

The following text will try to develop some ideas what the EU might do in this subject-matter in its relations with non-EU countries. From the perspective of cross-border insolvency law the topic has an overarching character as it comes up both in domestic insolvency, at recognition of foreign insolvencies and in situations of parallel proceedings. Also, from the perspective of insolvency-related proceedings, the proceeding may complement a domestic insolvency proceeding or a foreign insolvency proceeding, and it it may even have to position itself between concurrent insolvency proceedings. The topic thus has an overarching character and has therefore been included in the general part of this book, although it will also be adressed in the specific parts of this book.

A. Present state of the law – Overview

The EIR (recast of 2015) addresses insolvency-related proceedings basically at two places: Art.6 EIR determines direct international jurisdiction for insolvency-related disputes, terming them 'action[s] which derive[…] directly from the insolvency proceedings and [are] closely linked with them, such as avoidance actions'. Secondly, Art.32 EIR provides for rules on inner-EU recognition and enforcement of 'other' decisions, contrasting them with the 'opening' of the proceeding (Art.19 EIR).

The MLIJ (2018) takes a different approach: It deals specifically with recognition and enforcement of foreign insolvency-related judgments, thus excluding, e.g., direct jurisdiction for such proceedings. On the other hand, it regulates the recognition of such judgments in a general manner, not distinguishing between domestic, foreign or concurrent insolvency proceedings. This approach corresponds to classical legislation or treaties on recognition of foreign judgments, disassociating the MLIJ to a certain degree from the legal assistance approach of the MLCBI.

National legislation on this topic varies significantly.

In a small number of EU member states, some issues of insolvency-related proceedings are addressed in the cross-border context[1]. Usually, insolvency-related proceedings are dealt with In general insolvency law. Some EU member states provide for a broadly fomulated jurisdictional vis attractiva concursus for insolvency-related disputes, which sometimes includes in principle, all insolvency-related disputes arising after[2] the opening of the insolvency proceeding. Examples are the Austrian Insolvency Code[3], the Portuguese Insolvency Code[4] and the Spanish Bankruptcy Act[5]. Sometimes general formulas such as 'actions on claims arising under insolvency law and immediately linked with the insolvency proceeding' are used[6]. Sometimes a disctinction is made between insolvency-related disputes and the conduct of the insolvency proceeding in general (which may include, apart from the 'opening decision', various technical decisions such as on publication of the opening decision in registers, on creditors' rights to participate in a creditors' meeting or on approving a reorganization plans[7]. Interim measures are often mentioned expressly[8].

Other countries avoid general rules on jurisdiction for insolvency-related proceedings, but implicitly accept general rules on jurisdiction also in the insolvency context, if no other rule applies. This is true, for example, for Croatia and Germany. Polish law, interestingly, contains a specific rule on

1 See, e.g. Art. 118 § 2 Belgian Code de droit international privé (direct jurisdiction for insolvency-related actions) or sec. 348 (1) German InsO (jurisdiction of the insolvency court for certain technical decisions).

2 As to the effets of cross-border insolvency upon pending court proceedings see → Silvestri, effects upon arbitral proceedings → Lazić.

3 Sec.63a IO.

4 Art.7 (3) CIRE.

5 Art.52 – 54 LC. But see the limitation of the scope of this provision in cross-border cases under Art.55 of the Act.

6 E.g. sec.63a IO; cf. also Art.118 § 2 Belgian Code de PIL: 'contestations qui en dérivent directement'.

7 See, e.g. Art.7 (1) of the Portuguese Insolvency Code in comparison with Art.7 (3) of the Code. A similar disctinction is underlying Art.118 § 1 and 2 Belgien Code de PIL and §§ 63 and 63 a Austrian InsO.

8 See e.g. Art. 404 Croatian Bankruptcy Act, sec.219 and 220i Austrian InsO, sec.344 German InsO, Art.289 Portuguese Insolvency Code.

the inadmissibilty of choice of forum agreements in insolvency matters (Art. 383 of the Polish Bankruptcy Code). The provision appears to apply mainly to bankruptcy (insolvency) jurisdiction in general, but might also apply to bankruptcy-related disputes.

Apart from rules on jurisdiction, some national legislations contain rules on recognition of foreign insolvency-related judgments. For example, sec.344 (2) of the German Insolvency Code (InsO) provides for the recognition of interim measures passed by a foreign insolvency court as well as 'decisions, which have been rendered for the conduct or for termination of a recognized foreign insolvency proceeding'. Sec.344 (2) German InsO appears to be tailored after Art.32 EIR, but applies to decisions rendered in non-EU countries. Similar provisions exist in Portugal[9] and Spain[10].

Turning to non-EU countries, the picture is not much different from the legal approaches in the EU. Common Law countries tend to use for insolvency-related disputes general approaches of cross-border litigation, such as service of the writ (or summons) on the defendant, with limitations under principles such as due process or discretionary powers of the court In the U.S., in particular, bankruptcy judges have broad powers in this respect under the Bankruptcy Code[11] and the Federal Rules of Bankruptcy Proceedings (as to adversary proceedings see Part VII, Rules 7001 – 7087, of the Bankruptcy Rules) in conjunction with the Federal Rules of Civil Procedure.

Norway, a member country of the European Economic Area (as well as of the Nordic Bankruptcy Treaty of 1934), addresses recognition of foreign insolvency-related decisions in sec.167 of its Bankruptcy Act. Sec.167 appears to be, like German law, inspired by Art.32 EIR and states that 'foreign court decision[s] made in connection with or closely related to insolvency proceedings' are recognized in Norway if they fulfil certain conditions. The provision seems to apply only to decisions rendered in the state of the foreign insolvency proceeding.

