Recognition of third country insolvencies in the EU*

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Abstract:

The transcript of an oral presentation in the project starts with the legislative need on the EU level to address cross-border insolvencies related to non-EU countries. It then discusses source of inspiration for legislative actions and discusses some topical issues: the relationship between recognition of foreign insolvencies and recognition of foreign judgments (with particular reference of recent ECJ jurisprudence on possible exception from the rule of 'exequatur sur exequatur ne vaut', conflict of laws and the issue of reciprocity.

Keywords*:* Recognition of foreign insolvencies; legislative need; history; UNCITRAL Model Laws; recognition of foreign judgments; exequatur; reciprocity

Recognition of insolvency proceedings opened in non-EU countries is presently not governed by the European Insolvency Regulation, but by and large left to the legislation of the EU Member Countries. I would like to address in this presentation some of the issues arising in this context, hoping to give some input to the further discussion.

A. Why should third country insolvency decisions be addressed by EU legislation at all?

Obviously, there is practical importance; also, a powerful political argument that could be made: if the European Union describes itself as an area of freedom, security, and justice, shouldn't we worry about who (or rather, what judgments) enters this area and gets recognised there?

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Another argument may come from a decision by the Court of Justice of the European Union[1] (which was heavily criticized) concerning England and Jordan, in which the Court seems to have to departed from the widely known maxim *exequatur sur exequatur ne vaut* by treating an English recognition judgment as an ordinary judgment, which, in turn, has to be recognised and enforced by other European Union Member States. That case, of course, concerned the situation before Brexit.

Also, there are practical considerations. There are relatively few bilateral treaties that might get in the way of a European Union instrument, so we do not need a long list of exceptions. Also, lots of work has been done by UNCITRAL, and we have a lot of experience from which, I think, we have learned that recognition of the opening of the proceedings (that was very much the focus initially) is not sufficient: what about a discharge order, which comes at a moment (the end of the proceedings) where the focus has shifted away from the mere distribution of money to creditors. What about other decisions? What about the powers of the administrator? And (last but not least) what about insolvency-related litigation?

B. Possible sources of inspiration

So, let us have a look at what is out there in the world. First, a quick observation: recognition of insolvency proceedings is different from recognition of judgments given in ordinary civil proceedings, in that they affect not just two (or very few) parties, but many more. They also affect the status of the debtor and his ability to enter valid dealings. Sometimes, opening of the proceedings may have a retroactive effect. So, there are lots of differences leading to recognition of international insolvency proceedings being treated differently from the recognition of ordinary judgments.

The first major step, of course, on a truly international level, was the UNCITRAL Model Law on Cross-Border Insolvency, about which we heard yesterday, and which contains a recognition principle (among others). And there are other UNCITRAL model laws dealing with insolvency-related judgments and with insolvencies of groups of companies.

Looking at Europe, there is the ill-fated Istanbul Convention, an initiative by the Council of Europe, which ultimately was not successful as everybody was waiting for the European Union to act. Now, the Istan-

1 CJEU, 7.4.2022 -C-568/20, ECLI:EU:C:2022:264-, *J v H Ltd.*

bul Convention was conventional, in that it contained what is known as *compétence indirecte*, indirect jurisdiction. In other words, in the Istanbul Convention international jurisdiction was addressed only as a prerequisite for recognition, which was automatically granted to final decisions.

Then we have, of course, the European Insolvency Regulation. And it is perhaps quite fitting that we are discussing the European Insolvency Regulation this year because it marks the 60th anniversary not, of course, of the Regulation entering into force, but of the work for its preparation being started. The first efforts began in 1963, and it took a very long time until there a first draft was issued, followed by a pre-draft, and so forth. And, ultimately, that resulted in the European Insolvency Regulation, which adopted a universalist, or a limited universalist approach, and for the first time contained both direct rules on jurisdiction and uniform choice-of-law provisions. But, of course, as we all know, the European Insolvency Regulation does not (even in its recast version) contain any provisions about the recognition of insolvency proceedings pending in a non-Member State. For the sake of completeness, I should point out that there are several other European Union norms in special sectors such as banks and insurance undertakings, which, for reasons of time, I cannot address here.

In addition to the UNCITRAL and the EU there have been several regional initiatives such as the early Scandinavian Bankruptcy Convention of 1933, which does provide for immediate recognition of the decision opening insolvency proceedings. Latin American States concluded the Havana Convention, which also provides for a sort of universal effect of the opening of proceedings. Finally, there is the OHADA Convention, in Africa, which provides recognition from both member and non-Member States. And, in addition to these instruments, there are a lot of so-called soft rules and principles, resulting from the efforts of numerous bodies and dealing with cooperation in cross-border insolvency cases at large (rather than with recognition only)[2].