Taking another example, Swiss law contains a specific jurisdictional rule for avoidance actions (Art.289 Swiss Civil Execution and Bankruptcy Act), referring, as a basic rule, to the defendant's domicile (in Switzerland), otherwise to the forum concursus (in Switzerland) and also offering the

9 Art.293 Portuguese Insolvency Code: for 'decisions taken in foreign insolvency proceedings'.

10 Art.244 Spanish Bankruptcy Act: for 'every decision rendered in such foreign insolvency proceedings and which has its foundation in bankruptcy legislation'.

11 See, in particular, § 105 U.S. Bankruptcy Code.

forum arresti (Art.4 Swiss IPRG in conjunction with Art.52, 272 Swiss Civil Execution and Bankruptcy Act). Lawsuits on lodged, but disputed claims fall, in principle, under the jurisdiction of the general courts at the location of the insolvency proceeding (Art. 250 Swiss Civil Execution and Bankruptcy.

Summing-up, it can be summarized that cross-border procedural aspects of insolvency-related court proceedings are addressed in the EIR (with limitation to inner-EU relations), in UNCiTRAL texts and in national legislations, but that the approaches diverge significantly.

B. Main issues

From the perspective of national legislators, insolvency-related proceedings tend to be regulated partly in insolvency legislation, partly in other legislation, e.g. in Codes of Civil Procedure. From a cross-border perspective, the main issues in this subject-matter are direct jurisdiction for such proceedings and recognition of foreign judgments. Both national legislators and the EU and UNCITRAL have approached these issues and have found some concurring solutions, but major gaps and divergences remain. Subsequently, three issues will be addressed more in detail:

- the scope and structure of future EU regulation on this subject with a particular focus on relations with non-EU countries,
- direct jurisdiction for such proceedings,
- recognition of foreign insolvency-related judgments.

Issues of non-insolvency proceedings in case of concurrent insolvency proceedings wiill be addressed in the contribution to this book on concurrent procedings.

I. General aspects: scope and structure of regulation

Insolvency proceedings are, in principle, court-administered proceedings[12], which involve various court decisions: starting, again in principle, with an 'opening' decision of the insolvency court and ending, usually, with a

12 The term insolvency proceeding can include also administrative proceedings (with some court control), cf. Art.2 (6) (ii) EIR. It may also include proceedings which do not start with a judicial or administrative 'opening' decision, but some other act. This

'closure' decision of the court. Between these two pivotal decisions, and perhaps even before or after them, the insolvency court may render other decisions, e.g. interim measures or decisions in insolvency-related disputes or approvals of certain acts like insolvency plans. In so far as decisions are made by the insolvency court, they are usually regarded as part of the insolvency proceeding itself, distinguishing them from 'other' insolvency-related proceedings. However, national legislation differ as to which decisions are to be rendered by the insolvency court or by other courts.

1. Approach of the EIR

The EIR has reacted to this state of the law by distinguishing two categories of insolvency-related (or insolvency-based) proceedings: Apart from the 'opening decision' of the insolvency proceeding, which is the cornerstone of the EIR rules (see Art.3, 7 and 19 EIR), the Regulation differentiates between

- decisions (and the underlying sub-proceedings) of the insolvency court 'which concern the course and closure of insolvency proceedings, and compositions approved by that court' (Art.32 (1) subpara.1 EIR), and
- decisions (and the underlying proceedings) 'deriving directly from the insolvency proceedings and which are closely linked with them', such as avoidance actions (Art. 6 (1) and Art.32 (1) subpara.2 EIR).

Implicit in this is the existence of 'other' proceedings, which are more loosely connected with the insolvency proceeding and are not governed by the EIR (cf. Art. 32 (2) EIR).

In its Art.3, the EIR etablishes direct jurisdiction rules for the 'opening' as well as the further conduct of the insolvency proceeding (cf. Art. 7 EIR), which appears to include decisions in the sense of Art.32 (1) subpara.1 EIR. Additionally, Art.6 EIR establishes direct jurisdiction rules for insolvency-related 'actions [...] deriving directly from the insolvency proceedings and which are closely linked with them' (see Art.6 and Art.32 (1) subpara.2 EIR).

Thus, the EIR contains procedural rules both for the conduct of the insolvency proceeding itself and for one category of proceedings, which are particularly closely related with the insolvency proceeding, and which are

could apply, e.g. to certain reorganization proceedings under corporate or contract law, but this issue need not be analysed in depth at this place.

not necessarily decided by the insolvency court. Less directly insolvency-related proceedings are excluded from the EIR, but may be governed by other rules of cross-border civil or other procedure.

2. Approach of the MLIJ

In contrast with the EIR, the Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) contains a very broad definition of insolvency-related judgments as court decisions, which arise 'as a consequence of' or are 'materially associated with' an insolvency proceeding, whether or not that insolvency proceeding has closed (Art.2 (d)(i)a) MLIJ). The definition only excludes the opening (commencing) decision of the insolvency proceeding (Art.2 (d)(Ii) MLIJ). This goes far beyond the more restrictive definition of insolvency-related actions in Art.6 EIR, which is grounded on jurisprudence of the European Court of Justice delimitating the the spheres of application of the (former) Brussels Convention of 1968 from the EIR[13]. The EIR was passed later, but integrated the ECJ's jurisprudence into its own rules. The idea behind this is that the Brussels Ia Regulation (which has replaced the Brussels Convention) and the EIR should not overlap. UNCITRAL does not have to cope in this respect with overlapping legal instruments and could define the scope of application of its 2018 MIJ independently of such concerns. The consequence is that the MLIJ applies to judgments (and proceedings) covered by Art. 6 EIR as well as to decisions which would fall under either Art.32 EIR or the Brussels Ia Regulation (in conjunction with Art.32 (3) EIR). This might cause difficulties for the EU if it were to adopt either the MLCBI or the MLIJ.

3. National approaches

In so far as national legislators have addressed this issue, they also distinguish – explicitly or implicitly – between the conduct of the insolvency proceeding itself under the administration of the insolvency court and 'related' proceedings, which are, in principle, conducted in other courts. Such proceedings are sometimes defined in similar terms as Art.6 EIR

13 Gourdain v. Nadler case (1979), accessible at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61978CJ0133 (accessed 22.06.2025).

(see, e.g. sec. 63a Austrian InsO, Art. 744 (1) Spanish Bankruptcy Act), but most EU member states avoid a general statement. There are also different approaches as to the delimitation of the jurisdiction of the insolvency court and other courts in insolvency-related matters. Some countries, bot inside and outside the EU, grant the insolvency court decision-making power in matters, which in other countries fall under the jurisdiction of other courts.

4. Interim summary

Generally speaking, each of these approaches can be justified, and there is no clear insolvency policy-advantage of one or the other approaches.

Basically, the approach of the EIR to distinguish between the insolvency proceeding itself and certain other insolvency-related proceedings, which has been established within the EU, would seem adequate also for relations with non-EU countries. The EIR and the MLIJ include, in principle, all relevant proceedings and decisions. The circumstance that the EIR does not regulate 'loosely insolvency-related' decisions, does not hinder their recognition under non-insolvency rules. The MLIJ might be an element to fill this gap in relations with non-EU countries.

II. Direct jurisdiction

Both the EIR and national legislations provide for rules of direct jurisdiction for insolvency proceedings in general and for insolvency-related proceedings. The MLIJ deals only with indirect jurisdiction (for recognition purposes), but may also give some inspiration for direct jurisdiction.

1. Approach of the EIR

The EIR contains not only jurisdictional rules for the insolvency proceeding itself (Art.3 EIR), but also for other insolvency-related court proceedings (Art. 6 EIR).

It seems implicit in Art.3 EIR in conjunction with Art.7 EIR and Art.32 (1) EIR that sub-proceedings and decisions of the insolvency court, 'which concern the course and closure of insolvency proceedings' are also covered by the jurisdiction rule of Art.3 EIR.

Art.3 EIR provides for exclusive (international) jurisdiction, with the specifics that jurisdiction can be grounded either on the debtor's COMI

(Art. 3 (1) EIR) or, in the case of Art. 3 (2) EIR, on a debtor's establishment in the EU.

As to closely insolvency-related proceedings ('actions deriving directly from insolvency proceedings and closely linked with them')[14], Art. 6 (1) EIR establishes, in principle, an exclusive[15] (international) jurisdiction of courts in the (EU-based) forum concursus[16].

The provision applies, apart from the expressly mentioned example of avoidance actions[17], e.g. to proceedings in the insolvency court to impose subsidiary liability on corporate directors[18] or lawsuits before general courts for liability of corporate directors under non-insolvency legislation, but initiated by the insolvency representative and serving the purposes of the insolvency proceeding[19]. The borderlines of the covered proceedings are, however, disputed. Views differ, e.g., whether proceedings (and the resulting judgments) on termination of executory contracts by the insolvency representative, or on claims to 'separate satisfaction' (German: Aussonderung) as to assets technically not falling into the estate, or on 'privileged satisfaction' by secured creditors, or on limitations of a right of set-off in insolvency, or proceedings for the admission/non-admission of lodged claims of creditors fall under this category[20].

Alternatively, the courts of the EU member state, in which the defendant of such an action is domiciled, are also accorded jurisdiction (Art.6 (2) EIR). This is, however, conditioned by a cumulation of two actions in the State of the forum rei: an action 'which derives directly from the insolvency proceedings and is closely linked with them' and another ('related'[21]) 'action

14 As to the background of this term see supra note 13 (ECJ Gourdain v. Nadler jugment 1979).

15 See CJEU, Wiemer & Trachte v. Tadzher (ECLI:EU:C:2018:902) (in case against defendant with domicile in EU; interestingly, the Court has limited its ruling to this situation). In intra-EU parallel proceedings, jurisdiction is concurrent, CJEU, Nortel v. Rogeau (ECLI:EU:C:2015:384).

16 This may hinder recognition of foreign judgments, both from other EU countries and from non-EU countries.

17 Practical cases: ECJ cases Seagon v. Deko Martin (ECLI:EU:C:2009:83) and Schmid v. Hertel (ECLI:EU:C:2014:6).

18 Under French insolvency law; ECJ decision in Gourdain v. Nadler.

19 Cf. CJEU, Kornhaas v. Dithmar (ECLI:EU:C:2015:806).

20 Each of these constellations is under dispute, cf. Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed. (2025), Art.6 EIR Rz.14 and 15.

21 Definition of when such actions are deemed related, Art.6 (3) EIR. Also there is a particular mention of actions instituted by a debtor-in-possession, Art.6 (2) subpara.3 EIR.

in civil and commercial matters against the same defendant' (Art.6 (2) 1st alternative EIR). An additional rule is provided for cases of several defendants (Art.6 (2) 2nd alternative).

It seems that the purpose of Art.6 (2) EIR is less to open an alternative forum for such disputes than to avoid conflicting judgments in related cases. Practically speaking, in a relevant number of cases claims under insolvency law and (related) civil or commercial law may coexist. e.g. claims for the avoidance of transactions and contractual tort claims. In such cases insolvency representatives can be expected to sue the defendant on both grounds under Art.6 (2) EIR. On the other hand, the insolvency representative can also decide to sue the defendant only[22] in the forum concursus.

It should be mentioned that the jurisdictional rules of Art.3 and 6 EIR designate only courts of EU member states (except Denmark). They do not hinder the insolvency representative to sue in a non-EU country under the jurisdictional rules of this country, though doing so may be incompatible with the insolvency representative's duties under the lex fori concursus[23].