2 Just to mention a few: the IBA Model International Insolvency Cooperation Act (1989); the IBA Cross-Border Insolvency Concordat (1996); the ALI/III Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases (2000); tbe European Communication and Cooperation Guidelines for Cross-border Insolvency (2007, currently under revision); the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009); the Prospective Model International Cross-Border Insolvency Protocol by the International Insolvency Institute (2009); the ALI Global Principles for Cooperation in International Insolvency Cases and the Global Guidelines for Court-to-Court Communications in International Insolvency Cases (2012).

C. Recognition of foreign decisions

Now, as I indicated in the short introduction to my speech, I am going to adopt an issue-by-issue approach, and, of course, I shall start with the issue of recognition of foreign decisions. I already pointed out that there are some differences (and indeed I think they are very important in understanding our topic) between recognition of insolvency proceedings on the one hand, and traditional civil litigation on the other hand. But when we talk about recognition of insolvency proceedings, there is an important distinction to be made: There are two different questions we face here. One is whether at all we are prepared to recognize a foreign decision, and the second question is, if the first question is answered in the affirmative, what effects are to be accorded to that foreign decision?

It seems to me there are two approaches. One is what I call the equation model, where the foreign judgments are treated as if they were domestic judgments. Now, I think this model is not really suited for insolvency proceedings. Most countries and most instruments have focused on, and have adopted, the extension model approach, whereby the foreign decision produces abroad all the effects, all the power, all the force, that it has in its country of origin. But there are also some compromise models, such as that of the UNCITRAL Model law on Insolvency-related Judgments, where an option is left to the adopting state, to either extend the effects of the foreign judgment or can give it the same effects it would have, if it were a domestic judgment. The European Insolvency Regulation has adopted the extension model, which is different from the UNCITRAL model. In the latter, upon recognition of a foreign proceeding, some automatic relief ensues, but there is a wide range of measures, what this automatic relief can be: it can be an automatic stay, and that would be the law, for example, if I understand it correctly, in the United States. But that is by no means a universal approach: There are many countries which have taken an *ad hoc*, 'tailor-made' approach.

Now, one aspect, when we talk about recognition of the opening of insolvency proceedings, is, of course, the impact on the debtor's status. In the European Union, because the effects of the foreign decision are extended, it is quite clear that it will be the law of the country where the bankruptcy is pending, the *lex fori concursus*, that will be applied. Under the UNCITRAL Model Law, the court has a certain margin of discretion, and that is, of course, because of the truly international nature of the UNCITRAL efforts.

When we talk about recognition, we also should not only think about courts, but about the powers of the administrator. What are the effects on the powers of the administrator if we recognise a foreign judgement? Do we allow the foreign administrator to exercise his powers in our own country? Or can he just go to a local court and make motions there? That would be the approach of UNCITRAL. And again, under the European Insolvency Regulation the administrator can exercise his or her powers in the entire European Union.

Also, the judgment opening insolvency proceedings can be used as a trigger to open secondary proceedings. That is the same both under the European Insolvency Regulation and under the UNCITRAL Model Law. And that takes me to a different issue, and that is the *exequatur* proceedings. Do we need a decision of a domestic court making a foreign judgment enforceable and recognising their foreign judgments? The answer of the UNCITRAL model level is, of course, yes. Under the European Insolvency Regulation, there is no *exequatur* proceeding. The European Union has, in a large measure, abolished that for all judgments, not just in insolvency cases. There are only a few isolated vestiges of the *exequatur* model, so to speak. But generally, the European Union has tried to do away with such proceedings.

On the other hand, if we do have an *exequatur* proceeding, the question arises, what does the court of the *exequatur* have to re-examine? There should not be a *révision au fond*. But what about re-examining, for example, the jurisdiction of the foreign court?

Also, when we need an *exequatur* decision, this may take some time. Thus, all countries having an exequatur system provide for the availability of some form of interim relief. On the other hand, with automatic recognition, such as in the European Union, there is no need for interim relief, because *ipso facto*, at the very moment a foreign decision is issued, it is recognised in all other Member States.

But that approach is in large measure limited to the European Union with its close integration. Very few domestic systems provide for automatic recognition of insolvency proceedings opened outside the European Union: my own country, Austria, as well as Germany, are examples for such an approach.

When we talk about recognition, we often deem recognition of current proceedings. But we cannot recognize a proceeding as such. All we can recognise, and do recognize, is a decision. So, what kind of decisions are we prepared to recognise? Opening decisions, of course; but what about other decisions? Beginning from the end of the proceeding, what about discharges? What about decisions closing proceedings? What about preservation measures? What about insolvency-related judgments? And a whole lot of other decisions. When we talk about the opening decision, that sounds fairly easy, but it is not, because in some countries such a decision has retroactive effects. This seems to be included under the UNCITRAL Model Law, and it is certainly possible, if we talk about countries from the entire world, that we do find such systems.