If the debtor's COMI is located outside the EU, Art.6 EIR – like the Regulation in general – does not apply. On the basis of the ECJ's Gourdain v. Nadler judgment[24], proceedings and judgments covered by Art.6 EIR do not fall into the sphere of application of the Brussels Ia Regulation and in consequence probably also not of the Lugano Convention. Thus they would be governed – if no other international treaties apply[25] – either by the autonomous international insolvency law[26] or autonomous civil procedure law[27] of the EU member states.

22 As to ECJ case law on this jurisdiction as exclusive see Lukas Schmidt, https://conflictoflaws.net/2020/c%E2%80%91493-18-ub-v-va-and-others-exclusive-jurisdiction-under-the-european-insolvency-regulation/.

23 Cf. the judgment of the ECJ of 06.12.2019, UB v. VB, Tiger et al., ECLI:EU:C:2019:1049 (inner-EU case).

24 Supra note 13.

25 Both the Hague Judgments Convention 2019 (Art.2 (e)) and the Hague Choice of Court Convention 2005 (Art.2 (e)) exclude insolvency matters; but the extent of these exclusions is untested.

26 This may be at least partly true for Austria, cf. sec. 240 (1) InsO (recognition of foreign decisions under the InsO applies both to the foreign 'opening' decree and to decisions passsed 'in' the foreign insolvency proceeding.

27 This is the dominant view in Germany, see Lüer/Knof, in: Uhlenbruck, Insolvenzordnung, 15th ed. (2019), sec. 343 InsO margin note 27.

2. Approach of the MLIJ

Although UNCITRAL's MLIJ does not create common rules on direct jurisdiction for insolvency-related proceedings, its provisions on indirect jurisdiction (for recognition purposes) can give an impresssion about the current international state of discussions also with regard to direct jurisdiction. It should be reminded that the MLIJ deals with insolvency-related decisions in the large sense, i.e. both decisions 'in' insolvency proceedings and other, even loosely insolvency-related proceedings and decisions.

Art. 14 (g) MLIJ lists two cases of specifically worded indirect jurisdiction: choice of forum by the parties to the dispute or submission of the defendant to the proceeding. In addition, it provides for two general clauses on indirect jurisdiction – the first one uses the 'mirror principle' approach well known, e.g. from German international civil procedure law, the second uses a public policy-like formula: the basis of jurisdiction 'was not incompatible with the law of the [recognizing) State.

It is worth mentioning that the MLIJ does not provide for cases of exclusive jurisdiction on the side of the recognizing country. As can be seen from Art. 14 (g) MLIJ the drafters did not regard exclusive direct jurisdiction for such proceedings a convincing approach. Under the MLIJ, at least choice of forum agreements or submission of the defendant to such proceedings should be accepted also in the context of direct jurisdiction.

A more flexible standard for (direct) jurisdiction in such cases can also be expected to widen the procedural options for insolvency representatives to act in the interests of all creditors and would also raise the chances that 'domestic' judgments in such cases are recognized in the non-EU world.

3. National approaches

All scrutinized autonomous insolvency laws establish rules on direct jurisdiction for insolvency proceedings, including the decision-making power of the insolvency court for some issues arising in the proceedings. Some laws provide for jurisdiction of the insolvency court even in cases, which fall under Art.6 EIR

Other autonomous laws confer jurisdiction in cases falling under Art.6 EIR (and, all the more, loosely insolvency-related cases) to other courts.

The circle of cases covered by such rules is sometimes described abstractly[28], but usually defined only for specific types of proceedings (actions)[29].

Some autonomous laws – both of EU and non-EU countries – provide for an (international) forum concursus for (at least some) such proceedings[30], others tend to apply general rules of jurisdiction under Codes of Civil Procedure[31] or other legislation. The forum for such disputes under autonomous law is usually not exclusive[32], but there are also examples of (internationally) exclusive jurisdiction in such cases[33].

4. Interim summary

In view of the rather divergent approaches as to direct jurisdiction in insolvency-related proceedings (in the large sense), some degree of approximation of rules, also in relations with non-EU countries, would be welcome. In view of the economic relevance of such decisions, jurisdictional disorder certainly does not further international cooperation in insolvencies linked with non-EU countries.

The approach chosen by the EIR to distinguish in this respect between insolvency proceedings themselves (including jurisdiction of the insolvency court for follow-up decisions) and other insolvency-related decisions has not created major problems within the EU, but this is probably due to the unifying function of the Court of Justice of the European Union. More conflicts may be expected in relations with non-EU countries.

Therefore, it might be feasible not to insist on exclusive direct jurisdiction of courts of the forum concursus in closely insolvency-related proceedings when the debtor's COMI is located outside the EU[34]. Concurrent

28 See, e.g. Art. 118 § 2 Belgian Code de DIP.
29 See, e.g. sec. 63a Austrian InsO (broad list) and Art.52 – 54 Spanish Bankruptcy Act (broad list, with abstract limitation in Art.55 of the Act), Art, 171 Swiss PIL Act in conjunction with Art. 282 Swiss Civil Execution and Bankruptcy Act.
30 This is the case, e.g., in Belgium (sec.118 § 2 Code de droit international privé) and in Austria (sec. 63 Austrian InsO: exclusive jurisdiction of Austrian forum concursus).
31 This is the case, e.g., in Germany. However, if the debtor's COMI is located in the EU, art.6 EIR applies.
32 This probaby true under sec.118 § 2 Code de droit international privé of Belgium, and applies also under German law (Code of Civil Procedure).
33 Sec. 63a and sec. 111 Austrian InsO (exclusive jurisdiction of Austrian forum concursus), see also sec.52 (3) of the Spanish Insolvency Code (some actions against company shareholders or corporate organs in business insolvencies).
34 Supposed that in such cases an EU-based insolvency proceeding may be opened.

jurisdiction of the forum concursus would appear more adequate (perhaps also in inner-EU cases) and also be in line with the MLIJ. As to loosely insolvency-related proceedings unification of direct jurisdiction would not seem to be a matter of primary legislative concern on the EU level.

III. Recognition and enforcement of foreign insolvency-related judgments

The second main topic in the field of insolvency-related proceedings with a cross-border dimension is recognition and enforcement of judgments in such proceedings. Both the EIR and national legislation deal with this topic, and UNCITRAL has developed a particular Model Law on this subject (MLIJ of 2018. Again, we will start with the EIR, thereafter move to the UNCITRAL Model Law familiy on cross-border insolvency and conclude with a look at national approaches, followed by an interim summary.

As insolvency-related proceedings may take place in various countries, recognition of such judgments may become relevant in any country of the world, not only in the context of insolvency proceedings.

This is also true for the EU, which may have to recognize such judgments even if they relate to an insolvency proceeding outside the EU and there is no concurrent proceeding in the EU. However, recognition of such judgments in the context of an insolvency proceeding may require some additional considerations.

1. Approach of the EIR

According to Art.32 EIR, ‘other judgments’ (than the opening decision of a foreign insolvency proceeding) are recognized and, as the case may be, enforced under particular rules established by the EIR. Art.32 EIR applies only to inner-EU cases, i.e. to recognition of such judgments between EU member states, the EIR being applicable due to the debtor’s COMI being located in the EU. Art.32 EIR presupposes, as a rule, that the foreign judgment was passed by the insolvency court in another EU-based insolvency proceeding (cf. Art.32 (1) subpara.1 EIR). Art.32 (1) subpara.2 EIR covers also decisions of other courts than the insolvency court, without detailing on which jurisdictional basis they rendered their decision. It seems to be generally accepted, however, that Art.32 (1) subpara.2 EIR relates only to decisions rendered under Art.6 EIR (forum concursus, in exceptional cases also defendant's domicile)[35]. Consequently, Art.32 (1) EIR does not apply to recognition and enforcement of judgments relating to non-EU insolvency proceedings, e.g. in an avoidance action by the insolvency representative of a third country insolvency proceeding.

As was already stated, Art.32 EIR distinguishes basically two types of court decisions: decisions rendered by the insolvency court, 'which concern the course and closure of insolvency proceedings' (Art.32 (1) subpara.1 EIR: 'core decisions of the insolvency proceeding') and judgments – also by non-insolvency courts – in 'closely insolvency-related' disputes as defined in Art.6 EIR (Art.32 (1) subpara.2 EIR). As to recognition and enforcement of judgments in only 'distantly (or loosely) insolvency-related' disputes, Art. 32 (2) EIR refers to the Brussels Ia-Regulation, 'provided that that Regulation is applicable'.

The first group of decisions are governed by the same rules as the recognition of the 'opening' decision and are, in principle, automatically recognized as a consequence of the recognition of the opening decision[36]. As to execution of such decisions, Art.32 (1) subpara. 1 sentence 2 EIR refers to the Brussels Ia Regulation, without, however, the grounds for refusal of recognition under Art.45 Brussels Ia Regulation. The only ground for refusal of execution of such decisions seems to be the public policy clause of Art.33 EIR[37].

As to the second group of decisions Art.32 (1) subpara.2 EIR refers to the rules of Art.32 (1) subpara.1 EIR. This implicitly creates a link, also for these judgments, between the recognition of the foreign insolvency proceeding (more precisely, its opening decision) and 'closely insolvency-related' judgments under Art.6 (1) EIR. Thus, for example, an avoidance judgment would not be recognized, if the insolvency proceeding as such (i.e. the opening decision) is not recognized. Furthermore, the reference to Art.32 (1) sentence 2 EIR means that – at least for execution – the refusal grounds of Art.45 Brussels Ia Regulation are excluded.

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35 See Patrick Ehret, in: Braun, Insolvenzordnung, 10th ed. (2024), Art.32 EuInsVO margin note 14.

36 Generally, a separate recognition scrutiny is regarded as necessary, but it is unclear whether the public policy clause of Art.33 EIR is the only ground for non-recognition in this context. As to enforcement of such decisions [and possibly also of the opening decision] see the special rule in Art.31 (1) second sentence EIR.

37 Or other prerequisisites, e.g. correct characterization of a decision as falling under Art.32 81), effectiveness of the decision?

Rules of priority between parallel proceedings or conflicting judgments in such cases are missing.

Recognition under Art.32 EIR is automatic, a particular recognition proceeding is not foreseen. Also, under the EIR, recognition is granted by law, there is no discretion on recognition to be exercized by courts in the recognizing country.

2. Approaches of the MLCBI (1997) and the MLIJ (2018)

In contrast with the EIR, which treats recognition of foreign insolvencies (including insolvency-related decisions) as a matter of law, not of discretion, the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (MLCBI)[38] is based on a much more flexible judicial assistance approach. It is, however, disputed whether the MLCBI covers also the recognition of foreign insolvency-related judgments. The UK Supreme Court has denied this in a much-discussed judgment of 24 October 2012 in the case of Rubin v. Eurofinance[39], applying instead traditional rules on recognition of foreign judgments. The Eurofinance judgment has been criticized by numerous authors, and some courts have decided differently[40]. In view of the practical importance of this topic, UNCITRAL has developed the separate Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ).

Like the MLCBI, the MLIJ does not deal with direct jurisdiction and is limited to recognition and enforcement of (foreign) judgments. It is constructed as a stand-alone text, although it is conceptually linked with the MLCBI. It may therefore be adopted even by countries, which have not chosen to adopt the MLCBI. The MLIJ follows the established pattern of international civil procedure, distinguishing between recognition and enforcement, and treating recognition as a legal duty of adopting States

38 Accessible online at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency.

39 Rubin and Another v Eurofinance SA and others and New Cap Reinsurance Corporation Ltd and another v Grant and others [2012] UK SC46.