Also, what kind of proceedings (better, the opening of what kind of proceedings) do we recognize? There is a long list in the Annex A to the European Insolvency Regulation, but if we look at the entire world, it would be impractical to compile a list. That would be a huge list, it would be incomplete, it would get soon outdated; in a word, it would be unsatisfactory. So, we would have to find some general criteria.

In the slides I have dealt with other forms of decisions, like administrative orders, closure of proceedings, and discharge orders. In my opinion, the biggest defect of the current UNCITRAL Model Law is that it does not expressly address the recognition of a discharge. Now that should not detract from the achievement of the UNCITRAL Model Law. A lot of things have changed since its enactment. The focus of insolvency proceedings has shifted more towards a discharge, and we should be prepared to think about the effects of a discharge. Clearly, under the common law, in many countries, a discharge is only recognized if it was obtained in the country, the law of which applies to the claim in question (the so-called 'Gibbs Rule'). But not all common law countries follow such a limited approach.

What about judgments in related proceedings? The traditional view is that such judgments do not fall under the insolvency regime, but are, for purposes of recognition, to be treated as ordinary judgments. But clearly, they are somehow related to insolvency proceedings and probably deserve special treatment. And indeed, an UNCITRAL Model Law addresses their recognition as well. The recast version of the European Insolvency Regulation now includes a provision about the so-called related proceedings, or closely linked proceeding (a term, the latter, coined by the Court of Justice a long time before the recast version), so the rules on jurisdiction and recognition of judgments for such closely connected proceedings, are now to be found in the Insolvency Regulation rather than in the Brussels Ia regime.

There are also some very technical questions, too, linked with recognition. For example: what kind of supporting documents are needed? Should we only recognise 'final decisions', in the sense that a no appeal is available against that decision, or in the sense that the decision has become effective under the law of its country of origin? I think is the latter approach is preferable, but it is by no means universal. For instance, in the OHADA Act, the decision must become irrevocable, and it appears that this is a requirement for recognition.

What about reciprocity? The tendency is to move away from reciprocity. But, again, such an approach is by no means self-evident or universal. Should the jurisdiction of the court that opened the proceeding be re-examined? Should the recognising court re-assess whether the home forum was indeed the forum which has some sort of connection with the debtor, such as the COMI, or some other generally, internationally recognised criteria? In addition, what should be the grounds for non- recognition of third countries' decisions? That is an answer a lot more difficult to give, than if we were asked the same just about the countries within Europe, which are quite similar one to each other. So clearly, all the violation of public policy comes into mind, but what about national economic laws? What about discharge? What about procedural violations? What about judgments obtained by fraud? There are countries in the world where bribery is a serious issue. Very often, finally, the recognition of related judgments may be less generous than the recognition of the opening of insolvency proceedings itself.

D. Enforcement of foreign decisions

Just for the sake of completeness, because this is an academic forum, there is a distinction that must be remembered between recognising the effects of a judgment, and actually using the coercive powers of the State's authorities in enforcing foreign decisions.

E. Conclusion

For reasons of time, I have now to wrap up. There are considerable differences between the recognition of ordinary judgments in civil cases and the recognition of insolvency proceedings. It seems that, generally, States appear to be more open towards cooperation in insolvency cases, and there are more liberal recognition regimes around compared to that of judgments in ordinary civil litigation.

When we look at the European Union, in answering one of the questions discussed in this conference (should we accord recognition to non-EU judgments?), we must bear in mind that there are some differences between recognition on an intra-EU level, and recognition of judgments originating from outside the European Union. There is no similar level of integration. There are differences in culture; in legal culture, but in culture generally as well.

Can we expect the same level of trust? Because trust is one of the main reasons why the Court of Justice in Europe says we have to be generous. Can we extend the same trust to other countries? And if the answer is no (and in many cases it will be so), there are consequences for the question whether recognition should be automatic or should require some form of *exequatur* decision to be given on an *ad hoc* basis.

And if less trust, or very little trust can be given to courts in third countries, there might be consequences on many questions: Should we really examine the jurisdiction of the Court opening the proceedings? What about consequences for this kind of decision to be recognized? What about consequences for grounds of non-recognition? I suggested earlier we should give a closer scrutiny to judgments originating from third countries.

Therefore, the European Insolvency Regulation does not seem a suitable model for dealing with non-EU decisions, because of a lesser level of integration, or no integration at all, with non-EU countries. The UNCITRAL Model Law, on the contrary, has a worldwide aim, and provides a solution for countries with a lesser level of integration and fewer similarities. However, experiences that are more recent should be taken into account, such as we should talk about a discharge, we should think about what kinds of decisions we are prepared to accord recognition.

Ladies and gentlemen, thank you very much for your attention! I look forward to the discussion, and because I am not able to be present in person, you will find a slightly outdated photo of myself on the slides. Thank you very much!