40 Cf. Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, note 2; see also Gerard McCormack and Wai Yee Wan, Model Law on cross-border insolvency comes of age: New times or new paradigms, (2019) Texas International Law Journal 54, pp.273 – 304, with further references, accessible at https://ink.library.smu.edu.sg/sol_research/2964 (accessed 22.6.2025).

to give effect to foreign judgments, if certain prerequisites are fulfilled[41]. Recognition under the MLIJ does not include – in contrast with the ML-CBI – discretion on the side of the recognizing court.

As has already been stated above, the material scope of the MLIJ (cf. Art.2 (d): insolvency-related judgments) is very broad, including both decisions of insolvency courts in the course of the insolvency proceedings and other insolvency-related decisions, even decisions of an only loosely or partly insolvency-related character[42].

Within the MLIJ one can, basically, distinguish between prerequisites of recognition, the proceeding for recognition and the effects of recognition (which may also lead to enforcement).

a) Prerequisites of recognition

Among the prerequisites of recognition/enforcement (Art.13 and 14 MLIJ in conjunction with Art.7 and 9 MLJI), most important is the non-existence of grounds for refusal of recognition:

1) classical refusal grounds, which are also contained e.g. the Brussels Ia Regulation:
   = deficient notification of the defendant (Art.14 (1)(a),
   = fraud (Art.14 (1)(b)
   = inconsistency with a judgment in the recognizing State or an earlier judgment in a third State (Art.14 (1)(c) and (d);
2) secondly, following the traditional model of treaties on recognition of foreign judgments: lack of (indirect) jurisdiction of the originating State (Art.14 (1)(g) MLIJ.
   The grounds for indirect jurisdiction are considerably more numerous than direct jurisdiction under the EIR. The following heads of jurisdiction are accepted:
   a) explicit consent of the defendant[43] to the proceeding in this State (Art.14 (1)(g)(i); this includes a prorogation agreement;
   b) submission of the defendant to the proceeding (Art.14 (1)(g)(i)

41 See Art.7 in conjunction with Art.14 of the MLIJ.

42 This basically covers all proceedings or judgments mentioned in Art.32 EIR.

43 The text speaks 'of the party against whom the judgment was issued'. It is submitted that this refers to the defendant (even in cases when the defendant has won).

c) any ground of jurisdiction available in the recognizing State (mirror image principle, (Art.14 (1)(g)(iII);
d) any ground of jurisdiction that is 'not incompatible with' the law of the reognizing State; this opens the way to a broad range of jurisdictional grounds which need to be evaluated from the perspective of the recognizing State, the considerations probably being similar to a public policy analysis[44].

This very liberal approach towards indirect jurisdiction fundamentally differs from the strict jurisdictional rules of the EIR as to 'closely insolvency-related' cases (Art.6 and 32 EIR). In addition, it needs to be mentioned again that the MLIJ applies not only to 'closely insolvency-related' disputes in the sense of Art.6 EIR, but also to decisions of the insolvency court in the course of the insolvency proceeding (Art.32 (1) subpara.1 EIR: e.g. approvals of an insolvency plan or discharges) as well as 'loosely insolvency-related' decisions (e.g. decisions on termination of executory contracts).

3) A further group of refusal grounds is specifically tailored to insolvency-related judgments and purports to exclude conflicts between the recognition or enforcement of an insolvency-related judgment and relevant insolvency proceedings: Art.14 (1)(e), (f) and h) MLIJ.

Under these provisions, recognition or enforcement are also excluded,

a) if they would 'interfere with the administration of the debtor's insolvency proceedings' (Art.14 (1)(e) MLIJ)[45]. This would be the case, the text states, e.g. if the foreign judgment conflicted with a stay or other order that could be recognized or enforced in the recognizing State. Thus, (domestic or foreign) insolvency proceedings are given priority over the recognition or enforcement of insolvency-related judgments, which may have originated in another country.
b) if the judgment '(i) materially affects the rights of creditors generally, and (ii) the interests of creditors and other interested persons, including the debtor, were not adequately protected in the proceeding in which the judgment was issued' (Art.14 (1)(f) MLIJ);

44 A somewhat similar, though less complicated provision is contained in Art.21 (2) and Art.22 (1) MLCBI.
45 A somewhat similar provision is contained in Art.19 (4) MLCBI.

This provision appears to be tailored after provisions of the U.S. Bankruptcy Code[46] and can be seen as a specific public policy clause, protecting creditors and 'other interested persons' against unfair treatment by the (foreign) insolvency-related judgment. The text of the provision mentions as examples foreign plans of reorganization, foreign discharges or approvals of voluntary out-of-court restructuring agreements[47].

c) if the foreign insolvency-related judgment 'originates from a State whose insolvency proceeding is not or would not be recognizable' in the recognizing State ' (Art.14 (1)(h) MLIJ). This provision links the recognition or enforcement of an insolvency-related judgment with the recognition of the insolvency proceeding to which the judgment relates[48], but only if the insolvency proceeding and and the related judgment originate in the same State. If the insolvency-related judgment is rendered in another State than the forum concursus, the provision is not applicable by its wording, but might by applied by analogy or an equivalent effect might be found on the basis of (Art.14 (1) (e) or (f) MLIJ) or the general public policy clause of Art.7 MIIJ.

d) Finally, recognition of the foreign insolvency-related judgment may not be 'manifestly incompatible' with the public policy of the recognizing State, including procedural fairness (Art.7 MLIJ).

Overall, the grounds for refusal of recognition of foreign insolvency-related judgments under the MLIJ are far more detailed than under EIR and contain also several specific insolvency-tailored grounds for refusal, which are not foreseen in the EIR. Perhaps most significantly, indirect jurisdiction is accepted under the MLIJ to a much larger degree than under the EIR, showing a more liberal approach towards recognition of foreign insolvency-related judgments than the EIR.

46 Sec.361 et seq. U.S. Bankr. Code, https://www.law.cornell.edu/uscode/text/11/361. This provision has been taken as a model in several other jurisdictions, cf. e.g. sec.245 (2) German Insolvency Code.

47 Here the question may arise whether and under which conditions such agreements are covered by the Model Law at all.

48 This is resembles Art.32 (1) subpara.1 EIR.

b) Proceeding for recognition

In contrast with the EIR, which provides for the automatic recognition of foreign insolvency-related decisions, the MLIJ prioritizes a proceeding-based approach, both for recognition and enforcement (Art.11 – 13 MLIJ). This is in line with the approach of the MLCBI[49]. However, the MLIJ also foresees the possibility of incidental recognition of a foreign insolvency-related judgment or by way of defense (Art.11 (1) sentence 2 MLIJ).

The proceeding is determined in considerable detail in Art.11 – 13 MLIJ. For example, under Art.11 (1) MLIC in principle only 'an insolvency representative [foreign or domestic] or other person entitled under the law of the originating State' are empowered[50] to request formal recognition. However, it seems that also courts may request recognition on the basis of Art.13 (d) in conjunction with Art.4 MLIJ. There are numerous conceivable situations, in which the insolvency representative might not have an interest in recognition. One example is that the insolvency representative has lost the foreign lawsuit and the other side then wishes to enforce this judgement in the recognizing country. In this case incidental recognition of the foreign judgment wourd be possible incidentally. Enforcement would require a particular enforcement proceeding, which may be excluded or stayed due to Art.14 MLIJ.

c) Effets of recognition

Art.15 MLIJ contains a noteworthy provision on the effects of recognition. In contrast with the MLCBI, which gives the recognizing court broad and partly discretionary powers (competences) to determine the effects of recognition (see Art.19 and 21 MLCBI[51]) Art.15 MLIJ refers in a general manner to the law either of the originating State or of the recognizing State. The choice of one of these approaches is left to the adopting State[52]. As insolvency-related judgments typically have a concretely determined

49 Art.15 MLCBI. The MLCBI does not state expressly whether incidental recognition is excluded. This seems left to national legislation.

50 The MLCBI sometimes uses the term 'standing', see Art.23 (1) MLCBI.

51 In contrast, Art.20 MLCBI (recognition of foreign main-insolvency proceeding) is mostly non-discretionary.

52 Commentary Art.15 page 64 margine note 121.

content, this approach appears justified and should not create particular problems in practice[53]. The case is different with the judgment 'opening' (or 'commencing') an insolvency proceeding, which produces of broad range of effects of procedural and substantive character and is not covered by the MLIJ. These effects are determined flexibly under the 1997 Model Law or by a set of conflict of laws rules and substantive rules under the EIR.

From the perspective of conflict of laws it is remarkable that Art.15 (2) MLIJ contains a specific provision on 'adapting' effects of a foreign judgments, which are governed by the law of the originating State and are not known as such in the recognizing State, to the legal system of this State.

3. National approaches

Only relatively few autonomous insolvency laws contain specific rules on recognition and enforcement of foreign insolvency-related decisions beyond recognition of the foreign insolvency opening judgment. Pre-opening decisions of the foreign insolvency court or follow-up decisions (decisions in the sense of Art.32 (1) EIR) are usually also covered by the general rule on recognition of the foreign insolvency opening decision (see, e.g. sec. 240 Austrian InsO, Art.427 Croatian Bankruptcy Act, sec.343 (2) German InsO, Art.288 Portuguese Insolvency Code, Art.744 Spanish Bankruptcy Act), but there are also some specific rules on pre-opening or follow-up decisions such as foreign interim measures (e.g. Art. 748 Spanish Bankruptcy Act) or insolvency plans (cf. special mention in Art. 427 Croatian Bankruptcy Act).

Special provisions about the recognition and enforcement of other 'insolvency-related' decisions appear not to exist in the scrutinized legal systems, but provisions implementing the MLCBI[54] or general provisions on recognition of foreign judgments may be applied.

d) Interim summary

The existence of specific rules on insolvency-related proceedings or judgments in the EIR as well the development of the MLIJ and the – though

53 Insolvency-related judgments, which have a similar broad range of effects like an opening judgment, would seem to fit better under the 1997 ML instead of the MLIJ. An example would be the appointment of interim representative, which -however – is expressly covered by the MLCBI (see Art.2 (1).

54 In the EU: Greece, Poland, Romania, Slovenia.

sparse – regulations on the national level illustrate that there is a legislative need to deal with this topic. Usually, a distinction is made between decisions made by insolvency courts in the course of the insolvency proceedings and other insolvency-related proceedings and decisions. The borderline between these two categories is drawn differently in national legislations. Mostly, decisions rendered by the insolvency court are covered by general rules on recognition of foreign insolvencies, while recognition of other insolvency-related decisions is handled differently: The MLIJ takes in this respect a liberal approach, while the EIR provides, in principle, for exclusive jurisdiction of the courts of the forum concursus state, thus (arguably) excluding recognition of foreign decisions rendered in other countries.

C. Suggestions for future action

Taking the forgoing comparative observations as a starting point, some ideas for future action of the EU in this field may be presented.

I. Practical relevance

I would argue that treatment of insolvency-related proceeings is a matter of high practical relevance, also in cross-border cases, and should therefore not be excluded if the EU decided to develop rules on cross-border insolvency relations with non-EU countries. In the following particular attention will be devoted to the question whether the EU should either adopt the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (eventually with some modifications) or whether the EU should develop its own rules, orienting itself along the lines of the present EIR.

. II Conceptual approaches

1. Isolated or integrated approach

Insolvency-related proceedings (and decisions/judgments) gain their characteristics in relation to the relevant insolvency proceedings. Even if the

MLIJ can be used as a stand-alone instrument, this needs to be qualified. Developing rules on insolvency-related proceedings gains its sense in the context of a cooperation-friendly general approach as to the regulation of cross-border insolvency relations with non-EU countries.

2. Concept of recognition

The concept of recognition used in international civil procedure as to foreign court decisions seems adequate also with regard to foreign insolvency-related decisions. This is in line both with the EIR and with the MLIJ.

3. Scope of application: ‘insolvency-related’ proceedings and decisions

a) Definition of ‘insolvency-related’ proceedings and decisions

A first aspect of relevance concerns the definition of the respective proceedings and decisions (MLIJ: judgments), for which particular rules should be developed.

The basic distinction in the EIR between the insolvency proceeding itself (including sub-proceedings and decisions by the insolvency court: ‘core insolvency decisions’)[55], ‘closely insolvency-related‘‘ proceedings[56] and ‘loosely insolvency-related proceedings[57] seems adequate also for relations with non-EU countries. It coincides in fact with the open definition used in Art.2 (d) MLIJ, but is more precise.

There are good reasons to exclude, ‘distantly (or loosely) insolvency-related’ decisions, such as judgments on termination of executory contracts or deciding about issues of set-off in insolvency, from special insolvency rules. Such proceedings can remain governed by national rules (applicable under Art.7 EIR) and ensuing judgments can remain in the area of recognition and enforcement of judgments in civil and commercial matters. Particular considerations of insolvency policy can also be taken account of in this context, e.g. by adequate use of the public policy exception.

55 Art.3 EIR, Art.32 (1) subpara.1 EIR: proceedings and/or decisions’which concern the course and closure of insolvency proceedings, and compositions approved by that court’.

56 Art.6 EIR, Art.32 (1) subpara.2 EIR: proceedings and/or ‘deriving directly from the insolvency proceedings and which are closely linked with them’, such as avoidance actions.

57 Art.32 (2) EIR.

4. Urgency of regulation: Direct jurisdiction and recognition/enforcement

a) The most urgent legislative need exists in the field of (mutual) recognition and enforcement of closely insolvency related judgments (decisions), such as decisions on avoidance of transactions. Mutual recognition of such decisions (including decisions by the insolvency court) is by and large a general issue of recognition of foreign insolvencies and, arguably, deserves some fine-tuning, but can in principle also be covered by general rules.
b) Direct jurisdiction should also be reflected as to its relevance for relations with non-EU countries, but this does not appear to require fundamental changes of the current approach of the EIR (Art.6 EIR).

III. Direct jurisdiction for insolvency-related proceedings

The present approach in Art.6 EIR as to closely insolvency-related insolvency proceedings (forum concursus with some small extensions) would seem to be practical enough to be retained for the time being. It would, however, be preferable to convert Art.6 EIR from a case of exclusive jurisdiction into a concurrent jurisdiction. A more flexible standard for (direct) jurisdiction in such cases can also be expected to widen the procedural options for insolvency representatives to act in the interests of all creditors and would also raise the chances that 'domestic' judgments in such cases are recognized in the non-EU world.

Alternatively, it might be disposed (e.g. in a subchapter on relations with non-EU countries), that Art.6 EIR does not hinder recognition of insolvency-related judgments passed in non-EU countries.

IV. Recognition of foreign insolvency-related decisions

In view of practical experience both under the EIR and in the general international field it would be helpful to develop uniform rules on recognition and enforcement of foreign insolvency-related judgments also for relations between the EU and non-EU countries. The MLJJ would be a good basis for such a regulation, even if some adaptions to the EIR context may be recommendable. The content of the MLIJ would, basically, fit both for decisions by foreign insolvency courts in insolvency proceedings and for other insolvency-related decisions. It may, however, be preferable for the EU to limit the application of the MLJI to 'closely insolvency-related' decisions, leaving recognition of decisions of foreign insolvency courts in insolvency proceedings to general rules on recognition of foreign insolvency proceedings and leaving 'loosely insolvency-related' decisions out of a common regime.

1. Prerequisites of recognition

a) Prerequisites derived from general rules of recognition and enforcement of foreign judgments such as adequate information of the defendant or lack of conflict with other judgments should also be foreseen as to recognition and enforcement of foreign foreign insolvency-related judgments of the type defined in Art.6 (1) EIR. Special regulation of this aspect does not seem necessary as to foreign foreign insolvency-related judgments of the type defined in Art.32 (1) EIR. Extreme defects relating to such decisions can be covered by the general public policy exception.
b) Indirect jurisdiction should be defined more broadly in relations with non-EU countries than direct jurisdiction in this matter is presently determined under Art.6 EIR. The approach taken by the MLIJ seems preferable, but needs to be refinend and, arguably, a bit restrained.
c) Specific prerequisites of recognition taking into account the interaction between the rules on recognition and enforcement of foreign insolvency-related judgments with the more general rules of cross-border insolvency law and the need to support the functions of insolvency proceedings should be adopted. The MLIJ offers a good model for such rules.
d) The general public policy exception deserves to upheld also in this context.
e) A requirement of reciprocity in this context does not seem necessary, at least if it is not also introduced for recognition of foreign insolvency proceedings in general.

2. Proceeding of recognition

An optional recognition proceeeding with, possibly, third party effects, may be useful also with regard to insolvency-related foreign judgments, if such a proceeding is also introduced for recognition of foreign insolvency proceedings of non-EU countries in general.

3. Effects

Particular rules on the effects of foreign insolvency-related judgments do not seem necessary.

Bibliography

Braun, Insolvenzordnung, 10th ed., München, 2024

Kindler, in: Münchener Kommentar BGB, Bd. 13, 9th ed., München, 2025

McCormack/Wai Yee Wan, Model Law on cross-border insolvency comes of age: New times or new paradigms, Texas International Law Journal 54, 2019, 273

Schmidt, note, https://conflictoflaws.net/2020/c%E2%80%91493-18-ub-v-va-and-others-exclusive-jurisdiction-under-the-european-insolvency-regulation/

Uhlenbruck (ed.), Insolvenzordnung, 15th ed., München, 2019